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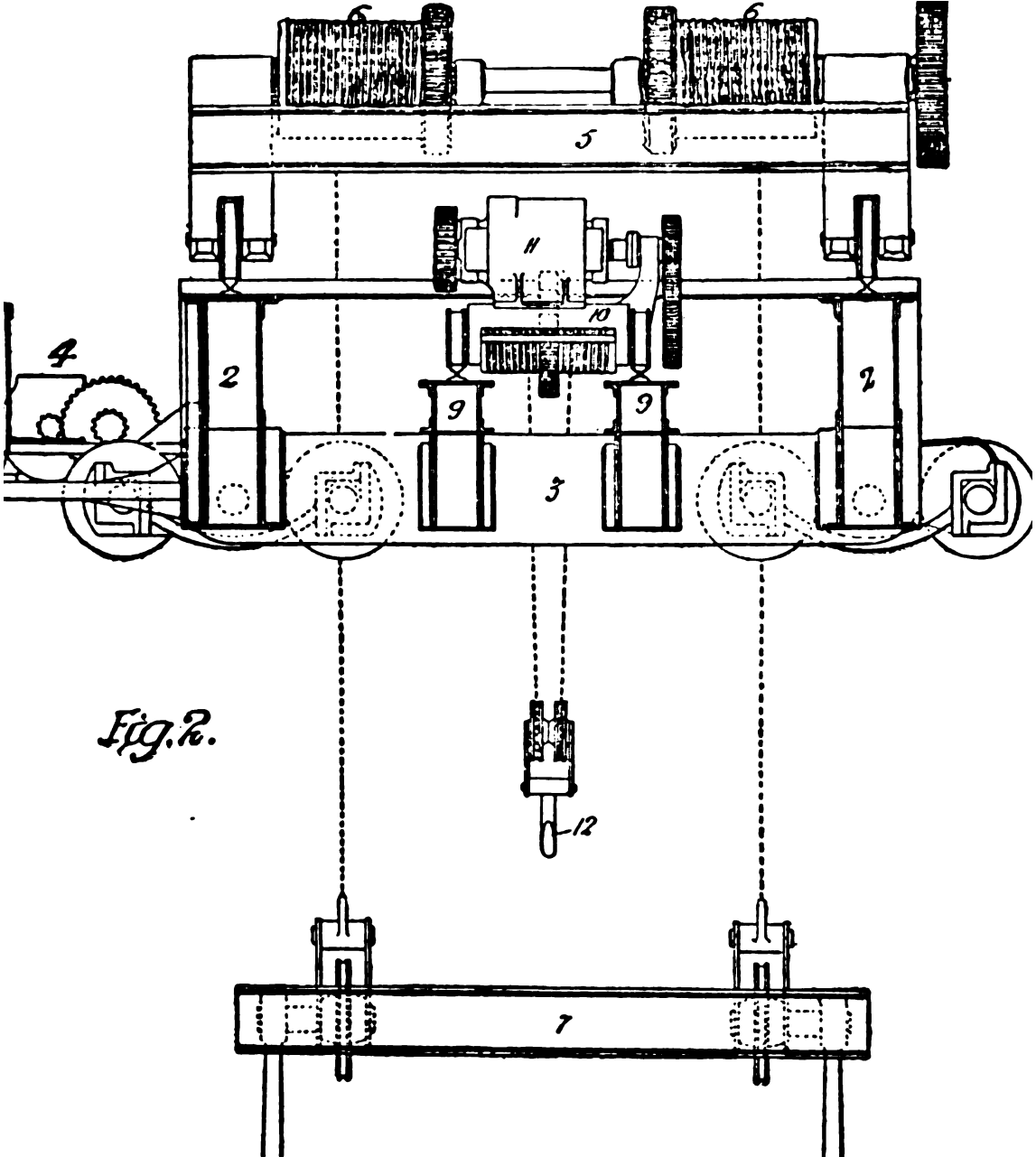
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⁴ Died March 28, 1910.⁵ Resigned.⁶ Appointed Associate Judge of Court of Customs Appeals March 30, 1910.⁷ Appointed May 2, 1910, to succeed William H. Hunt.

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176 F.

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CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE CIRCUIT AND DISTRICT COURTS.

WILLMARTH et al. v. CARDOZA.

(Circuit Court of Appeals, First Circuit. February 25, 1910.)

No. 849

1. MASTER AND SERVANT (§ 194*)—RISKS ASSUMED BY SERVANT—NEGLIGENCE OF FELLOW SERVANT—TERMINATION OF RELATION.

The implied contract of a servant to assume the ordinary risks of the service, including the risk of negligence on the part of fellow servants, does not end the moment the servant finishes his day's work, but continues until he ceases to be affected by such conditions and risks.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 383, 384; Dec. Dig. § 194.*]

Assumption* of risk incident to employment, see note to Chesapeake & O. R. Co. v. Hennessey, 38 C. C. A. 314.]

2. MASTER AND SERVANT (§ 194*)—RISKS ASSUMED BY SERVANT—NEGLIGENCE OF FELLOW SERVANT—TERMINATION OF RELATION.

Plaintiff was employed by defendant by the day in the construction of a building. After finishing a day's work, he went to a shed on the premises to get his coat, which he had left therein, and, finding it locked, he proceeded to defendant's office for a key, and after he again reached the shed, and while the door was being unlocked, he was struck and injured by a piece of rock thrown by a blast through the negligence of another employé of defendant. Held, that he was still defendant's servant, and a fellow servant of the one whose negligence caused his injury, and could not recover from defendant therefor.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 383-384; Dec. Dig. § 194.*]

In error to the Circuit Court of the United States for the District of Rhode Island.

Action by Albert Cardoza against John Willmarth and others. Judgment for plaintiff, and defendants bring error. Reversed.

Walter B. Vincent and Ralph T. Barnefield (Alexander L. Churchill, on the brief), for plaintiffs in error.

A. B. Crafts (A. B. Patton, on the brief), for defendant in error.

Before COLT, PUTNAM, and LOWELL, Circuit Judges.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

LOWELL, Circuit Judge. The defendant in error, hereinafter called the plaintiff, sued the plaintiffs in error, hereinafter called the defendants, to recover damages for being hit with a stone fired negligently from a blast. At the trial the defendants requested the learned judge to instruct the jury to return a verdict for them, on the ground that the negligence charged against them was that of their employé, the plaintiff's fellow servant. The request was refused and the defendants duly excepted. The plaintiff admitted that this employé, who set off the blast, and whose negligence the plaintiff relied upon, was the plaintiff's fellow servant, provided only that the plaintiff himself was in the defendants' employ at the time of the accident. There was evidence of this man's negligence. The learned judge submitted to the jury the question of the plaintiff's employment, under instructions not objected to, except as above stated. The jury returned a verdict for the plaintiff, and the defendants have brought the case to this court. The only assignment of error relied upon at the argument concerned the plaintiff's own employment at the time of the accident. The circumstances were not in dispute.

The plaintiff was a hod carrier working for the defendants at a daily wage. His day's labor was over at 5 o'clock, and at that time the "boss" called to the men to quit work. The plaintiff remained a few minutes, and, by order of the boss, covered with a cloth the masonry laid that day. He then descended the ladder from the building to the ground, and went to a shed, where he had hung up his coat before going to work that afternoon. This shed was not on the path leading directly from the building to the entrance of the lot on which the building stood. When the plaintiff reached the shed he found its door locked, and asked the boss carpenter to open it. With him the plaintiff went on still further to the defendants' office, where the boss carpenter told the timekeeper to give the key to the plaintiff, and told the plaintiff to bring back the key to the office after getting his coat. The plaintiff returned to the shed, where he met the night watchman. The latter was unlocking the door when the blast was blown, and a piece of rock hit the plaintiff, breaking his leg. The defendants contended that, as the facts were not in dispute, the court should itself have determined that the plaintiff was in the defendants' employ at the time of the accident. If there was evidence which warranted a finding that the plaintiff had already quitted the defendants' employment for the rest of the day, the verdict must stand.

The cases hold generally that a workman's employment does not cease at the instant his work time is over, that employment includes the incidents of employment, and that the workman is still his master's servant while he is gathering up his tools and adjusting his clothes after the day's work, and is leaving the place of his employment. *Olsen v. Andrews*, 168 Mass. 261, 47 N. E. 90; *O'Neil v. Pittsburg R. R. (C. C.)* 130 Fed. 204; *Manville v. Cleveland & T. R. R.*, 11 Ohio St. 417; *Ewald v. C. & N. W. R. R.*, 70 Wis. 420, 36 N. W. 12, 591, 5 Am. St. Rep. 178; *Int. & G. N. R. R. v. Ryan*, 82 Tex. 565, 18 S. W. 219; *Higgins v. Hannibal & St. R. R.*, 36 Mo. 418, 432, the last being an extreme case. In *Farwell v. B. & W. R. R.*, 4 Metc. 49, 38

Am. Dec. 339, which Sir Frederick Pollock calls the fountain head of later decisions concerning the doctrine of common employment that doctrine is rested upon an implied contract between master and servant. Quoting *Tunney v. Midland R. R.*, 1 C. P. 291, 296, Pollock states the rule of common employment as follows:

"A servant, when he engages to serve a master, undertakes, as between himself and his master, to run all the ordinary risks of the service, including the risk of negligence upon the part of a fellow servant when he is acting in the discharge of his duty as servant of him who is the common master of both." Pollock on Torts (Webb's Ed.) p. 117.

Is it to be supposed that implied contract and undertaking end suddenly at a fixed minute, while the servant is still surrounded by the conditions and risks of his employment, or that they continue until the servant has ceased to be affected by these conditions and risks? We think the latter conclusion is obviously correct. To adopt the former, whether in favor of the master or of the servant, would deprive the rule of its reason.

In the case at bar the plaintiff, indeed, did not dispute that his employment would have continued until he reached the highway, provided that he had walked there directly from the building. This concession is decisive of the case at bar. If the employment covers, not only the time during which the workman is engaged in his ordinary labor, but also a later time, during which he is passing from the surroundings of his employment into surroundings unrelated thereto, then this additional period will evidently be longer or shorter according to the circumstances. The situation and nature of the building may affect the time needed for leaving it. The tools which the workman uses may be more or less complicated and numerous. They may be easy or hard to put away for the night. That the workman may have to lay aside some of his clothes while working is plain. This may well be both for his employer's benefit and his own, like the travel in *Kilduff v. Boston El. Ry.*, 195 Mass. 307, 308, 81 N. E. 191, 9 L. R. A. (N. S.) 873. That a proper place should be provided by the employer wherein to keep the clothes temporarily is reasonable, and that this place cannot always be in direct line between the place of work and the gate of the premises is obvious. If the door of the receptacle is locked—perhaps for the safety of the employé's property—or if it sticks, or if some time is otherwise spent by the workman in looking for his clothes, this also is an incident of his employment, and the employment ordinarily continues during the operation. The distinction between employment and nonemployment is the same, whether it works in favor of the master or of the servant. In the case at bar the plaintiff is contending that his employment ceased before the accident; but in the next case the employé may be driven to maintain that his employment is prolonged to his final departure from the premises. This happened in *Boyle v. Columbian Fire Proofing Company*, 182 Mass. 93, 102, 64 N. E. 726, 730, a suit brought under the employer's liability act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1909, p. 1171]). The plaintiff was injured while going down in an elevator at the noon hour to get his dinner, and the court said:

"Going from the particular part of the building where he has been set to work, to eat dinner, is an incident of a workman's employment who is engaged by the day in erecting the building in question, at least so long as he has not finished passing over or through the building to get his dinner."

In *Rosenbaum v. St. Paul R. R.*, 38 Minn. 173, 174, 36 N. W. 447, 8 Am. St. Rep. 653, the plaintiff contended that he remained an employe while riding back on the defendant's construction train, after hours, to get the coat which he had left at the place of his work. The contention was sustained. To the same general effect are *Arkadelphia Co. v. Smith*, 78 Ark. 505, 95 S. W. 800; *Brydon v. Stewart*, 2 Macq. 30. Many of those cases in which it was held that the plaintiff was not in the defendant's employ at the time of the accident yet recognize that employment may continue after actual work has ceased. Thus in *Fletcher v. Baltimore & Potomac R. R.*, 168 U. S. 135, 138, 18 Sup. Ct. 35, 36, 42 L. Ed. 411, the Supreme Court observed:

"The plaintiff at the time of the accident had finished his employment for the day, and had left the workshop and grounds of the defendant, and was moving along a public highway in the city with the same rights as any other citizen would have."

To much the same effect are *Baird v. Pettit*, 70 Pa. 477, 483; *Whitney v. N. Y., N. H. & H. R. R.*, 102 Fed. 850, 855, 43 C. C. A. 19, 50 L. R. A. 615.

It has often been held that a master is liable for acts of his servant done in the general course of employment, although done for the servant's individual benefit and not for that of the master. *Ritchie v. Waller*, 63 Conn. 155, 28 Atl. 29, 27 L. R. A. 161, 38 Am. St. Rep. 361. In the case at bar, as has been said, the plaintiff's act in seeking his coat may well be deemed done for his master's benefit as well as for his own, inasmuch as the master's interest may have required the plaintiff to work without his coat. The ruling of the Circuit Court in the case at bar appears to have been based upon *Packet Co. v. McCue*, 17 Wall. 508, 21 L. Ed. 705; but upon careful consideration of that case, and of the comment made thereon in *Randall v. Baltimore & Ohio R. R.*, 109 U. S. 478, 3 Sup. Ct. 322, 27 L. Ed. 1003, we are satisfied that the Supreme Court deemed the circumstances there to be exceptional, both in the nature of the plaintiff's employment and in the manner of its termination.

In the case at bar there was no evidence which warranted the jury in finding that, at the time of the accident, the plaintiff had quitted the defendants' employ. The learned judge was therefore in error in leaving the question of employment to the jury.

The judgment of the Circuit Court is reversed, the verdict set aside, and the case remanded to that court for further proceedings not inconsistent with the opinion passed down the 25th day of February, 1910; and the plaintiffs in error recover their costs of appeal.

LOUISVILLE & N. R. CO. v. WOODWARD.†

(Circuit Court of Appeals, Fifth Circuit. February 22, 1910.)

No. 1,971.

MASTER AND SERVANT (§ 243*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—RAILROAD YARDS—CONTRIBUTORY NEGLIGENCE.

Plaintiff's intestate, who was a car inspector employed by defendant railroad company in its yards, went between two cars of a train being made up in the yards to couple the air hose, when the engine backed other cars against those so standing, and he was run over and killed. He was an experienced inspector, and knew that the rules of the company prohibited him from going between the cars until the train was fully made up, and such train was not due to leave for an hour and a half. He could also have seen the approaching engine if he had looked. *Held*, that he was chargeable with contributory negligence as a matter of law, and there could be no recovery from defendant for his death.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 768-771; Dec. Dig. § 243.*]

Shelby, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Northern District of Alabama.

Action by M. E. Woodward, administrator, against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

John C. Eyster, for plaintiff in error.

W. W. Callahan, for defendant in error.

Before PARDEE and SHELBY, Circuit Judges, and FOSTER, District Judge.

FOSTER, District Judge. This was an action by M. E. Woodward, administrator, against the Louisville & Nashville Railroad Company for damages for the death of one Ed. Ezell, alleged to have been caused by the negligence of said company.

Plaintiff's pleadings originally contained four counts, and by amendment allowed a fifth count was added, but before the case went to the jury he abandoned the second, third, and fourth counts of the complaint. The material part of count No. 1 is as follows:

"On the said date [July 4, 1906] plaintiff's intestate was in the employ of defendant in the capacity of car inspector at or near said Boyles, and as such it became and was his duty to enter between the two rear cars of train No. 101, which train belonged to the defendant and was at that time composed of 17 cars, to couple the air hose between said cars, and while plaintiff's intestate was so as aforesaid in between said cars engaged in his duties, one Smith, an engineer in the service of the defendant, and who was in charge and control of one of defendant's engines, negligently backed said engine and 7 cars coupled thereto onto and against train No. 101, while plaintiff's intestate was between the cars as aforesaid, causing said cars to roll backward and push against and over plaintiff's intestate, causing severe injuries to him, from which he then and there died."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied March 23, 1910.

Count No. 5 is practically the same as count No. 1, with the following addition:

"And plaintiff avers that the said train was being made up under the superintendence of one Allen, who was defendant's yardmaster at said Boyles, and while in the exercise of such superintendence the said Allen negligently ordered or directed the said train to be made up in such a place as that it was necessary to switch the cars around a curve, and as that the engineer in charge of the engine engaged in making up said train could not see the length of his train, and that the said train was not in view of the employes engaged in making up said train, and by reason of the negligence of the said Allen while engaged in such superintendence plaintiff's intestate received as a proximate consequence the injuries which caused his death as aforesaid."

Defendant interposed nine pleas, and, on settlement of the pleadings, demurrers were sustained to the second, seventh, and eighth pleas. Defendant's pleas, as allowed, set up, first, the general issue; and, second, the contributory negligence of the deceased, on the following grounds:

That he knew that the train was being made up on the track at said place, and that it was his duty to wait until it was made up before commencing to inspect it; that it was his duty, and he knew it to be such, to prevent harm by placing a blue flag at the end of each of said cars, and he failed to do so; that he had no duty to perform at the place where he was at the time he received his injuries; that he went in between two cars that were standing still, without looking to see whether an engine and cars were approaching upon said track; that there was nothing to obstruct his view; that, had he looked, he would have seen the cars approaching; that the cars were standing on said track, and he knew the train was being made up by the engine and cars approaching in a curve; and that the position where he was inspecting said cars was on the outside of the curve, where he could not see the engine, and he negligently, knowing that he could not see the engine, went between the cars.

Defendant's plea No. 2 is substantially covered by the pleas allowed. Plea No. 7 sets up the negligence of plaintiff's intestate in failing to comply with defendant's rule No. 315, of which he had knowledge, and plea No. 8 sets up his knowledge of, and negligence in failing to comply with, defendant's rules No. 316 and No. 38. The rules referred to are as follows:

Rule 315: "They must carefully examine the couplings in trains after they are made up, and see that the links and pins are of proper size, and report to the yardmaster any imperfections."

Rule 316: "When inspecting or repairing cars that they do not wish moved, they must protect themselves by placing conspicuously a blue signal on both ends of the car, as provided in rule 38. When necessary to make repairs on a car in a train, they must place blue signals on both ends of the train before commencing work. If an engine is attached to it, they will place a blue signal upon the engine."

Rule 38: "A blue flag by day and a blue light by night, placed on the end of a car, denote that car inspectors are at work under or about the car or train. The car or train thus protected must not be coupled to or moved, until the blue signal is removed by the car inspectors. When a car or train standing on a siding is protected by a blue signal, other cars must not be placed in front of it so that the blue signal will be obscured, without first notifying the car inspector, that he may protect himself."

Defendant offered these rules in evidence at the trial and the court admitted rule 315, but excluded rules 316 and 38.

Defendant assigns as error, among other grounds, the sustaining of demurrers to its pleas Nos. 7 and 8, the exclusion of rules 316 and 38, and the refusal of the court to give the following instruction:

"If the jury believe the evidence, they will find for the defendant."

The plaintiff introduced but one witness, C. H. Wilson, also a car inspector on duty at the same time, as to the actual happening of the accident. We excerpt from his testimony as follows:

"Train No. 101 was made up at Boyles, the schedule time to leave was 6:50, and the injury occurred a few minutes after 5 o'clock. The fact that a curve existed there did not obstruct the view of an approaching engine to deceased. The point where this train was made up was the point where it was usually made. Ezell had worked there since December, and I think before that. Rules 315, 316, and 38 were in force at that time. At the time the train struck the deceased it had not been completed. It was necessary to put the four cars on that were attached to the engine. The car inspectors had no duty to perform with respect to this train until it was made up complete, unless of their own will. If they did anything at all, it was a voluntary act. The orders we got from the master car builder when we went to the yard was to wait until the train was completely made up before going in to make the couplings or doing anything at all. Ezell had no duty to perform with respect to this car until No. 101 was made up complete. There was nothing to do on No. 101, just risking his judgment, like I was risking my judgment."

Joseph Jacob was the only witness who testified for defendant. His uncontradicted evidence is, in part, as follows:

"I was foreman of the car department of the Louisville & Nashville Railroad at Birmingham, including the yard at Boyles, in July, 1906, and knew Ed. Ezell. At that time he was a car inspector. I was general foreman and supervisor over the car inspectors. I instructed him very careful, and never to go between the cars while switching, and told him the danger of it. Rules 315, 316, and 38 were in force. I examined him with reference to his knowledge of the rules before I put him on as extra inspector. I put him on as extra inspector, and he afterwards became general inspector."

The entire evidence is before us, and the undisputed facts seem to be as follows: On the day of his death, July 4, 1906, deceased was employed by defendant as car inspector at Boyles, a suburb of Birmingham, Ala. While he was between two cars of a number standing on the track, the engine backed up several more cars for the purpose of coupling them to those standing, to complete the train. Because of the shock of the coupling he was thrown down, and the train rolled over him and killed him. He was an experienced car inspector, and was familiar with the rules of the company. At the time he met his death, he was not called on or required to go in between the cars in his line of duty. The train had not been fully made up, and he was only in a position of danger because of his violation of the defendant company's rules, adopted for the protection of the very class of employees to which he belonged. There was no occasion for haste. The train was not to leave for at least an hour and a half after he went between the cars. The train was being made up at the usual place and in the usual manner of making up trains at Boyles. He knew, or he ought to have known, that the train was not completed when he went

in between the cars, and if he had looked he could have seen the approaching engine.

We think the demurrers to pleas 7 and 8 should have been overruled, and that rules Nos. 316 and 38 should have been admitted in evidence. Further, we believe that, even on the state of the case as made up, defendant below was entitled to the peremptory instruction in his favor.

The judgment of the Circuit Court is reversed, and the case is remanded, with instructions to grant a new trial.

SHELBY, Circuit Judge (dissenting). The court, by the opinion just read, has reached the conclusion, on the case shown by the record, that "the defendant below was entitled to the peremptory instruction in its favor." This conclusion could only be reached on the ground that the plaintiff's intestate was guilty, as matter of law, of contributory negligence. It appears that the alleged contributory negligence charged against the deceased in the opinion consists (1) in a disregard of the rules of the railroad company, and (2) in going between the cars when, "if he had looked, he could have seen the approaching engine" which pushed the cars over him and killed him.

1. The deceased went between the cars to make a coupling of the air hose. He was performing the duty, according to the evidence, in the usual way. C. H. Wilson testified:

"The inspectors at the time of making up the train were supposed to couple the air hose as quickly as could be done. They were coupling up while the train was being made up, if the cars were standing still, and no engine attached to it. That was the custom at Boyles."

If the rule is to be construed to forbid the inspector from going between the cars for that purpose, the evidence shows that it was not practically enforced—that it was the custom to perform the duty just as the deceased was performing it. A railroad company cannot defend by showing a printed rule which has been violated, if it appears from the proof that the rule was customarily disregarded, and that this was known to the agents of the road in charge.

Wilson further testified:

"I could not say whether Mr. Burke, who was assistant general yardmaster, paid any attention to me and my assistant coupling the air hose on my train or not. He was all over the yard while the work was going on. He did not object, or caution me not to do so. Coupling while the train was being made up on the main line was generally done in the presence of the yardman there."

It has been well said:

"A railroad company does not discharge its whole duty to the public by merely framing and publishing proper rules for the conduct of its business and the guidance and control of its servants; but it is also required to exercise such a supervision over its servants and the prosecution of its business as to have reason to believe that it is being conducted in pursuance of such rules." *Whittaker v. D. & H. C. Co.*, 126 N. Y. 544, 549, 27 N. E. 1042; *L. & N. R. Co. v. Richardson*, 100 Ala. 232, 236, 14 South. 209, 211.

The charge of the trial judge, which is made a part of the bill of exceptions, shows that he properly submitted the question to the jury as to whether or not the rule was in force, or was customarily disre-

garded within the knowledge of the officers of the company. This was right, "it being a question for the jury whether the rule had been waived by the company, or whether there was any attempt to enforce it in good faith." *C., C., C. & St. L. Ry. Co. v. Baker*, 91 Fed. 224, 33 C. C. A. 468; *Lake Erie & W. R. Co. v. Craig*, 80 Fed. 488, 25 C. C. A. 585; 1 *Labatt on Master & Servant*, § 232, and cases there cited.

The master will not be permitted to suffer a general nonobservance of a rule designed to promote the safety of his servants, and then revive it for the purpose of tripping up and defeating the action of a particular servant, who, but for the rule, has an action against him for damages. 5 *Thompson on Negligence*, § 5404.

2. The court, in the opinion just read, makes a summary of what it decides are the "undisputed facts." This statement concludes:

"When he [the deceased] went between the cars, * * * if he had looked, he could have seen the approaching engine."

The only evidence that tends to sustain this conclusion is a single ambiguous statement of C. H. Wilson:

"The fact that a curve existed there did not obstruct the view of an approaching engine to the deceased."

That the witness did not mean that Ezell, the deceased, could have seen the engine from where he stood, is shown by the witness' further examination:

"I was on the west side where I could see the engine, and he [the deceased] was on the south side where he could not see the engine."

At another point in his examination he, in effect, repeated that Ezell could not have seen the approaching engine:

"He could not have seen the engine and the four cars where he entered between the cars."

The evidence does not, in my opinion, justify the conclusion that the deceased could have seen the approaching engine from where he entered between the cars. The statement of Wilson is directly to the contrary: The deceased "was on the south side, where he could not see the engine."

It follows, in my opinion, that, so far as this contention is concerned, the trial court ruled correctly in submitting the question of contributory negligence to the jury.

MARBURY et ux. v. ILLINOIS CENT. R. CO. et al.

ILLINOIS CENT. R. CO. et al. v. MARBURY et ux.

(Circuit Court of Appeals, Sixth Circuit. January 5, 1910.)

Nos. 1,965, 1,966.

CARRIERS (§ 320*)—INJURIES TO PASSENGER—QUESTION FOR JURY.

Plaintiff, who was recovering from a severe illness, by advice of her physician went in January from Memphis to New Orleans, traveling on the railroad of one of the defendants, and riding in a sleeping car of the other defendant. The weather at Memphis was very cold, with ice and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

snow on the ground. The car was not heated until four hours after leaving Memphis, although defendants were advised of plaintiff's condition, and she suffered continuously from cold during that time. The second day after reaching New Orleans she suffered a relapse, and was again very ill for several months. In an action against defendants for negligence, on the question of damages, physicians were called as experts, and, while admitting that the relapse and subsequent illness might possibly have been due in whole or part to exposure in going to and from the stations and the fatigue of the journey, they without exception expressed the opinion that the far more probable cause was the continued exposure to cold in the car. *Held*, that such evidence was sufficient to require the submission of the question to the jury.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 320.*]

In Error to the Circuit Court of the United States for the Western District of Tennessee.

Action by C. C. Marbury and Mrs. C. C. Marbury against the Illinois Central Railroad Company and the Pullman Company. Judgment for plaintiffs, and both parties bring error. Reversed on plaintiffs' writ of error.

This suit was brought in the circuit court of Shelby county, Tenn., by William Messick and Mrs. Mary Messick, his wife, against the Illinois Central Railroad and the Pullman Company, to recover damages for alleged negligence. On petition of defendants the case was removed to the court below.

It was stated in the declaration in substance that on January 7, 1905, Mrs. Messick was a passenger in a sleeping car of the Pullman Company on one of the trains of the railroad company, from Memphis to New Orleans; that the weather was extremely cold, and the sleeping car was allowed to be and remain unheated for several hours and until the train reached Grenada, Miss.; that Mrs. Messick was in a delicate condition, recovering from a severe illness of several months, and this information was given to the defendants at the time plaintiff boarded the car; that Mrs. Messick suffered a relapse, which permanently affected her health and wrecked her nervous system. To this declaration the defendants each filed a plea of not guilty.

William Messick died, and the suit was revived in the name of his widow. Subsequently Mrs. Messick married O. O. Marbury, and thereupon an order was entered by the court that the case be prosecuted in the name of O. O. Marbury and Mary Marbury. The case brought here was the result of a second trial; a verdict being rendered in favor of plaintiffs against both defendants for \$750. Plaintiffs for themselves and the defendants have each prosecuted error to this court.

John E. Bell, for plaintiffs.

Albert H. Biggs, for defendant Illinois Cent. R. Co.

Thos. H. Jackson, for defendant Pullman Co.

Before LURTON, SEVERENS, and WARRINGTON, Circuit Judges.

WARRINGTON, Circuit Judge (after stating the facts as above). So far as Mrs. Marbury is concerned, the complaint is that the court in its charge to the jury erred in limiting recovery to such damages as a person in average health would suffer, without resulting sickness, inconvenience, or injury, from riding for several hours on a cold day in a sleeping car which was not supplied with heat, and in withdrawing from the jury all evidence relating to plaintiff's real condition and to damages resulting from her subsequent relapse and sickness.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The reason for so limiting recovery is not in terms stated in the charge of the court. The reason urged at the time by counsel for the railroad and Pullman companies in support of motions to direct a verdict was that the proofs did not connect defendants' breach of duty with plaintiff's subsequent relapse. It is still insisted that the proof fails in this regard, because it does not show certainly that the cold in the car caused the relapse; and, on the contrary, it is said that other causes for which defendants were not liable may have brought on the relapse. From this it is argued that the cause of plaintiff's relapse is merely conjectural, and consequently that the jury was not entitled to speculate as to the real cause.

In attempting to show that the condition of the sleeping car was the cause of plaintiff's relapse and sickness, testimony of physicians was offered and received. But the court subsequently withdrew this testimony from the consideration of the jury. There was no claim that the cause of relapse was not a proper subject for expert testimony. Nor was it suggested that the physicians were not competent as experts. It is likewise to be noticed that no denial is made in argument of the impaired physical condition of plaintiff when she entered the car, or of the fact that she suffered a relapse and severe illness some days subsequently to her exposure to cold in the car. Moreover (apart from a claim of the Pullman Company that it was not shown that it owned the sleeping car), the position taken by the companies amounts to an admission that they were guilty of neglect in failing to heat the car. The present inquiry is therefore reducible to this: Whether the whole proof as originally received was sufficient *prima facie* to connect defendants' breach of duty with plaintiff's subsequent relapse and sickness.

We shall speak of Mrs. Marbury as Mrs. Messick, for she is called by the latter name in the record. It appears that Mrs. Messick suffered a miscarriage in September, 1904, and that this was attended by pelvic inflammation, including inflammation of the ovaries and Fallopian tubes, as well as of the peritoneum covering those organs; the technical name of the disease being salpingitis. She suffered with the disease through October and November; her life being despaired of for a few days. She apparently improved in December, and, as she says, "commenced getting better and better and better" until Christmas. She then moved about the rooms in which she and her husband (who was also ill) were confined until January 7, 1905. On that day, under the advice of her physician, she and her husband, with their children and a nurse, went from Memphis to New Orleans over the Illinois Central Railroad, to remain for a time at the home in New Orleans of Mrs. Messick's mother. She was not off of the floor of the rooms before mentioned between the commencement of her illness and the time of starting for New Orleans. She walked down the stairs of her home and then for a distance of some 30 or 40 feet to a carriage, and upon arrival at the railroad station she was taken in a wheeled chair to a restaurant in the station, where she waited with friends until the train arrived. She was taken thence in the chair to the steps of the sleeping car. She then walked into the car and to the drawing room.

It will conduce to clearness later briefly to refer to Mrs. Messick's

exposure to cold. The weather was cold at Memphis, the thermometer ranging from 23 degrees above zero in the morning to 31 at 12 o'clock noon, 32 at 3 o'clock, and 31 at 4 and 8 o'clock; the ground being covered with ice and snow. The sleeping car was not heated when Mrs. Messick and her family boarded it, and it was suffered to remain in that condition for about four hours. At Grenada, Miss., after some trouble, if not repair, the heat was turned on. Requests were repeatedly made of the conductor and porter to have the heat turned on, but though frequently promised it was not done until the time mentioned. Meanwhile Mrs. Messick reclined on the lounge. The car was comfortable on the trip from Grenada to New Orleans. Upon arrival in that city, Mrs. Messick walked from the car to a carriage, and was taken thence to the home of her mother, where she walked from the carriage into the residence. She there suffered a relapse, and a long and continued illness.

The difficulty of the present question begins here, for there is no dispute of moment in the testimony thus far. Was the relapse traceable proximately to the cold in the car? If so, liability does not seem to be seriously controverted. Or, on the other hand, was the relapse traceable to exposure in going to the car, or to the excitement and natural fatigue of the trip? Or were all these causes so blended as to prevent identifying any cause for which defendants were liable? These and kindred questions are found throughout the testimony of the physicians, and they resulted in introducing into the case much confusion.

This confusion may, we think, be fairly cleared away by giving attention to what we conceive to be the preponderance of testimony concerning Mrs. Messick's trip from her home to the sleeping car at Memphis, and from the sleeping car at New Orleans to the home of her mother in that city. The short distance she walked between the room of her home and the carriage, and the comparatively short time she was in the carriage in going to the station, and then in the wheeled chair to the restaurant of the depot, do not, from the testimony, appear in point of time or of exertion to have caused excitement, fatigue, or exposure of consequence. The restaurant was on the level of the street approach and the railroad tracks, while the waiting room was on the floor above. The restaurant was comfortably warm, and Mrs. Messick was cheerful while waiting there an hour for the train. She was then removed in the wheeled chair to the steps of the sleeping car, and the exertion required to walk into the car and to the drawing room could not have been as great as that involved in walking from her room to the carriage. It is true the attention of one of the witnesses was called to the fact that in her former testimony she had said that Mrs. Messick appeared exhausted when she reached the drawing room; but the explanation of the witness seems to remove that impression. The same general result may be stated respecting Mrs. Messick's leaving the car and going to her mother's home in New Orleans, although the distance between the station and her mother's home in that city was about two miles. We do not discover any claim that the weather was cold in New Orleans; nor do we recall any evidence tending to show that there was any more occasion for fatigue in riding from the sleeping car to the home of her mother in that city than

there was in riding from her own home to the sleeping car in Memphis. Dr. Maury, one of her attending physicians in Memphis, testified:

"Q. Who, if any one, advised that the trip would be safe? A. I did. Q. Doctor, if she had taken that trip well cared for until she was placed into a sleeping car, in the drawing room of the car, and the car had been properly heated and provided, would the trip have been a dangerous one? A. I don't think so, at the time."

It is therefore hard to see how the testimony supports the hypotheses and consequent answers relating to exposure, fatigue, or excitement during the portions of her trip between residences and stations.

Turning now to the plaintiff's experience in the car and her subsequent condition, she stated that she was "extremely cold, and I had to use all the wraps I could possibly get, and take a great deal of whisky to keep up any warmth at all"; and she said she "was comfortable when the heat was turned on." She stated that within a week she had grown so ill that she was compelled to take her bed "because of constantly increasing suffering." In her cross-examination this was said:

"Q. When did you first begin to suffer pains indicating a relapse to your former troubles, which you had in Memphis? A. About the second day after I arrived."

She further stated that it was nine days before she called a doctor.

It is true as claimed that in answer to a hypothetical question put to Dr. Maury, which concluded with the inquiry "whether the relapse was caused by the cold condition of the car," he stated that he "could not express an opinion as to whether the relapse was due to any exposure in this particular case." When asked whether such exposure would be "apt to cause a relapse," he answered:

"Yes; it would."

Later, he said:

"If the symptoms of relapse occurred in a day or two after the exposure, I would think it would be very probably the cause of it."

Mrs. Messick testified that this occurred, as above pointed out.

Dr. Turner, in answer to a question closing with the inquiry as to the effect of exposure to cold in the car, said:

"I should expect such symptoms as she had suffered from before to be lighted up again, or any that still existed in her convalescence to be aggravated."

Dr. Leroy was questioned by the court and answered thus:

"Q. State whether or not, if a relapse came to this woman in New Orleans, it might or might not be attributable either to the exercise incident in getting from the bed down the steps into the carriage, driving to the railroad at Memphis and waiting for the train, and getting into the car, and the exercise and weariness from the trip, independent of any cold to which she was exposed in the car and the exercise of getting out of the car into the carriage and driving several miles and going into the house, whether or not that might be attributed to the exercise and fatigue incident to the exposure and independent of any cold in the car? A. Such a thing would be within the bounds of possibility, but in the presence of two causes, one of which to me is so much more manifest, especially with a woman who has been up a couple of weeks, I would be inclined to disregard one for the much more manifest cause."

"The Court: It would be in your opinion that it was more likely to have occurred from the exposure in the cold car than the other? A. Unquestionably so.

"The Court: But it might be attributed and might have been produced by the other? A. Such a thing is within the bounds of possibility."

"The Court: Then it might be attributable to both? A. Both; the trip might contribute something. Of course, if it is within the bounds of possibility, we could not exclude one; if we admit one we must admit them both, I think."

Dr. Holt, who attended Mrs. Messick in New Orleans from January 16, 1905, to the following May 17th, testified in relation to her trip in the sleeping car that "such exposure under the protracted influence of cold is precisely that which would most likely re-awaken inflammation and bring on a relapse"; "that her relapse dated from her long exposure on the train"; that her condition "was exactly such a condition as would follow such a cause"; also, answering a question whether she would have recovered if the trip had been a comfortable one:

"I do mean to state for the reason that the simple fact of traveling from Memphis to New Orleans, under comfortable conditions, would not have been the exciting cause of the renewed inflammation, within the range of reasonable probability."

Is it correct to say as a conclusion of law that this testimony in its trend and tendency has no weight or value? Is it not to be considered at all, especially under appropriate instructions and in connection with the facts and circumstances of the whole case? In the classifications made of decisions by Mr. Rogers, both in criticism and support of opinion evidence, it is said in his work on Expert Testimony (section 203):

"On the other hand, many cases may be found in which courts have expressed the opinion that the testimony of experts in medical science is of great value, or entitled to great weight."

It is true, cases cited in that work (like many of the decisions, federal and state, collected in 5 Enc. of Ev. 637 et seq., tit. "Weight of Expert Testimony," note 21) show, and we agree, that discrimination in subjects must be exercised in attaching material weight to opinions of medical experts, as also and especially of some other classes of experts. But it is only fair to say that the present physicians appear to have been regarded by counsel for both sides as exceptionally well qualified, and also as candid and frank. No witnesses were called by defendants. Upon the question, then, of whether there was any evidence meriting submission to the jury touching the cause of relapse, we think we may safely treat the testimony of these physicians the same as we should testimony concerning ordinary facts.

It was to be expected of such men that they would not state with absolute certainty that Mrs. Messick's relapse could not have been due to exposure or fatigue occasioned by the journeys between the two residences and stations of Memphis and New Orleans. They admitted these as possible causes; but their testimony in effect shows that there was no cause attending these journeys which seems comparable to the cause arising from the condition of the sleeping car.

There is a class of decisions in which medical opinion is relied on to

show cause of bodily affection, even though it cannot be shown with certainty. Illustration may be found in *Matteson v. N. Y. Central R. R. Co.*, 35 N. Y. 487, 490, 91 Am. Dec. 67, where it appeared that plaintiff's wife was suffering from spinal affection claimed to be due to injury received on defendant's road. The court said:

"* * * It was impossible to prove, by direct evidence, and with absolute certainty, from what cause the affection proceeded. Something was necessarily left to inference; not a merely speculative, but a rational, inference, based upon all the circumstances of the case."

True, evidence was offered in that case tending to eliminate causes other than the one complained of, but that is true of the present case. The difference between the two cases in this regard could at most be only of immaterial degree.

In *McCafferty v. Pennsylvania Railroad*, 193 Pa. 339, 344, 345, 44 Atl. 435, 74 Am. St. Rep. 690, when speaking of the difficulty in that case of showing connection between the accident and the death of the person claimed to be negligently injured, the court said:

"The connection between the accident and the death was not clearly established. The deceased was injured by the derailment of the car in which he was riding on April 1, 1896. He lived until April 12, 1897, and the immediate cause of his death was an abscess on the liver. A month before he died he had a severe attack of gripe. It was incumbent upon the plaintiff to show with reasonable certainty that the abscess was caused by the injury received. This it was difficult to do, as the disease is one whose origin is difficult to trace. The medical testimony produced by the plaintiff was in itself far from convincing; but it was fortified by proof that her son had never recovered from the effects of his injuries, and that they were apparently internal, and indicated a serious derangement of the liver before he had the gripe. We are not prepared to say that the court should have instructed the jury that the testimony did not warrant the conclusion that the death was the natural and proximate consequence of the accident. The question, however, was one which should be submitted with most careful instructions."

See, also, *Beauchamp v. Saginaw Mining Co.*, 50 Mich. 163, 172, 173, 15 N. W. 65, 45 Am. Rep. 30; *Baltimore City Pass. Railway Co. v. Kemp and Wife*, 61 Md. 74, 80; *Bishop v. St. Paul City Ry. Co.*, 48 Minn. 26, 33, 50 N. W. 927; *Denver & R. G. R. Co. v. Roller*, 100 Fed. 738, 752, 49 L. R. A. 77;¹ *Taft v. Brooklyn Heights R. Co.*, 14 Misc. Rep. 390, 35 N. Y. Supp. 1042; *Harvey v. Fargo*, 99 App. Div. 599, 91 N. Y. Supp. 84.

There can be no difference in principle between the competency of opinion evidence which ascribes cause of disease and that which minimizes or altogether eliminates cause; or, in other words, the trained mind must be capable of differentiating causes reasonably certain in their effect from those of no importance or probable effect.

We are thus led to believe that the present case is not like that of *Patton v. Texas & Pacific Ry. Co.*, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361, or the class of kindred cases which are so much relied on by learned counsel for defendants. There is not the uncertainty of cause in the present case that was found to exist in the *Patton Case*. The source of relapse seems to us to be traceable with reasonable certainty. At least, upon all the evidence pertinent to the issue touching result of cold in the sleeping car, it would not be safe to conclude as matter of law that "fair-minded men" may not, without guessing as

¹ 41 C. C. A. 22.

to cause of relapse, "honestly draw different conclusions." The present case would seem therefore to be ruled by the settled principle affirmed by Mr. Justice Brewer in *Richmond & Danville Rd. Co. v. Powers*, 149 U. S. 43, 45, 13 Sup. Ct. 748, 37 L. Ed. 642, and referred to by him in the *Patton Case*. Furthermore, in *Mt. Adams & E. P. Inclined Ry. Co. v. Lowery*, 74 Fed. 463, 477, 20 C. C. A. 596, 609, Judge Lurton, in stating the difference between the functions of the trial judge in granting a motion for a new trial and in passing upon a motion to direct a verdict, said:

"In the latter case we think he cannot properly undertake to weigh the evidence. His duty is to take that view of the evidence most favorable to the party against whom it is moved to direct a verdict, and from that evidence, and the inferences reasonably and justifiably to be drawn therefrom, determine whether or not, under the law a verdict might be found for the party having the onus."

And in the recent case of *G. Rochford, etc., v. Pennsylvania Co.*, 174 Fed. 81, 84, the same learned judge, speaking for the court, said:

"If the plaintiff has produced material evidence, sufficient, if believed and uncontradicted, to warrant a verdict, no amount of contradictory evidence will authorize the trial judge to take the question of its effect and weight away from the jury."

We are constrained to hold that the court erred in withdrawing the evidence mentioned from the jury, and that the judgment in favor of the plaintiffs below must be reversed and a new trial awarded for that reason. It follows that the assignments of error presented by the defendants below must fall with the judgment of which they complain. The costs of both proceedings in error in this court will be paid by defendants.

FRANK UNNEWEHR CO. v. STANDARD LIFE & ACCIDENT INS. CO.

(Circuit Court of Appeals, Sixth Circuit. January 5, 1910.)

No. 1,964.

1. MASTER AND SERVANT (§ 95*)—DANGEROUS EMPLOYMENT—MINORS.

Whether the employment of a child 16 years of age as off-bearer from a veneer saw in a mill was an employment whereby his life or limb was endangered within Rev. St. Ohio, § 6986-1, prohibiting such employment, did not depend on whether the services required of the child could not be performed without danger to life or limb, but on whether the employment, considering the inevitable wear and tear of the strain of the position and the indifference to danger that would naturally follow from childish curiosity and inexperience, rendered the position dangerous.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 141, 160; Dec. Dig. § 95.*]

2. INSURANCE (§ 437*)—INDEMNITY POLICY—EMPLOYMENT OF CHILDREN—ILLEGAL ACTS.

Plaintiff employed a child under 16 years of age as off-bearer from a circular veneer saw in a mill. The saw was 68 inches in diameter, weighing about 1,000 pounds, and extended about 45 inches above the floor. When once started, the method adopted for stopping it after releasing the power was to jam a piece of scantling between the edge of the floor and the saw disk. It was no part of the child's duty to start or stop the saw,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

his duty being to stand some distance away from it and carry off the boards of veneer as they were sawed off. On several occasions, however, he voluntarily attempted to stop the saw, and was directed by adult coemployees not to do so, that he would get hurt, and on the occasion of his injury he attempted to stop the saw in this way, and one of his arms was caught in the teeth and injured. *Held*, that the child was employed in a position whereby his life or limb was endangered in violation of Rev. St. Ohio, § 6986-1, and hence a master, after being cast in an action for damages sustained by the child, could not recover over against an indemnity insurance company on a policy exempting the company from liability for injuries suffered by any person employed in violation of law as to age.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 437.*]

In Error to the Circuit Court of the United States for the Southern District of Ohio.

Action by the Frank Unnewehr Company against the Standard Life & Accident Insurance Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Alfred Mack, for plaintiff in error.

C. D. Robertson, for defendant in error.

Before LURTON, SEVERENS, and WARRINGTON, Circuit Judges.

WARRINGTON, Circuit Judge. The question in this case stated broadly is whether, in view of an Ohio statute (Rev. St. Ohio, § 6986-1) forbidding placing a child under the age of 16 years "at employment whereby its life or limb is endangered," an employer can knowingly put a child under that age at work within close proximity to a large circular saw, and then recover from an indemnity insurance company the amount of a judgment paid by the employer to the child for injuries suffered from the saw while not engaged in line of duty, notwithstanding a condition of the insurance policy which exempts the company from liability to the insured arising out of injuries "suffered by any person employed in violation of law as to age."

The case was brought in the court below by plaintiff, Unnewehr Company, against defendant, an insurance company, upon a policy of insurance. Plaintiff was engaged in the business of manufacturing veneer and thin lumber at its plant in Cincinnati. By the policy plaintiff was indemnified against loss imposed by law for damages on account of bodily injuries suffered through operation of its factory by any of its employees while within its factory during a fixed period. Jurisdiction was obtained through diversity of citizenship. A judgment and costs for \$2,587.96 had been recovered against plaintiff in another suit by one Luther Watson, who, on November 14, 1907, as alleged in the petition in the present case, "was then in the employ of plaintiff as off-bearer (to wit, carrying away pieces of thin lumber after same had been sawed) at a veneer saw," and who then "sustained bodily injuries accidentally suffered by reason of the operation of the business or trade of the plaintiff." The defense now relied on is in substance that at the time Watson received his injuries he was a child under the age of 16 years, and engaged "at employment whereby its life or limb was endangered" within the meaning of section 6986-1

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of the Revised Statutes of Ohio, and that defendant had indemnified plaintiff subject to a condition that the policy should not cover loss from liability for injuries suffered by "any person employed in violation of law as to age."

The cause was tried to the court and a jury upon the facts admitted by the pleadings and by an agreed statement, with certain exhibits, whereupon the court below in its charge stated, among other things:

"I am of the opinion that the services which the boy was rendering for the plaintiff was at an employment whereby his life or limb was in danger, and therefore I instruct the jury to return a verdict in favor of the defendant."

It was agreed that plaintiff received the policy of insurance; that it gave defendant notice of the accident to Watson and of the bringing of his suit by his next friend; that Watson was at the time of the injury in plaintiff's employ and that the employment and the work carried on were covered by the policy; that the defense to the suit brought by the boy was conducted jointly by the attorneys of plaintiff and defendant, but without prejudice to the rights of either; that judgment and costs were recovered in the sum of \$2,587.96; that by agreement then made by the parties to the present suit no proceedings in error were taken and the judgment and costs were paid by plaintiff to Watson, and that defendant refused to reimburse plaintiff; also that, previous to entering upon his employment, Watson placed with the plaintiff an "age and schooling certificate as required by the laws of Ohio," from which it appears that he was born July 9, 1892, and that at the date of the certificate, July 31, 1907, he was four feet six inches in height, and that he could read at sight and write legibly simple English sentences.

The statute then in force was section 6986-1, enacted April 8, 1890 (87 Ohio Laws, p. 161), which provided:

"No child under the age of sixteen years shall be employed by any person, firm or corporation in this state, at employment whereby its life or limb is endangered, or its health is likely to be injured, or its morals may be depraved by such employment."

The ultimate inquiry is whether the service assigned to Watson was dangerous to life or limb.

The veneer saw is circular in form, and with its attachments is 68 inches in diameter. Its weight is about 1,000 pounds. It has an axle resting upon bearings near the floor of the room in which it is operated; about 45 inches of its diameter being above the floor. It is operated by steam power applied through belts and shafting. When once set in motion, the power is removed by pulling a rope attached to an idler and so loosening the driving belt; but, owing to the weight and rate of speed of the saw, it continues to revolve for some time. The method adopted for stopping the saw after release from the power was to "jam" a piece of scantling between the edge of the floor and the disk of the saw. The boy Watson attempted to stop the saw in this way, and one of his arms was caught in the teeth of the saw and so injured as to require amputation near the shoulder.

It is agreed that it "was no part of his duties either to start or stop the saw." It was further agreed that the operator of the veneer saw,

Stevens, would testify that on two or three occasions he found "that the boy Watson had run around and tried to stop the saw by putting in a stick"; that instead of giving him orders to do so, whenever he did stop the saw he, Stevens, told him to "stop monkeying with the machine"; also that the head sawyer, Smith, would testify that he had supervision of two saws, the one operated by Stevens and the other by himself; that he also noticed that as soon as the operator would stop the machine "the boy would run around with the stick and stop the saw"; that he told him "on at least half a dozen occasions not to do this, as he would get hurt sure."

The contention made is that plaintiff did not violate the statute in question, because Watson was not employed to stop the saw, but was employed as an off-bearer of the thin boards as they came from the saw, and that, if he had confined himself to the performance of the duties assigned to him, he could not have been hurt. A better understanding of this contention and of the situation will be gained by further description.

The relative positions of Stevens, the operator, and Watson, the off-bearer, with respect to the saw during much of the time that they were at work were about the same. In photographic views offered to display the disk of the saw and side of the carriage Stevens is represented as standing at the right and Watson at the left of the edge of the saw, and each about five feet away from it. Stevens applied and turned off the power by means of a rope, and by levers operated the carriage bearing the log and adjusted the latter to the saw. Watson would alternately sit and stand at the end of a spreader 51 inches long and 30½ inches high. The spreader extended in front of the saw, and was used for separating the boards from the log as the sawing progressed. This enabled Watson to receive and remove the boards. The conclusion of the court below upon the facts was:

"Two persons were necessary to operate the saw. One was the man Stevens, who managed the carriage and brought the log into contact with the saw, and the other was the boy, who steadied the boards after they passed a given point, as they were sawed from the log, and finally bore them away to a pile. His services were as necessary as those of Stevens."

The claim made in behalf of plaintiff is that the language of the statute forbidding placing a child under the age of 16 years "at employment whereby its life or limb is endangered" limited the inhibition to service that could not be performed without danger to life or limb; and hence that no employment would be regarded as dangerous to life or limb of the child unless it involved operating or assisting in operating a dangerous machine. But does this take into account either the import of the words of the statute, or the purpose of such legislation?

We do not find it necessary to consider whether the duty imposed upon Watson as off-bearer literally involved operating or assisting to operate the veneer saw. It is hard to conceive that an adult, much less a child, could reasonably be expected at all times to keep all parts of his body within the bounds set for this off-bearer. He was for a substantial portion of his time required to stand and work within five

feet of this obviously dangerous saw. An unguarded step or movement resulting in an accidental fall might bring him into contact with the saw. He was within easy range of injury in the event of breakage of the saw or other mishap, due to its great size and speed. The inevitable strain of such a position and the indifference to danger that would naturally follow cannot escape notice; for these conditions and also childish curiosity must have combined to induce Watson to rush away from his position so frequently in spite of admonition and stop the saw.

Enough appears in the record to suggest some comparison between the danger attending the work of the operator and that of the off-bearer. We are unable to see how manipulation of the rope for turning on and shutting off power in operating the veneer saw, or how working the contrivances used for moving the carriage bearing the log and adjusting the latter to the saw, could be attended with danger to life or limb exceeding that incurred by the off-bearer while discharging his regular duties. It does not appear from the photographs or from anything we have found in the record that the operator is required to make nearer approach to the saw while in operation than the off-bearer is; and it would seem that the duties of the person operating the veneer saw are probably lessened by the fact that the head sawyer has supervision of the veneer saw as well as of the saw that he operates personally. Is it to be said that the inhibition of the statute would be applied to the one position and withheld from the other? The accepted meaning of "endanger" embraces exposure to injury coming from without as well as from within a given place or object. It is conceivable that there are many instances where attendants may incur danger quite equal to that of the operators themselves; but it is hard to conceive of a legislative purpose to furnish protection against only one of such dangers.

It is to be regretted that the Supreme Court of Ohio has not had occasion to construe either the old act or the new one (passed February 28, 1908; 99 Ohio Laws, p. 30). The only mention made of either act is that found in *Jacobs v. Fuller & Hutsinpillar Co.*, 67 Ohio St. 70, 65 N. E. 617, 65 L. R. A. 833, in which that court held that it was error in the trial court to instruct the jury that it could consider the employment of plaintiff, a boy under the age of 16 years, a violation of the statute, as a circumstance bearing upon the alleged negligence of his employer. Under this rule, violation of the act may be conceded and only its relevance to the issue of negligence denied.

Reference is made to *Breckinridge v. Regan*, 22 Ohio Cir. Ct. R. 71. A girl of 15 years had been employed by plaintiff to operate a machine used for stamping and cutting tin. The court said that "it may be regarded as a machine at least somewhat dangerous." Although no question was made in the trial below concerning the act now in question, yet the reviewing court upon suggestion of counsel considered the bearing of defendant's violation of the act upon the question of its negligence. It is true that in applying the statute to the facts of that case the court regarded the act as indicating that in the judgment of the Legislature children of the age of plaintiff "are unfit by reason of

their indiscretion to be employed in the operation of a dangerous piece of machinery." But there was no fact calling for any statement, and none was made, that the act could not be violated unless an employer should direct a child to operate a dangerous machine.

During the argument of the present case a typewritten paper said to be a copy of an unreported opinion of another Ohio Circuit Court was presented and read without objection. The case seems to be analogous to the one under review. It is Ohio Moulding Manufacturing Co. v. Standard Life & Accident Insurance Co. It was decided in December, 1903, by the Circuit Court sitting in Cuyahoga county. The action was to recover upon a policy of insurance similar to the one now in question. It was alleged, say the court, when speaking of the child who had been employed:

"That the employment was of a dangerous character whereby his life and limbs were in danger and specifying that the employment was about a rapidly moving circular rip saw."

It is to be observed that the statement is that "the employment was about a rapidly moving circular rip saw," not that the boy was either operating or assisting in operating the saw. Judgment was given in the court of common pleas in favor of the insurance company. After passing upon various questions of evidence and waiver, the Circuit Court in affirming the judgment below said:

"The issues fairly made by the pleadings, whether the employment of Uhas was in violation of the statute above quoted, and therefore any accident to him not within the terms of the policy. The court refused to submit this issue to the jury, but said to the jury that the employment of the boy, if under 16 years of age, to work in the place where he was injured, was unlawful. In so charging the jury it is claimed that the court erred. It is true that a question of fact was raised by this issue, and it probably would have been better to have submitted that issue to the jury for determination; but, after a careful consideration of all the testimony bearing upon that issue, it is made certain that the jury must have found the employment to have been unlawful. Any other conclusion than that reached by the jury would not have been permitted to stand. We are therefore of opinion that this judgment should not be reversed for this alleged error."

Prior to the enactment of the statute of April 8, 1890, the Supreme Court of Ohio in Rolling Mill Co. v. Corrigan, 46 Ohio St. 283, 20 N. E. 466, 15 Am. St. Rep. 596, declared as a rule of general law concerning employment of a child under the age of 14 years and placing him at work in close proximity to a moving belt passing over revolving wheels that:

"Persons who employ children to work with, or about dangerous machinery, or in dangerous places, should anticipate that they will exercise only such judgment, discretion, and care as is usual among children of the same age, under similar circumstances, and are bound to use due care, having regard to their age, and inexperience, to protect them from dangers incident to the situation in which they are placed. * * *"

The effect of that decision is clearly to impose upon an employer of children the duty to take into account their inexperience and heedlessness when assigning them to work about a dangerous machine. There is nothing in the decision which recognizes any right in an em-

ployer simply to set bounds within which a child shall work in close proximity to a dangerous machine, and escape liability as claimed in the present case on the assumption that the child either will or at his peril shall keep within those bounds. The importance of the decision, as we view it, is that it is inconsistent with any inference that the Legislature by its enactment passed within little more than one year after the date of the decision intended to restrict the statutory law to narrower limits than those of the general law as announced by the highest tribunal of the state.

It is deserving of remark that the only persons connected with the company who appear to have said anything to Watson concerning dangers of the saw were the head sawyer and the operator of the veneer saw. While disclaiming having any control over him, they simply warned him of the danger of stopping the saw. It was the assistant superintendent who employed Watson, but although he knew Watson was under the age of 16 years, it is not shown that he or any one else having control over Watson ever gave him any instructions in regard to the dangers of the saw. Upon the question whether plaintiff assigned and kept Watson at an "employment whereby his life or limb was endangered" within the meaning of the statute, attention must be given not only to the knowledge and conduct of the plaintiff, but also to the obvious intent of the Legislature to protect children within the prescribed age against their own incautious tendencies. Several different illustrations of this latter feature may be seen in decisions of the Supreme Court of Michigan, when construing an act similar to the Ohio statute.

In *Braasch v. Michigan Stove Co.*, 153 Mich. 652, 118 N. W. 366, 20 L. R. A. (N. S.) 500, recovery was allowed in favor of a boy under the age of 16 years who had been injured in running an electric freight elevator in a factory. Testimony was offered to show that at the time of his employment the boy was 14 years and 8 months old. It was claimed in his behalf that his employment was in violation of the statute of that state prohibiting employment of children under the age of 16 years where dangerous to life or limb. The court took judicial notice that a "freight elevator is a place of danger to life and limb in the hands of an inexperienced boy of 14 years," and said:

"An elevator, like many other machines, is a reasonably safe machine under proper management. But accidents are not infrequent. Any construction of the statute which does not take into account the inexperience and natural heedlessness of children overlooks an important consideration. Undoubtedly it was passed to protect children against accidents, which in adults might well be said to result from negligence on the part of the victim, but which in children would be largely due to a want of experience, or heedlessness, for which experience is ordinarily the only cure."

The same court in *Dalm v. Bryant Paper Co.* (Mich.) 122 N. W. 257, decided July 15, 1909, again passed upon the same statute. The court affirmed a judgment in favor of a boy between 15 and 16 years of age, who had been employed in a paper factory as a "winder boy." It appeared that at the time of receiving his injury he was passing along an aisle five feet wide, not however in performance of his duties as winder boy, but in execution of an order to carry some material called "broke." The aisle was formed by two rows of machines called

"calendar stacks," each consisting of rollers one above the other to the height of about 12 feet. The boy had taken up an armful of material to carry it out; and some of it being caught between certain of the rollers drew his arm between them. In answer to the claim that the work as winder boy was without danger to life and limb, and that the order he had received to enter the aisle and carry away the paper was delivered by a fellow servant, the court said (page 259):

"Can it be said, even if the work of the winder boy in this manufactory was without danger to life and limb, which we do not determine, that he can be required to do this dangerous work, and thereby become a fellow servant with the person ordering him to do it? * * * If it may be done, then the duty imposed by the statute, and liability for neglect of such duty, may in every case be avoided."

Thus the court again treated the boy as an object for protection under the statute, even though he was at the time of his injury only in close proximity to the dangerous machine; and this too in spite of the fact that he was not operating the machine containing the rollers.

In *Sterling v. Union Carbide Co.*, 142 Mich. 284, 105 N. W. 755, in considering the question of alleged contributory negligence respecting the conduct of a boy between 15 and 16 years of age while feeding metal into a corrugating machine, where his hand would not in the ordinary course of the work be nearer the roller than the width of the metal, the court said:

"The statute takes cognizance of the immaturity of judgment of children under 16. * * * To construe this statute as designed to protect children from such dangers only as could not be obviated by persons of mature judgment would render it nugatory."

In *Morris v. Stanfield*, 81 Ill. App. 264, a statute was under consideration forbidding employment of a child under 13 years of age for any period of time greater than one day, unless a school board should give a certificate that an aged or infirm relative was depending upon the child. No certificate was obtained, but it was claimed in defense that the boy and his mother represented his age to be more than 13. The boy was placed at work at a table near a circular saw and was charged with the duty of passing bones to the operator of the saw. Through playful contact with a boy working close to him, he threw one of his legs under the table and was injured by the saw. In affirming the judgment below, the court said (page 273):

"Greater care on the part of employers is required when the young and inexperienced are exposed to dangerous machinery. They cannot be expected to see and appreciate dangers that older and more experienced persons would see."

In considering the foregoing decision, we do not overlook the absolute character of the inhibition of the statute in the absence of certificate. But there can be no difference in principle between an absolute inhibition and a conditional one, wherever the condition is not observed. As said in *Sullivan v. Hanover Cordage Co.*, 222 Pa. 40, 70 Atl. 909, when speaking of a statute making it unlawful for employers operating certain dangerous machinery to employ a minor under 16 years of age to clean or oil machinery while in motion:

"We agree that if the machine at the time of the cleaning was not in dangerous motion such as was usual in its operation, and if the motion at the time of the cleaning was not dangerous but simply consisted in partial revolutions made from time to time in order to facilitate the cleaning, the prohibition of the statute would very properly be held inapplicable."

In that case the question of whether the machinery was being operated in the usual way or not was submitted to the jury, and the judgment of the court below allowing the verdict in favor of the boy to stand, was affirmed. It is perfectly true that this decision recognized the right to employ a boy within the prescribed age to do work not calculated to cause injury, but it is equally true that it reduced the question of danger to one of fact.

When plaintiff's contention in the present case is reduced to its last analysis, its strength or weakness is to be found in the assumption that the place where Watson worked did not endanger life or limb. This assumption is greatly impaired by plaintiff's failure when placing and keeping the boy in such close proximity to the saw to reckon with the lack of caution of boys of his age. The fact that the boy did not meet with his injury while working within the place assigned to him, or the fact that he was not in line of duty when he suffered his injury, does not show that the place in which he was directed to work was not dangerous to life or limb. According to the understanding we gain of the place and its surroundings from the record, as before shown, we regard the first one of these facts as accidental rather than as evidence of safety. We consider the other as evidence of what might reasonably have been anticipated of an immature and energetic boy. But the main ground of our conclusion, as before pointed out, is that throughout a large portion of the boy's work he was required to stand at the spreader and attend to the boards as they were being sawed from the logs, and so was necessarily exposed to danger from the saw. We do not mean to hold that a boy could not be put at work in any factory or in this factory without danger to life or limb. What we do mean to hold is that this place in this factory did involve such danger.

We have reached this conclusion after considering all the decisions cited by counsel for both sides. We have not attempted in this opinion either to reconcile all of the cases cited or to point out the distinctions which we conceive to exist between many of them and the case in hand. Several of the decisions cited on behalf of plaintiff in error might at first blush be considered as supporting its contention; but that would mean, if the claim respecting them be correct, that those courts intended to fasten a degree of care upon a child equal to that ordinarily imposed upon an adult. That would contravene a rule of decision of this court concerning the degree of care exacted of minors. *Wright v. Stanley*, 119 Fed. 330, 332, 56 C. C. A. 234; *Erie R. Co. v. Weinstein*, 166 Fed. 271, 274, 92 C. C. A. 189; *Coney Island Co. v. Dennen*, 149 Fed. 687, 692, 79 C. C. A. 375. See, also, *Railroad Company v. Fort*, 17 Wall. 553, 558, 21 L. Ed. 739; *Union Pac. Ry. Co. v. McDonald*, 152 U. S. 262, 281, 14 Sup. Ct. 619, 38 L. Ed. 434; *Northern Pac. Coal Co. v. Richmond*, 58 Fed. 756, 759, 7 C. C. A. 485; *Rolling Mill Co. v. Corrigan*, 46 Ohio St. 283, 20 N. E. 466, 15

Am. St. Rep. 596 (before cited). The result would be to limit unduly and in large measure to defeat the object of the statute.

We may refer to one decision relied on by plaintiff's counsel and so reflect our views in regard to some other cases cited. We allude to *Lowe v. Pearson* (1899) 1 Q. B. 261. It appeared in that case that a boy was employed in a pottery to make balls of clay and hand them to a woman working at a machine, with which he was forbidden to interfere. He suffered an injury through attempting to clean the machine while the woman was temporarily absent. He sought to recover for the injury under the workman's compensation act of 1897. That act imposed liability only in respect to accidents "arising out of or in the course of the employment" of the workmen. It made no distinction between claimants, whether minors or adults. Pub. Gen. St. 60-61 Vict. c. 37, p. 53. Respondent failed utterly to bring himself within the condition imposed by the statute; for plainly his injury did not arise "out of or in the course of" his employment. The Ohio act was made to apply only to minors. It did not purport to impose liability upon the employer in favor of the child. The important difference to be noted now between the two statutes is that the act of Parliament makes the right of recovery against the employer depend upon certain conduct of the employé; while the Ohio act made the child the object of protection against certain conduct of the employer.

Nor do we regard our conclusion as affected by the contention that the statute under consideration is in derogation of the common law, and must be strictly construed for that reason. As a general rule of construction, no one would dispute this. But it will not do to carry that rule so far as to sacrifice plain legislative intent. As said by Taney, Chief Justice, in one of the cases relied on by plaintiff (*United States v. Morris*, 14 Pet. 464, 475, 10 L. Ed. 543), that, while penal statutes should be construed strictly, "yet the evident intention of the Legislature ought not to be defeated by a forced and overstrict construction." See, also, *Johnson v. Southern Pacific Co.*, 196 U. S. 1, 17, 25 Sup. Ct. 158, 161, 49 L. Ed. 363.

It follows that the judgment of the court below must be affirmed; for we do not understand any claim to be made that, if Watson was in fact placed and kept at employment dangerous to life or limb, there can be any recovery under the condition of the policy.

UNDERGROUND ELECTRIC RYS. CO. OF LONDON, Limited, v. OWSELEY et al.

(Circuit Court of Appeals, Second Circuit. August 17, 1909.)

No. 294.

1. COURTS (§ 262*)—EQUITY JURISDICTION OF FEDERAL COURT—APPOINTMENT OF RECEIVER FOR ESTATE OF DECEDENT.

A Circuit Court of the United States as a court of equity has no jurisdiction of a purely probate proceeding, which is not a matter of equity cognizance, nor has it power to undertake the general administration of the estate of a deceased person, but it may, as a court of equity, having the full jurisdiction of the English Courts of Chancery as they existed at the time of the adoption of the Constitution, in a suit where it has jurisdiction of the parties, appoint a receiver of an estate pending the probate of a will, in the absence of the appointment of a custodian by the probate court, and this although proceedings for the probate of the will and the appointment of an executor are pending in such court which have been delayed by reason of litigation between parties in interest.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 798; Dec. Dig. § 262.*]

2. EXECUTORS AND ADMINISTRATORS (§ 431*)—ACTION BY CREDITORS—RIGHT OF ACTION TO PROTECT ESTATE.

A creditor of the estate of a decedent whose claim has been allowed by the court of principal administration and is not disputed is not required to be a judgment creditor to entitle him to maintain a suit in equity for the preservation and protection of property of the estate in another jurisdiction.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1679; Dec. Dig. § 431.*]

3. COURTS (§§ 262, 490*)—EQUITY JURISDICTION OF FEDERAL COURTS—APPOINTMENT OF RECEIVER FOR ESTATE—COMITY BETWEEN STATE AND FEDERAL COURTS.

The will of a testator was probated in Chicago as his place of domicile and a general executor appointed. Decedent owned property in New York City of the value of perhaps \$3,000,000, including a valuable residence and art collection, but the executor took no steps for ancillary administration there for three years, and in the meantime the property there was in possession of the widow, who asserted an adverse claim to a large part of it. The art collection was given no care, and taxes amounting to \$200,000, were unpaid, and a mortgage on a part of the real estate was being foreclosed for nonpayment of interest. When the executor applied for appointment as ancillary administrator, his application was contested by the widow, who procured an injunction in Chicago restraining him from proceeding therewith. The estate was largely indebted, and a foreign creditor whose claim for a large amount had been allowed filed a bill in equity in the federal court in New York on behalf of itself and all other creditors, praying the appointment of a receiver, that the court administer the property there, and for general relief. Held that, while the court was without jurisdiction to grant all the relief prayed for, it had and properly exercised jurisdiction to take charge of and preserve the property by its receiver, but that the receivership should be provisional until an application to the Surrogate's Court for the appointment of a temporary administrator under Code Civ. Proc. N. Y. § 2670, could be made and determined, and be continued only in case such appointment was refused.

[Ed. Note.—For other cases, see Courts, Dec. Dig. §§ 262, 490.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

4. RECEIVERS (§ 27*)—GROUNDS FOR APPOINTMENT—PRESERVING PROPERTY OF ESTATE.

The fact that a part of the property was in the possession of the widow under an adverse claim thereto was not ground for denying a receiver.

[Ed. Note.—For other cases, see Receivers, Dec. Dig. § 27.*]

Coxe, Circuit Judge, dissenting.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Suit in equity by the Underground Electric Railways Company of London, Limited, against Louis F. Owsley, executor, and others. From an order appointing a receiver, Mary Adelaide Yerkes, defendant, appeals. Affirmed.

For opinion below, see 169 Fed. 671.

Appeal from orders of the Circuit Court, Southern District of New York, appointing a receiver of the property situated within said district of Charles T. Yerkes, late of Chicago, Ill., deceased.

The following is a summary of the facts in the case:

On December 29, 1905, said Charles T. Yerkes died leaving surviving him the defendant Mary Adelaide Yerkes, his widow, and the defendants Charles E. Yerkes and Bessie L. Rondinella, his only children and heirs at law, and a will which on March 15, 1906, was admitted to probate by the probate court for Cook county, Ill. Letters testamentary were issued to the defendant Owsley only; the other persons named in the will as executors having declined to serve. Notice was given requiring the creditors of the decedent to present their claims to said probate court. Claims amounting to upwards of \$3,000,000 were duly presented and were allowed by said court. Among them was the claim of the complainant, a British corporation, for \$796,619.01 for unpaid calls upon 32,000 shares of its capital stock subscribed for by the defendant. Other claims were presented which have not yet been allowed.

The will of the decedent has never been admitted to probate in the state of New York nor have ancillary letters testamentary ever been granted in said state. On January 18, 1909, however, a petition for such letters was filed in the Surrogate's Court of the county of New York by the defendant Owsley, and those proceedings are now pending in that court, objections having been filed by the defendant Mary Adelaide Yerkes. It does not appear that the complainant or any other creditor or person interested in said estate has ever applied under the New York statute for the appointment of a temporary administrator by reason of the delay in the ancillary proceedings. Soon after the filing of the application for ancillary letters, the defendant Mary Adelaide Yerkes petitioned the Illinois probate court to remove the defendant Owsley from his position as executor for misconduct. This petition was denied and an appeal from the order of denial is now pending.

Shortly after this action of the probate court the defendant Mary Adelaide Yerkes brought a suit in equity in the superior court for said Cook county, Ill., against the defendant Owsley, praying that he be enjoined from further acting as executor and that a receiver of the estate be appointed. A temporary injunction was thereupon issued restraining the defendant Owsley from prosecuting his application for ancillary letters testamentary in the New York Surrogate's Court. The defendant Owsley moved to dissolve this injunction, but no decision thereon has yet been rendered. The parties to said suit have, however, entered into a stipulation that further proceedings in the Surrogate's Court shall be postponed until after the disposition of said motion.

The property of the estate of said Charles T. Yerkes in the city of New York, other than securities pledged as collateral, consists of:

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

- (1) The valuable residence and picture gallery known as No. 804 Fifth avenue and comprising several parcels of land.
- (2) A stable on East Sixty-Ninth street.
- (3) An art collection in said residence consisting of pictures, statuary, tapestries, and other works of art.

This property is estimated to be worth over \$2,000,000.

The assets of the Yerkes estate outside the state of New York consist principally of street railway securities of large face value, but of problematical market value. The indebtedness of the estate is very large. It is not contended that the estate is insolvent, but it is claimed that it will be necessary to use the proceeds of the New York real estate to pay the debts. Prior to the institution of these proceedings no person representing the estate was in charge of the New York property. It was not insured. Taxes aggregating \$200,000 had remained unpaid. A part of the real estate was subject to a mortgage which was in process of foreclosure. The art collection—according to the testimony of the complainant's expert witness—was neglected and deteriorating. The defendant Mary Adelaide Yerkes was provided for in the will of her husband, but elected to renounce her rights under it and to accept her widow's portion under the Illinois law—one-third of the personalty and dower in the real estate. After her husband's death she continued to live as before in the Fifth avenue residence, and has remained there ever since. An affidavit filed in her behalf in these proceedings states that she occupies the premises under a claim of right. The foundation of such claim is not stated.

Counsel, by way of explanation, assert in their brief that title to the most valuable part of the real estate was in Mrs. Yerkes' name for several months prior to February, 1893, when she deeded it to a third person, who immediately reconveyed to Mr. Yerkes. The contention seems to be that this deed was invalid for want of delivery. It is also stated that in 1893 Mrs. Yerkes executed another deed conveying this same property as well as a rear lot and the stable to another person, who also reconveyed to Mr. Yerkes. The contention with respect to this deed seems to be that it was without consideration and was obtained by false representations. One parcel of the real estate—that subject to the mortgage—was never in Mrs. Yerkes' name.

With respect to the art collection and other personal property, it is asserted that Mrs. Yerkes is the owner thereof by virtue of certain bills of sale executed in 1884 and 1887 relating to the contents of a certain house in Chicago and a bill of sale dated in 1896 covering the then contents of the Fifth avenue residence. On April 5, 1909, the complainant filed its bill of complaint, stating many of the facts already mentioned and others, and in effect praying for the administration of the estate of the decedent situated in the state of New York, the appointment of a receiver, and other relief.

On the same day a temporary receiver was appointed, and an order to show cause why the receivership should not be continued issued. Thereafter the parties defendant appeared, but only the defendant Mary Adelaide Yerkes appeared in opposition. Affidavits were filed in behalf of the complaint and of said defendant, and on April 28, 1909, an order was entered continuing the receivership. These two receivership orders are the subjects of this appeal.

James Russell Soley and Wm. B. Hornblower, for appellant Yerkes.
Paul D. Cravath, for appellee Railways Co.
W. O. Underwood, for appellee executor.

Before COXE and NOYES, Circuit Judges, and HOUGH, District Judge.

NOYES, Circuit Judge (after stating the facts as above). The question upon the surface of this case is whether the receivership orders were proper. The question underlying is whether the Circuit Court had power to make them. The latter is a jurisdictional question, and is duly raised upon the record. Under a recent decision of

the Supreme Court it is our duty to decide it. *Boston, etc., R. Co. v. Gokey*, 210 U. S. 155, 28 Sup. Ct. 657, 52 L. Ed. 1002.

The question of jurisdiction should first be considered. And this question in its essence is not whether the Circuit Court had power to grant all the relief prayed for, but whether it had power to afford any such relief. If the orders appealed from were within its jurisdiction and were proper, they must stand even if the court had no power to grant the other measures of relief sought. Strictly speaking, if the appointment of the receiver was within the jurisdiction of the court, it is not material just here whether it had power to proceed with the general administration of the estate. And yet the broad jurisdictional question has been fully presented. The determination of the basis of the power to appoint receivers, as well as its existence, may settle something in this intricate litigation. While, therefore, the result in either case will be the same, we think it of importance to ascertain—at the commencement of our examination—whether such power, if it exists, is to be found as a part of the general power of the Circuit Court to administer the estates of deceased persons or as a particular power for the protection of property pending litigation.

The inquiry is, then, whether the Circuit Courts of the United States, as courts of equity, have jurisdiction to administer the estates of decedents. The appellant contends that no such power exists, and lays especial stress upon the fact that the inquiry relates to federal courts. But this is not the fundamental objection. If the Circuit Courts are without power to entertain probate proceedings, it is not primarily because they are courts of the United States, but because the subject does not belong to general equity jurisdiction. No limitations attach to the purely equitable relief which these courts can grant when they have jurisdiction of the parties. They have the full equity jurisdiction formerly exercised by the English Courts of Chancery, and are not limited by the chancery system adopted by any state.

Now, as long ago as 1727 it was settled in England that a court of equity could not entertain jurisdiction of a bill to set aside a will or the probate thereof. So in the case of *Broderick's Will*, 21 Wall. 503, 509, 22 L. Ed. 599, Mr. Justice Bradley said in a suit of that nature:

"As to the first point, it is undoubtedly the general rule, established both in England and this country, that a court of equity will not entertain jurisdiction of a bill to set aside a will or the probate thereof. The case of *Kerrick v. Bransby* (decided by the House of Lords in 1727) 7 Brown's Parl. Cas. 737, is considered as having definitely settled the question. Whatever may have been the original ground of this rule (perhaps something in the peculiar constitution of the English courts), the most satisfactory ground for its continued prevalence is that the Constitution of a succession to a deceased person's estate partakes in some degree of the nature of a proceeding in rem, in which all persons in the world who have any interest are deemed parties, and are concluded as upon *res judicata* by the decision of the court having jurisdiction."

Similarly, in *Ellis v. Davis*, 109 U. S. 485, 494, 3 Sup. Ct. 327, 332, 27 L. Ed. 1006, which was a suit brought in the Circuit Court to set aside a will and annul probate, Mr. Justice Matthews, following *Broderick's Will*, *supra*, and denying the power of the court to grant the relief sought, said:

"It is well settled that no such jurisdiction belongs to the Circuit Courts of the United States as courts of equity, for courts of equity, as such, by virtue of their general authority to enforce equitable rights and remedies, do not administer relief in such cases."

In *Farrell v. O'Brien*, 199 U. S. 89, 116, 25 Sup. Ct. 727, 736, 50 L. Ed. 101, it was said that:

"The Circuit Courts of the United States had no jurisdiction to admit a will to probate or to entertain a pure probate proceeding."

See, also, *Garzot v. De Rubio*, 209 U. S. 283, 28 Sup. Ct. 548, 52 L. Ed. 794. And in the very recent case of *Goodrich v. Ferris* (decided by the Supreme Court May 17, 1909) 214 U. S. 80, 29 Sup. Ct. 583, 53 L. Ed. 914, Mr. Justice White said:

"A case involving the devolution and administration of the estate of a decedent (is) a subject peculiarly within state control."

The principles underlying these decisions have a two-fold basis. In the first place, courts of equity cannot act in probate proceedings because the subject is statutory. In this country the laws of the several states determine the succession to the property of deceased persons intestate and provide for the probate and establishment of wills. Statutes confer upon various tribunals jurisdiction over probate proceedings. The courts in exercising the powers conferred exercise statutory, and not equitable, powers. In the second place, courts of equity will not entertain jurisdiction over probate proceedings because they are in the nature of proceedings in rem. In the case last referred to (*Goodrich v. Ferris*), the Supreme Court also said:

"It is elementary that a probate proceeding by which jurisdiction of a probate court is asserted over the estate of a decedent for the purpose of administering the same is in the nature of proceedings in rem, and is therefore one as to which all the world is charged with notice."

It may be regarded then as settled that the Circuit Courts, because they are courts of equity and because the subject is not one of equity cognizance, have no jurisdiction of purely probate proceedings, such as relate to the probate of wills and distribution of estates. But this does not carry us far enough. While much of the relief which the bill of complaint asks for could only be granted in a strictly probate proceeding, it goes further. It prays the court (1) to appoint a receiver; (2) to sell the property of the decedent; (3) to ascertain and determine the indebtedness of the estate; (4) to set apart the widow's dower right; and (5) to distribute the estate. Taking the bill as a whole, it must be regarded as asking the Circuit Court to undertake the general administration of the estate—to do something more than act in a purely probate proceeding.

The distinction between a strictly probate proceeding and one involving the general administration of an estate is pointed out in *Martin v. Ellerbe's Adm'r*, 70 Ala. 339:

"The term 'administration,' in this respect, is of comprehensive meaning. It includes more than the mere collection of the assets, the payment of debts and legacies, and distribution to the next of kin. It involves all which may be done rightfully in the preservation of the assets, and all which may be done legally by the administrator in his dealings with creditors, distributees or legatees, or which may be done by them in securing their rights; and it

includes all which may be done, and rightfully done, in relation to adverse claims to assets, which have come to the possession of the administrator as the property of the testator or intestate."

Now, it is obvious that the general administration of an estate, including the ascertainment and determination of the rights of creditors, distributees, and legatees, and the preservation of the assets, must almost necessarily involve the determination of controversies between citizens of the same state. It is absolutely certain that the present estate could not be settled in the manner prayed for in the bill without many such controversies arising. And this brings us to an objection peculiarly applicable to the federal courts on account of the limitation of their jurisdiction to controversies between citizens of different states. A Circuit Court undertaking the general administration of an estate and only passing upon controversies between citizens of different states could not ordinarily go far.

These objections to action by a federal court looking to the administration of an estate are pointed out in *Byers v. McAuley*, 149 U. S. 608, 612, 13 Sup. Ct. 906, 907, 37 L. Ed. 867. In that case an administrator with the will annexed appointed by a probate court had settled the estate and had presented his account for allowance. Suit was then brought in the United States Circuit Court by the heirs to annul the will and the probate thereof, to enjoin the administrator from further proceeding, and to obtain distribution. The Circuit Court practically assumed the general administration of the estate. Mr. Justice Brewer in delivering the opinion of the Supreme Court said:

"It is obvious from the decree which was entered that the Circuit Court of the United States assumed full control of the administration of the estate. That decree disposed of and distributed the entire estate among all the persons interested therein, citizens and noncitizens of the state. It did not stop with an adjudication of the claims of citizens of other states against the estate, but assumed to determine controversies between citizens of the same state, for the two corporations named in the first paragraph were both citizens of Pennsylvania, and yet the decree determined their rights as against the estate, as well as between themselves. * * *

"Indeed, the decree as a whole cannot be sustained, unless upon the theory that the federal court had the power on the filing of this bill to take bodily the administration of the estate out of the hands of the state court and transfer it to its own forum. * * * (Pages 619, 620, of 149 U. S., and page 910 of 13 Sup. Ct. [37 L. Ed. 867].)

"If original jurisdiction of the administration of the estates of deceased persons were in the federal court, it might by instituting such an administration and taking possession of the estate, through an administrator appointed by it, draw to itself all controversies affecting that estate, irrespective of the citizenship of the respective parties. But it has no original jurisdiction in respect to the administration of a deceased person. * * *

"Our conclusion, therefore, is that the federal court erred in taking any action or making any decree looking to the mere administration of the estate, or in attempting to adjudicate the rights of citizens of the state as between themselves."

It is urged, however, in behalf of the appellee that, while the Circuit Courts may have no jurisdiction over purely probate proceedings or over original proceedings for the administration of an estate, they have power to grant relief in cases relating to the administration of estates where maladministration or nonadministration is shown. And it is contended that the present case is one of nonadministration, where-

in the Circuit Court has power to marshal the assets, apply them to the payment of debts, and, having assumed jurisdiction for such purposes, go further and fully administer the property coming into its custody.

In our opinion, however, the cases referred to by the appellee do not support the proposition advanced. The distinction sought to be drawn seems in conflict with the principles laid down by the Supreme Court in *Byers v. McAuley*, *supra*. Even in the case of maladministration or nonadministration, we think the Circuit Courts of the United States have no power to undertake the general administration and distribution of the estates of deceased persons.

But it does not follow that the federal courts, as courts of equity, have no power to grant some measure of relief to persons whose interests are injuriously affected by the maladministration or nonadministration of estates. Relief in such cases has been repeatedly granted. Thus a bill in the United States Circuit Court by a next kin to recover a distributive share in an estate and charging fraud upon the part of the administrator has been sustained. *Payne v. Hook*, 7 Wall. 425, 19 L. Ed. 260. A judgment creditor has been permitted to maintain a suit in a federal court to enforce payment of his judgment against the estate of the judgment debtor. *Borer v. Chapman*, 119 U. S. 587, 7 Sup. Ct. 342, 30 L. Ed. 532. See, also, *Rio Grande R. Co. v. Gomila*, 132 U. S. 478, 10 Sup. Ct. 155, 33 L. Ed. 400. Similarly a creditor has been allowed to sue in the Circuit Court to set aside an alleged fraudulent conveyance made by a decedent. *Hale v. Tyler (C. C.)* 115 Fed. 833. So a suit by a legatee to enforce certain annuities against the estate of a decedent has been sustained. *Comstock v. Herron*, 55 Fed. 803, 5 C. C. A. 266; *Herron v. Comstock*, 139 Fed. 370, 71 C. C. A. 466. A receiver of the real estate of a decedent has been appointed at the suit of a distributee alleging mismanagement by the executors, nonpayment of interest and taxes, etc. *Ball v. Tompkins (C. C.)* 41 Fed. 486.

Where the line is to be drawn between cases in which the courts will and will not afford relief is not clear, neither are the grounds upon which the courts will act entirely free from obscurity. Probably the doctrine that a constructive trust exists in executors and administrators will be found to have afforded the basis of equitable jurisdiction in a majority of cases. So the inadequacy of the law to afford relief and the necessity for the protection of the property of estates has often lead to the intervention of courts of equity.

We expressly refrain from expressing an opinion as to how far a federal court may go in granting relief in case of the nonadministration of estates. We especially reserve the question, appertaining to the present suit, whether in case probate proceedings in the courts of New York with respect to the assets within that state should be permanently prevented, the Circuit Court would have power to marshal the assets and provide for the payment of the complainant's demand. We confine ourselves in the further examination of the jurisdictional question in this case to the inquiry whether the Circuit Court had power to make the particular orders appealed from.

Now, as already noted, the necessity for the protection of property of estates is a ground for the intervention of courts of equity. In-

deed, the protection of the fund in litigation before them has always been peculiarly within their province. Whether they can go so far as to protect the property of estates pending litigation in other courts must now be considered.

In England, before the passage of the act of Parliament authorizing ecclesiastical courts to appoint an administrator of an estate pending litigation concerning the probate of a will, the Court of Chancery often appointed receivers to take charge of the estate until the ecclesiastical court should determine the rights of the parties. And even after the passage of the act the Court of Chancery exercised such power when the ecclesiastical court failed for any reason to appoint an administrator. Alderson on Receivers, p. 95, § 63. See, also, Williams on Executors (7th Ed.) 563.

Lord Eldon in the case of *King v. King*, 6 Ves. 172, stated the reason for the practice:

"This is almost a motion of course. There is no doubt this court has appointed a receiver when it was in dispute who was the personal representative; when the matter is in controversy in the spiritual court as to whether there is an intestacy or not. The court goes upon this: That it will do its best to collect the effects. The property is in danger in this sense: That it may get into the hands of persons who have nothing to do with it."

See, also, *Atkinson v. Henshaw*, 2 Ves. & Bea. 84; *Rendall v. Rendall*, 1 Hare, 152; *Marr v. Littlewood*, 2 Myl. & Cr. 455; *Ball v. Oliver*, 2 Ves. & Bea. 96; *Watkins v. Brent*, 1 Myl. & Cr. 97.

Under the present English judicature act, the Probate Division of the High Court of Justice has power to appoint receivers and administrators pendente lite. Consequently the modern English practice is to leave such appointments to the Probate Division, although the Chancery Division will still appoint receivers when necessary for the preservation of an estate when the Probate Division has not first acted by appointing an administrator. See *Veret v. Duprez*, L. R. 6 Ed. 329. The English practice with respect to the appointment of receivers for estates has been followed in this country.

In 4 Pomeroy's Equity Jurisprudence, § 1332, it is said:

"During the litigation concerning the admission of a will to probate and during the interval before an executor or administrator is appointed, a court of equity has power to appoint a receiver of the personal property and of the rents and profits of the real estate, when there is any danger of their loss, misuse, or misapplication. The necessity of such a receiver has been greatly lessened by modern statutes authorizing the probate courts to appoint an administrator ad litem and enlarging his powers."

In *Redfield on Wills*, p. 96, it is stated:

"Where the property belonging to the estate is in peril of loss, and there is no one appointed to represent the estate, the right of administration being in controversy and the probate court not having appointed an administrator pendente lite, a court of equity will appoint a receiver to arrest or prevent inevitable loss where the estate is of sufficient value and the amount of apprehended loss such as to justify the expense of a receiver."

And in the very recent case of *McCarter, Atty. Gen., v. Clavin* (1907) 72 N. J. Eq. 642, 66 Atl. 599, the court used language most applicable in this case:

"In the present instance there is a controversy over the admission of the alleged will to probate. There is a contest over the question whether the party claiming to be the only heir is such. The property is in great danger of loss owing to tax sales and threatened foreclosure. It is clear that, in the absence of an heir, in the absence of an executor or of any lawful appointee entitled to hold the property together, it will be lost, and in any event the rents and profits will be misapplied. It appears to me that, if there ever was a case in which the rule I have referred to ought to be applied, it is in this case, otherwise a vast amount of property that may belong to the state will, for want of protection, be swept away, and pass, without practical consideration, into the hands of strangers to the decedents."

See, also, *Ball v. Tompkins* (C. C.) 41 Fed. 486; *Robinson v. Taylor* (C. C.) 42 Fed. 803; *Flagler v. Blunt*, 32 N. J. Eq. 518; *Estate of Colvin*, 3 Md. Ch. 278; *Buskirk v. Peck*, 57 W. Va. 360, 50 S. E. 432.

The Circuit Courts of the United States, sitting in equity, have the full jurisdiction of the English Courts of Chancery as they existed at the time of the adoption of the Constitution of the United States, and we are satisfied, upon the authority cited, that in a suit where they have jurisdiction of the parties they have power to appoint a receiver of an estate pending the probate of a will in the absence of the appointment of a custodian by the probate court.

The appellant urges numerous objections to the existence of any such power. She says, in the first place, that the Circuit Court has no power to entertain a bill for the appointment of a receiver and nothing besides—that the suit regarded merely as a suit for a receiver cannot stand. There is force in this contention. The appointment of a receiver is not the ultimate end and object of litigation, but is a provisional remedy or auxiliary proceeding. *Alderson on Receivers*, p. 15, citing *State ex rel. Merriam v. Ross*, 122 Mo. 435, 25 S. W. 947, 23 L. R. A. 534. Still we think that this merely means that there must be litigation in some court to which the receivership is auxiliary, and does not necessarily require that it should be in the court of equity itself. In all the English and American cases referred to the probate proceedings to which the receiverships were incident were in a court distinct from the court of equity. Bills merely for the preservation of property pending litigation have repeatedly been sustained. In *Williams on Executors* (7th Ed.) p. 563, it is said:

"During a litigation in the ecclesiastical court for probate or administration, a court of equity would entertain a bill for the mere preservation of the property of the deceased till the litigation was determined and appoint a receiver, although the court of probate, by granting an administration pendente lite, might provide for the collection of the effects."

It is true that in a suit merely for the appointment of a receiver the making of the appointment practically disposes of the matter in controversy. There is nothing more to be done except to surrender the property at the termination of the litigation to which the receivership is auxiliary. *Anderson v. Guichard*, 9 Hare, 275. See, also, *Lewis v. Campau*, 14 Mich. 458, 90 Am. Dec. 245. But this result while somewhat extraordinary constitutes no reason for denying the existence of a power so firmly established by the authorities. Of course, the defendant is correct in the proposition that a court cannot create

a receivership in a suit of which it has no jurisdiction. But this begs the question. In this case the court did have jurisdiction of the suit regarded merely as a suit for the preservation of imperiled property.

Again, it is urged that the suit considered merely as a suit for a receiver is not a controversy over which the Circuit Court can exercise jurisdiction, but is a proceeding purely in rem. We think this contention not well founded. A proceeding in rem strictly speaking is one in which the property itself is the defendant. But this suit, while having for its object the preservation of the property, is against the persons claiming interests in it. The complainant suing in its own behalf and the behalf of other creditors alleges that the property is being neglected by the defendants—the executor, the widow, and the heirs at law. The suit is a controversy *inter partes* affecting property. It can no more be regarded as a proceeding in rem than could a suit for an injunction to restrain waste. Moreover, if the suit be regarded as a proceeding in rem—using that term in a broader sense—it does not follow that the Circuit Court is without jurisdiction of it. In *Pennoyer v. Neff*, 95 U. S. 734, 24 L. Ed. 565, the Supreme Court said:

"It is true that in a strict sense a proceeding in rem is one taken directly against property, and has for its object the disposition of the property, without reference to the title of individual claimants; but in a larger and more general sense the terms are applied to actions between parties, where the direct object is to reach and dispose of property owned by them, or of some interest therein. Such are cases commenced by attachment against the property of debtors, or instituted to partition real estate, foreclose a mortgage or enforce a lien. So far as they affect property in the state, they are substantially proceedings in rem in the broadest sense which we have mentioned."

Suits of this nature while in a sense in rem are nevertheless controversies. Furthermore, while proceedings in rem are not a part of the general equity jurisdiction of any court—English or American—we have already seen repeated instances where courts of equity have entertained jurisdiction to appoint receivers to preserve estates, pending the appointment of a representative.

Again, it is urged that the English cases and those from the different states where receivers of estates have been appointed do not constitute authority for action by the United States courts because in those cases the equity courts and the probate courts were acting under the same sovereign. The equity courts, however, acted under general equity powers which the federal courts possess to the fullest extent. A state court as a court of equity has no greater power to appoint a receiver to hold property pending the appointment of a representative therefor than has the Circuit Court as a court of equity.

It is further contended that the jurisdiction of the Circuit Court to appoint a receiver is excluded by the fact that the Surrogate's Court has already taken jurisdiction. As shown in the statement of facts, the defendant Owsley, as executor, has applied to that court to establish the will and for ancillary letters testamentary. And it is urged that the principle is applicable that the possession of the *res* vests the court which first acquires jurisdiction with power to determine all controversies concerning it, and disables other courts of co-ordinate

jurisdiction from exercising a like power. *Farmers' Loan, etc., Co. v. Lake Street R. Co.*, 177 U. S. 51, 20 Sup. Ct. 564, 44 L. Ed. 667. But we are of the opinion that the principle does not apply here. This is not a question of conflicting jurisdictions. The Circuit Court in appointing a receiver has not attempted to interfere with the exercise by the Surrogate's Court of its full power to grant ancillary letters testamentary. The receivership is rather in aid of, instead of in conflict with, the jurisdiction of that court. It is unnecessary, therefore, for us to determine whether, when this suit was commenced, the proceedings in the Surrogate's Court had gone so far as to amount to an assumption of exclusive jurisdiction over the estate.

Similarly the jurisdiction of the Circuit Court to appoint a receiver is not excluded by the fact that a receivership bill has been filed in an Illinois court of equity. That court had nothing to do with the assets of the estate in the state of New York.

The contention that the complainant has no standing to bring this suit because it is not a judgment creditor is in our opinion without foundation. We are by no means satisfied that a creditor of the estate of a deceased person is obliged to obtain a judgment before he can resort to equity for the protection of the assets of such estate. Moreover, the claim of the complainant has been duly allowed by the court of principal administration and this allowance practically amounts to a judgment. Furthermore, it does not appear that any one disputes the validity of the claim.

Lastly, the contention is not well founded that the suit cannot be maintained because the Illinois executor, Owsley, has been made a party. He does not raise the question. It does not affect the jurisdiction of the suit. It cannot be properly determined upon this appeal from the receivership orders.

We thus reach the conclusion that, as the bill prayed for the appointment of a receiver and for general relief, the Circuit Court had jurisdiction of the suit, although some of the prayers were for relief beyond its power to grant, and that it acted within its power in appointing a receiver.

But it does not follow from the existence of the power that it was properly exercised in the present case. The appointment of a receiver is a drastic remedy. The facts presented should clearly show its necessity before such an appointment should be made. What are the merits here?

The slightest examination of the facts discloses a most extraordinary situation. For nearly four years this estate in New York, worth millions of dollars, has received no attention from its proper representatives. Taxes have been unpaid. The art collection has received only the attention which an adverse claimant chose to give it. Interest upon mortgages has been defaulted, and the equity in valuable real estate is being lost through foreclosure. The estate has been permitted to go adrift. Its very situation has been an invitation to persons to set up claims to it. Rightfully or wrongfully, this invitation has not been declined. The widow remaining the statutory period remained longer, and now claims practically everything.

The executor who accepted the trust and whose primary duty was

to secure and preserve the estate and pay its debts has done absolutely nothing in this jurisdiction. He even waited three years before seeking to establish the will here. That this may have been by the advice of counsel does not alter that fact. And when he finally attempted to perform his duty the widow promptly sued out an injunction in Chicago to restrain further proceedings. Thereupon the widow and the executor stipulated that nothing should be done with the New York proceedings until the decision in the Chicago suit. And so matters stand.

While this litigation between the widow and the executor goes on it would seem that the creditors were supposed to stand idly by and do nothing. As widow the defendant Mary Adelaide Yerkes prevents the probate of the will in this jurisdiction and the grant of ancillary administration. As adverse claimant she retains and uses the property here.

But the creditors are not remediless. A dead man's estate is primarily a fund with which to pay his debts. The complainant and other creditors of this state have the right in some way to look to these New York assets to pay their demands. They have the right to insist that these assets be protected and safeguarded. They have the right to protection by a court from the consequences of the failure of the proper representatives to act. If there ever was a case in which the facts called for the appointment of some proper custodian of the property of an estate, this is one.

Were it not for one consideration, it would necessarily follow that the proper custodian of the estate should be the receiver appointed by the Circuit Court. This consideration is the New York statute providing for the appointment of a temporary administrator. While, as we have seen, the power to appoint a receiver of the estate of a deceased person undoubtedly exists in the Circuit Court, it is nevertheless an extraordinary power and one seldom exercised by courts of equity at the present time. Its purpose is to protect property when there is no one in a position to look out for it. Its object is to supplement the powers of, but not to supplant, the statutory tribunals for administering estates. It should in our opinion only be exercised when the state statutes fail to provide for the appointment of a temporary custodian of an estate in case of delay in appointing a permanent representative. Every consideration renders it desirable that the probate court, which alone can appoint the latter should appoint the former. So far as possible probate proceedings—principal and auxiliary—should be under the control of one court.

Now, section 2670 of the New York Code of Civil Procedure provides that:

"On the application of a creditor or a person interested in the estate, the Surrogate may in his discretion, issue to one or more persons, competent and qualified to serve as executors, letters of temporary administration, in either of the following cases:

"(1) When, for any cause, delay necessarily occurs in the granting of letters testamentary or letters of administration, or in probating a will."

The powers of a temporary administrator are set forth in section 2672. Section 2675 prescribes his rights and duties with respect to

real estate. In our opinion the appointment of a temporary administrator under this statute would adequately protect the interests of the complainant and other creditors.

It is urged, however, by the complainant that it is not the practice of the Surrogate's Court in New York county to entertain an application by a creditor for a temporary administration of the estate of a nonresident when an application for ancillary letters is pending. It is said that the "letters testamentary" the delay in granting which justifies the appointment of a temporary administrator refer to the letters granted upon an original—and not an ancillary—probate of a will.

On the other hand, it is said that while it is true that a distinction is made in the decisions between the phrases "administration in chief" and "temporary administration," yet the former phrase applies as well to the grant of ancillary letters upon the estate of a nonresident as to the grant of original letters upon the estate of a resident—that the proper distinction is between permanent administration, whether original or ancillary, and temporary administration. And it is urged that the statute would largely fail in its purpose if it provided no protection in a case where a nonresident decedent left the great bulk of his property in New York.

It is not within our province now to construe or interpret this state statute. Upon its face it would seem to apply in a case like the present. Whether it does or does not apply must be determined by the state courts. And we are unwilling that the present receivership should stand other than as a mere provisional receivership unless and until application for a temporary administrator shall have been made under such state statute and such application shall have been denied. To that extent at least the receivership should be continued. Otherwise the estate would be permitted to again go adrift pending the application to the Surrogate's Court. And if the Surrogate's Court declines to act the receivership orders should then stand as fully affirmed.

But finally it is urged against any receivership that Mrs. Yerkes is in possession of the property under a "claim of right." This fact—if it be one—instead of constituting an objection to the appointment of a receiver, is a cogent reason why one should be appointed. Lord Eldon well said that a receiver should be appointed to prevent the property of the estate falling into the hands of persons without right to it. This may or may not have already happened in this case. A receiver should be appointed to see whether it has happened. If it be ascertained that the widow is actually in possession under a claim of right, the court will consider such fact in determining what, if any, steps should be taken to secure possession of the property. But every colorable claim is not a claim of right, and it is not clear from anything in this record just what the right of this claimant is founded upon. It should be investigated in order to determine the proper action to take. A receivership does not change title. It does not necessarily change possession. Indeed, it does not follow that, if a receiver should obtain the physical custody of the property in dispute, the claimant's ultimate right of possession would be affected. But we do not desire to pursue the inquiry further. It is sufficient now to say that the existence of Mrs. Yerkes' claim to most of the property is no objection to the ap-

pointment of a receiver. The proper orders to be made should a receiver be appointed must be the subject of future consideration. Moreover, it must be observed that Mrs. Yerkes does not claim all New York assets. We do not understand that she asserts any claim to the real estate which is being foreclosed, and it is difficult to perceive any basis for the claim to personal property acquired subsequently to her last alleged bill of sale. The existence of these items of property alone would justify the appointment of a receiver.

The following conclusions are, therefore, reached:

(1) The orders appealed from should be affirmed and the receivership therein provided for continued for such time as in the judgment of the Circuit Court shall be reasonably necessary to enable the complainant to apply to the Surrogate's Court for the appointment of a temporary administrator under the statute referred to and to obtain the action of said court thereon. The application should be filed not later than the first Monday of October, 1909, and should be pressed to a conclusion as expeditiously as possible.

(2) Unless at the expiration of such time it is shown to the Circuit Court that said application has been in good faith prosecuted and has resulted in a decision of the Surrogate's Court declining to appoint a temporary administrator, the receivership should be terminated and the bill of complaint dismissed; but, if such action by the Surrogate's Court is shown, the receivership should be continued until the grant of ancillary administration when the receiver should turn over the property to the representative of the estate.

(3) The question should be reserved as to how far the Circuit Court could go in protecting and securing the rights of the complainant should the receivership be continued and ancillary proceedings in New York be permanently stayed by the Illinois court. Especially should the question be reserved whether, in this contingency, the right of creditors created by the New York statutes to look to the real estate in case of deficiency in the personalty could be enforced through the federal courts.

The orders of the Circuit Court appealed from are affirmed without costs under the conditions stated in this opinion.

COXE, Circuit Judge (dissenting). I am unable to concur in the opinion of the majority of the court.

The following propositions must, I think, be regarded as established:

First. The probate court of Illinois has already taken jurisdiction, appointed an executor and allowed the claim of the complainant.

Second. In January of the present year the executor filed a petition for ancillary letters in the Surrogate's Court of New York, which is still pending undecided.

Third. Less than three months after this application to the Surrogate's Court the present action was commenced, April 8, 1909.

Fourth. Proceedings are now pending, therefore, in the state courts of Illinois and New York in which every possible question presented by the present bill can be determined. That these courts have jurisdiction and should ultimately decide this controversy, no one disputes.

Fifth. By express provision of law the Surrogates' Courts of New York may, on the application of a creditor, issue letters of temporary administration when, for any cause, delay occurs in granting letters testamentary. This court is unanimous in thinking that "the appointment of a temporary administrator under this statute would adequately protect the interest of the complainant and other creditors."

No application for such protection has been made.

Sixth. The Circuit Courts of the United States have no jurisdiction in purely probate proceedings.

Seventh. No decree of distribution can be granted by the Circuit Court; and if no answer be filed and a decree be taken by default it must be to the effect that the receiver continue to hold the property indefinitely until another court, having jurisdiction of the entire controversy, sees fit to administer it. Such a decree is an anomaly. A court which cannot dispose of property should not be permitted to receive it.

Eighth. It is our duty to assume that the state courts will do their duty, at least until something appears to justify a contrary conclusion. The appointment of this receiver within three months after the petition was filed in the Surrogate's Court and without any application for temporary administration, proceeds upon the theory that the Surrogate's Court will not do its duty:—to my mind a wholly unwarranted assumption.

If I am correct in the foregoing propositions, it follows that in sustaining the action of the Circuit Court in taking jurisdiction and granting a drastic remedy in, to say the least, an exceeding doubtful case, we are setting a dangerous precedent. We have repeatedly held that a preliminary injunction should never issue in such a case and yet we sanction, in limine, the taking of property from the custody of tribunals having full jurisdiction and entirely competent to administer it and thus add to the complications of a sufficiently tangled situation. The question of jurisdiction must be determined as of the time the bill was filed—April 8, 1909. If at that time the court had no jurisdiction the order appointing the receiver should be vacated. If jurisdiction is to be predicated of the failure of the state courts to act, it seems to me manifest that it does not attach until they have been asked to act and have declined to do so. In other words, a premature action cannot be maintained upon the theory that some event may occur in the future which will give it vitality. The opinion of the court directs that a speedy application be made by the complainant to the Surrogate's Court asking for the appointment of a temporary administrator and provides that unless it be shown that, within the time limited, the application has been made and denied, "the receivership should be terminated and the bill dismissed."

I cannot resist the conclusion that this refusal of the state courts to act, concededly necessary to sustain and continue the action, was a condition precedent to the filing of the bill and should have been alleged therein.

If the state courts had declined to administer the estate prior to the filing of the bill, there still would be a grave question as to the juris-

diction of the Circuit Court, but it is sufficient for present purposes to say that, in my judgment, the action was improvidently and prematurely brought.

The orders should be reversed.

EL PASO CATTLE CO. v. STAFFORD et al.

(Circuit Court of Appeals, Sixth Circuit. December 7, 1909.)

No. 1,973.

1. VENDOR AND PURCHASER (§ 110*)—SALE CONTRACT—RESCISSION—DEFECTS IN TITLE—CORRECTION—ABSTRACT—INSUFFICIENCY.

A contract for the sale of land required the vendor to furnish at his own expense abstracts of title, and submit them for examination, and, in event that the vendees' attorney found any substantial defect, the vendor on request was to use his best efforts to correct the defect, and, if he was unable to do so, then the vendees might, at their election, rescind and receive back the earnest money. *Held*, that the vendees' right to rescind was conditional on substantial defects in the title and the failure or inability of the vendor, on request, to correct them, and that a rescission, because of the vendor's failure to furnish a complete abstract of title without any showing that the vendor was unable or unwilling to submit a proper abstract, was unauthorized.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 196; Dec. Dig. § 110.*]

2. VENDOR AND PURCHASER (§ 110*)—PERFORMANCE BY VENDOR—RESCISSION.

A contract for the sale of Mexican lands required the vendor to arrange an agreement with the Mexican government for transfer of certain concessions with reference thereto, and provided that, if the vendor should be unable to procure the transfer of the concessions, the vendees, at their election, might rescind and recover the earnest money. *Held* that, where the only objection made by the vendees to the offered transfer of the concessions was that it did not comply with the terms of the contract, such objection did not show that the vendor was "unable" to procure the transfer required, but, at most, only that the parties differed in opinion as to the form of agreement, which was no justification for the vendees' rescission.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 196; Dec. Dig. § 110.*]

3. VENDOR AND PURCHASER (§§ 76, 78*)—DELIVER OF DEED—TRANSFER OF CONCESSIONS—CONCURRENT ACTS.

Where a contract for the sale of Mexican lands also provided that the vendor should arrange an agreement for the transfer of certain concessions with reference thereto obtained from the Mexican government, and provided that the vendees should secure the right to hold the lands and be ready to accept a conveyance of the lands and concessions when the vendor was in a position to make the same under the terms of the contract, time was not of the essence of the vendor's agreement to obtain a transfer of the concessions, but such transfer and the delivery of the deed were concurrent requirements.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 119, 121; Dec. Dig. §§ 76, 78.*]

4. VENDOR AND PURCHASER (§ 92*)—CONTRACT—BREACH BY VENDEES.

Insistence by vendees on the return of a deposit made to secure performance of a contract for the sale of land made in anticipation of the time of performance, while the contract was executory, was inconsistent

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

with further performance of the contract, and tantamount to a refusal by the vendees to perform, authorizing the vendor to treat the contract as terminated.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 149; Dec. Dig. § 92.*]

5. ASSIGNMENTS (§ 94*)—RIGHTS OF ASSIGNEES.

Where vendees, under contract for the sale of land, did not assign their rights under the contract, including an alleged right to recover a deposit to secure performance to plaintiff until more than three years after they had repudiated all obligation under the contract, plaintiff was bound by the acts of the vendees.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 162-165; Dec. Dig. § 94.*]

6. VENDOR AND PURCHASER (§ 334*)—CONTRACT—RESCISSION—RECOVERY OF DEPOSIT—QUASI CONTRACT.

Where vendees deposited \$15,000 to secure performance of a written contract for the sale of land and having rescinded the contract for the vendor's alleged breach, their assignee sued on the contract for the recovery of the deposit in which action it was determined that the vendees and not the vendor had broken the contract, and that their rescission was not justified, their assignee could not recover any part of the deposit in such action on the theory of quasi contract that it was money which the vendor in equity and good conscience ought not to keep.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 959; Dec. Dig. § 334.*]

Error in the Circuit Court of the United States for the Northern District of Ohio.

Action by the El Paso Cattle Company against Oliver M. Stafford and another. Judgment for defendants, and plaintiff brings error. Affirmed.

The El Paso Cattle Company, a Nebraska corporation, brought this action in the court below against Oliver M. Stafford, a citizen of Ohio and resident of Cleveland, and the Broadway Savings and Loan Company, an Ohio corporation. The object of the action was to recover for breach of contract certain damages against Stafford and also to recover of him and his codefendant certain money previously deposited with the latter pursuant to the contract.

The contract, dated January 4, 1902, was in writing and made between Stafford of the one part and Edward J. Carter and Jephtha D. Ryan of the other part. It provided for the sale by Stafford to Carter and Ryan of about 2,000,000 acres of land in the state of Chihuahua, Mexico, for the sum of \$300,000, payable \$15,000 cash upon execution of the agreement and the balance upon delivery and acceptance of the deed of conveyance. The latter sum was the amount deposited with the defendant savings company.

The land belonged to and stood in the name of the Northwestern Colonization & Improvement Company, a corporation of New Mexico. That company also held certain concessions under the national government of Mexico, granting exemption from taxation and certain customs duties for a period of fifteen years respecting the land and the importation of materials for its improvement, subject to obligation to colonize people on the land in certain numbers. The contract provided that Stafford should "arrange an agreement with the national government of Mexico for the transfer of these concessions" to Carter and Ryan or their assigns or nominee, and that Stafford should comply with the concessions regarding the placing of colonists on the land. It appears in a preamble to the contract that through Stafford's ownership and control of the stock and bonds of the colonization company he claimed and was advised that he could by proceedings to foreclose the mortgage securing the bonds, make good title to the land, and that Carter and Ryan were

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

willing to purchase the land provided Stafford was "so able to make good title." The other relevant features of the contract are stated in the opinion. The rights of Carter and Ryan under the contract were ultimately in terms transferred to the plaintiff.

Allegations of the petition of due performance on the part of Carter and Ryan and refusal of performance by Stafford were brought to issue by answer and cross-petition of Stafford; the latter also charging failure and refusal of Carter and Ryan to perform, and asking damages in consequence. Trial before the court and a jury resulted in a directed verdict for defendants. The cause is here upon proceedings in error.

J. M. Dawson, for plaintiff in error.

William B. Sanders, for defendants in error.

Before LURTON, SEVERENS, and WARRINGTON, Circuit Judges.

WARRINGTON, Circuit Judge (after stating the facts as above). The assignments of error disclose many complaints of the manner in which the case was disposed of in the court below. These complaints seem to have originated in a difference of opinion between court and counsel as to the effect of certain evidence, which was offered early in the trial. The court regarded plaintiff's cause of action as based on a charge that Stafford had committed a breach of the contract, and this evidence as showing that plaintiff's assignors were alone chargeable with its breach. It was for this reason that the court excluded much of the evidence offered by plaintiff in error, and of its own motion directed a verdict to be returned for defendants.

It is true that the action is founded on the contract of January 4, 1902, and the alleged performance by Carter and Ryan and their assignee, the plaintiff, of "each and every of the terms, provisions and conditions of said contract on their part stipulated to be done and performed," and also upon the alleged failure and refusal of Stafford and his codefendant to perform any of the acts or things required of them under the contract. In short, the petition contains only one count, and is framed on the theory of a contract made and kept on plaintiff's side, and made and violated on defendants' side. In order rightly to understand the ruling under review, it is necessary to examine the evidence upon which the court acted.

Plaintiff offered as a witness at the trial its president, McPherson, who seems to have been authorized to act for Carter and Ryan, and who testified that he was also cashier of the Union Stockyards National Bank, South Omaha, Neb.; that on June 28, 1902, defendant Stafford called upon him at the bank " * * * to make, as he said, a tender of what purported to be a deed of the lands covered by that contract and other papers in connection with the deal. At that time Mr. Stafford demanded payment of the balance of the purchase price due under that contract, and I said it was impossible to make that payment at that time without having thoroughly examined the documents, the originals of which were in Spanish, and what purported to be the copies of those originals were in many cases attached. * * * After an extended interview on the subject, Mr. Stafford prepared a receipt for papers which he described, * * * and I signed that receipt as

cashier of the bank; the bank being designated as custodian of those papers. * * *

The receipt so referred to was identified by McPherson in his cross-examination, and received in evidence against objection of plaintiff's counsel. The witness in his cross-examination also identified a letter to him from Stafford, and admitted his signature to an appended receipt other than the receipt before mentioned. These latter papers appear to have been signed at the foregoing interview. They were received in evidence over objection of plaintiff's counsel, and are as follows:

"South Omaha, Nebraska, June 28, 1902.

"Mr. T. B. McPherson, South Omaha, Nebraska—Dear Sir: Referring to my contract of January 4, 1902, with Messrs. Edward Carter, of Chicago, and Jephtha D. Ryan, of Leavenworth, Kansas, I beg to say, I am now ready on my part to fulfill all obligations of this contract, and I offer you herewith a deed conveying good and sufficient title to Messrs. Carter and Ryan of the land purchased by them under this contract. Also an agreement for transfer of the concession of Mexican government to said Ryan and Carter, as in said contract provided.

"I also submit abstracts of title showing good and legal title in the grantor in the deed which I tender you. This tender I make to you as representing Messrs. Carter and Ryan, and respectfully request of you the payment of the balance of purchase money due under said contract. O. M. Stafford."

"On behalf of Messrs. Edward J. Carter and Jephtha D. Ryan, I acknowledge receipt of the above letter from O. M. Stafford, and also that he offered to me the instruments of transfer referred to in his foregoing letter, and claimed by him to legally and effectually to transfer the property and concession referred to in said contract, and also requested of me the payment of the balance of the purchase money due under said contract.

"Thos. B. McPherson."

The witness further testified that, after he received the papers, "he referred the matter" to their attorneys, and subsequently received a report from them. Plaintiff offered in evidence a letter from Ryan, one of the signers of the contract, to Stafford, dated July 14, 1902, as follows:

"Dear Sir: I am advised by Mr. McPherson, with whom you left certain papers, covering the title to Mexican lands and the concession included in our mutual contract of January 4, 1902, that the attorneys to whom this matter has been referred, inform him that there are among the papers left with him no abstract of title that will enable them to pass upon the title to the lands in question.

"The attorneys also say that the so-called consent to the assignment of the concession does not comply with the terms of the aforesaid contract. I have, therefore, to request that you instruct the Broadway Savings & Loan Co. Bank to remit the Union Stockyards National Bank of South Omaha, Neb., the money deposited in escrow with it and payable to us under the terms of the contract of January 4, 1902.

"I have transmitted a carbon copy of this letter by registered mail to the Broadway Savings & Loan Co. Bank for their information."

Plaintiff offered in evidence the following letter dated July 19, 1902, from Stafford to McPherson, in which was inclosed the above letter from Ryan to Stafford:

"The inclosed letter from Mr. Ryan, of July 14, 1902, explains itself.
* * * May I ask you to tell me frankly by return mail what your position is, that I may be able to decide upon my future course in the premises."

In the cross-examination of McPherson a letter from McPherson to Stafford, dated July 21, 1902, was introduced, as follows:

"I have yours of the 18th inst., also yours of the 19th, and in reply have to say that the letter sent you by Mr. Ryan is final so far as the contract of January 4, 1902, is concerned. * * *"

Plaintiff also offered in evidence the following letter from Stafford to McPherson, dated July 26, 1902:

"I beg to acknowledge receipt of yours of the 21st inst., and enclose you a reply which I have sent to Mr. Ryan in answer to his letter of the 14th inst. * * *"

Plaintiff then offered in evidence the letter from Stafford to Ryan, referred to in the one just set out:

"I have your favor of the 14th inst., in which you make the surprising demand that the fifteen thousand dollars (\$15,000.00) paid by you and your associates under our mutual contract of January 4, 1902, should be remitted for your account to the Union Stockyards National Bank.

"I have fulfilled all the obligations of our contract of January 4, 1902, upon my part to be performed. You and your associates on the contract are in default of performance, and I suppose I am to understand your letter as a refusal to accept the deed which has been tendered you and make payment of the balance of the purchase money which is due.

"You will therefore please take notice that I no longer am bound to make a conveyance of said property. * * * As you and your associates are in default and not I, the money belongs to me, and I shall retain it, and shall further look to you and your associates to make me good for the damages sustained by your failure to comply with your contract obligations."

The correspondence seems to have been closed by a letter from Ryan to Stafford dated August 20, 1902, in which he attempts to interpret the past acts of the parties rather than to state anything of an evidential character. If the letter from Stafford to McPherson dated June 28, 1902, and the receipts given by McPherson on that day were alone considered, it would appear that Stafford seasonably tendered a deed purporting to convey the land in question to the purchasers, Carter and Ryan, and also a form of agreement for transferring the concessions. These papers with others were referred to plaintiff's counsel, who, as appears in Ryan's letter of July 14, 1902, above quoted, made objections to them in a report to McPherson. But the importance of these objections is greatly diminished, if not destroyed, in this action, by the conduct of the purchasers. Instead of communicating the objections to the seller and furnishing him an opportunity to make corrections, they forthwith demanded return of the \$15,000, which in pursuance of the contract had been deposited with the defendant Savings & Loan Company.

The contract required Stafford, party of the first part, to " * * * furnish at his own expense abstracts of title to the said lands and to submit the same to the attorneys of the party of the second part for examination, and, in event that said attorneys find said titles in any substantial respect defective, said party of the first part, upon request, agrees that he will use his best efforts to correct such defects, and if he is unable to do so, then and in such event, the party of the second part may, at their election, rescind this contract, and upon the exercise of such election, shall be entitled to receive from the party of the

first part the cash payment of \$15,000, which shall have been paid under this contract, together with the accumulated interest thereon at said Broadway Savings & Loan Company."

It is to be observed of this provision that the right to rescind plainly depended on substantial defects in title, and failure or inability in Stafford on request to correct them. But the only complaint made in respect of title in the Ryan letter of July 14th, was the absence of an "abstract of title that will enable them (purchasers' attorneys) to pass upon the title to the lands. * * *"

The implication plainly is that there was some sort of an abstract submitted, but that it was not complete. This was not showing that there was in reality any defect in title. It was, at most, showing only that the means for determining that question were not present. Nor was it showing that the seller was unable to procure and submit a proper abstract. It did not even suggest, much less point out, omissions or mistakes made in the instrument called an abstract. Where the right of rescission is expressly limited, as here, to defects of title that the seller either will not or cannot on request correct, it is not easy to perceive how the omission in the first instance to furnish all the means of ascertainment of title was a sufficient warrant for the exercise of the reserved right of rescission.

The only other right expressly reserved to the purchasers to rescind is found in the following portion of the contract:

"And it is mutually agreed between the parties that, if the said first party shall be unable to procure the transfer of the concessions as above stated, then and in that event the party of the second part shall have the right, at their election, signified in writing, to rescind this contract; and, in such event, the down payment of fifteen thousand dollars provided for hereunder, with the accumulated interest thereon, shall be returned to the party of the second part, and both of the parties hereto shall be relieved from further obligations under this contract."

It will be noticed that this right to rescind is limited to inability "to procure the transfer of the concessions as above stated." The words "as above stated" required the seller "to arrange an agreement with the national government of Mexico for the transfer of the concessions." The complaint made in the letter of July 14, 1902, in regard to the assignment of concessions, was that it "did not comply with the terms of the aforesaid contract." Here again is a failure to specify. Nothing like inability in Stafford to procure transfer is suggested. The most that can be said is that the parties differed in opinion as to the form of the agreement.

It is true that Stafford had agreed in the sixth paragraph of the contract to arrange an agreement on or before the 1st day of July, 1902, with the Mexican government for transfer of the concessions; but it is not claimed that the time thus stated was made of the essence of the contract. There was no such limitation concerning the furnishing of a deed conveying the land. The concession could be of no possible advantage unless title to the land could be conveyed. Indeed, it is provided in the eighth paragraph of the contract that the purchasers should secure the right to hold lands in Mexico and be ready "to accept a conveyance of said lands and concessions from the party

of the first part when he is in a position to make same under the terms of the contract." The plain import of this is that the delivery of the conveyance and of the transfer should be concurrent acts.

Moreover, it appears in a letter of earlier date (May 31, 1902) from McPherson to Stafford that Stafford had on the 21st of that month notified Carter and Ryan "to be in the City of Mexico on June 15th prepared to receive the deed and concessions as provided in your contract of January 4 with them." But McPherson thought this unnecessary, and requested completed abstracts to be submitted to him, explaining that their attorneys would require 30 days, and "possibly much longer," to look into the title.

It is worthy of notice, too, that just five days prior to the date of the Ryan letter demanding return of the deposit, counsel of the purchasers, to whom the papers had been referred, had in a letter to McPherson (dated July 9th) advised him that they had examined all the papers turned over to them "relating to the title," and that there were no abstracts of title among them, but that there was a report of certain named Mexican counsel concerning the title. Nothing, however, is said about any paper relating to the concessions. The letter concluded thus:

"It will be necessary for Mr. Stafford to furnish abstracts of title as provided in paragraph nine of the agreement entered into January 4, 1902. Until this is done, no examination can be made of the title."

The inference to be drawn from that letter is that there was reason to call for abstracts of title, but there is nothing to suggest rescission of the contract.

The letters cannot be misunderstood. The purchasers did not observe the contract when they demanded return of the \$15,000. Then, upon Stafford's request of McPherson of July 19th to tell him frankly what his position was, he was told by McPherson's answer of July 21st that the Ryan letter "is final." Plainly this evidence did not even tend to prove the breach alleged against Stafford, and the claim for damages based upon any such breach was rightly denied for that reason. *Sprague v. Booth*, [1909] A. C. 576. Indeed, if any breach was shown, it was committed by Carter and Ryan, and not by Stafford; and in view of the action taken by Stafford in response to the final demand made for the return of the deposit, the action of the cattle company would seem to have been altogether misconceived. At the dates of the Ryan and McPherson letters, the contract was executory. Insistence upon return of the deposit, made in anticipation of the time of performance, was totally inconsistent with further progress under the contract. It was tantamount to a distinct refusal to perform. Stafford was entitled to treat the contract as renounced by the purchasers. *Weber v. Grand Lodge of Kentucky*, F. & A. M., 169 Fed. 522, 533, 95 C. C. A. 20; *Roehm v. Horst*, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953; *Hockster v. De La Tour*, 2 El. & Bl. 678; *In re Neff*, 157 Fed. 57, 60, 84 C. C. A. 561. Whether Stafford could also rightfully, according to his avowed purpose, retain the \$15,000 is another matter.

We have not found it necessary to consider the real character of the instrument called an abstract of title. The same is true as to the form

of agreement concerning transfer of the concessions. Nor have we thought it important to determine whether the contract required the deed of conveyance to contain the name of Stafford as grantor, instead of the Palomas Land & Cattle Company, the apparent purchaser at foreclosure sale. The points urged touching the rejection of evidence do not seem to us to have been relevant to the case as it stood after the breach was shown. After the evidence above considered had been presented at the trial, the court below asked counsel for plaintiff whether he intended by his "future testimony to contradict the testimony" he had "already offered," to which counsel answered: "I certainly do not." We think this answer was correct, for we have found no evidence that would tend to warrant the demand and insistence made to return the deposit or to show that the demand was retracted. Hence the action of the purchasers seems to us to have been none the less a breach because of anything found in the rejected evidence. We hardly need say that plaintiff is bound by the acts of its assignors. The assignments made to it by Carter and Ryan did not occur until 1905, a period of more than three years after the contract had been repudiated.

But, without stating upon what theory recovery of the deposit could be had in this action, it is urged that Stafford cannot have the land and the deposit too. This is based upon a similar statement made by Baron Parke in *Laird v. Pim*, 7 M. & W. 472, 477. But that case did not present the question with which we are confronted. There the vendor, not the vendees, brought the action. The suit was to recover the purchase price and the interest, without tender of any deed of conveyance. Recovery was allowed for only the interest and the value of some clay which the purchasers had removed from the land. The remark of Baron Parke was made in comment upon the claim that the vendor was entitled to recover the principal of the purchase price, as well as the interest, although title to the land had not passed or even been tendered.

The difficulty in the present action is that the right of recovery of the \$15,000 is based on an express contractual promise to return the money and interest. This promise, upon the hypothesis of the present action, was made operative through the purchasers' rightful exercise of the reserved privilege of rescinding in consequence of a breach of Stafford. But, when it is found that Carter and Ryan committed the breach, no contractual promise to return the money with interest can be said to exist.

The effect then of plaintiff's claim in argument is to change the action from an affirmation of the contract to one in disaffirmance of it. This would convert the action into one based solely upon a constructive contract, and consequently upon a promise not made by defendants but imposed by law, or by natural equity, to prevent Stafford from "enriching himself unjustly at the expense of" his vendees. Keener on Quasi Contracts, 16, 24; *Hertzog v. Hertzog*, 29 Pa. 465; *Railway Co. v. Gaffney*, 65 Ohio St. 104, 115, 61 N. E. 152; *People ex rel. Dusenbery v. Speir*, 77 N. Y. 144, 150, 151; or, as said by Judge Lurton in *Michigan Yacht & Power Co. v. Busch*, 143 Fed. 929, 934, 75 C. C. A. 109 (accordant with Judge Severens in *Cherry Valley Iron Works v. Florence Iron River Co.*, 64 Fed. 569, 574, 12 C. C. A. 306):

"If the defendants have obtained money which ex æquo et bono they ought not to withhold from plaintiff, they should refund, and the law implies a promise to that effect."

It is manifest that when the court below found that plaintiff, instead of defendants, was chargeable with breach of the contract, there was no way to obtain relief as to the deposit unless it could be secured through some form of amendment. But whether a complete change in cause of action was permissible through amendment cannot be considered. No suggestion in this regard has been made by counsel, and the case was brought and purposely tried below on the hypothesis of express contract and its breach. No request was made at the trial to amend or change the form of action, and the court heard and disposed of the case in the original form. Argument, therefore, in support of a claim based upon another and different scheme of action, is unavailing. *L. & N. R. R. Co. v. Womack* (C. C. A., 6th Circuit) 173 Fed. 752, 97 C. C. A. 559. Whatever rights plaintiff may have respecting the deposit, they cannot be determined in this action.

Hence we are bound to overrule the assignments of error, and affirm the judgment

REPUBLIC IRON & STEEL CO. V. THOMASINO.†

(Circuit Court of Appeals, Fifth Circuit. February 8, 1910.)

No. 1,984.

MASTER AND SERVANT (§ 221*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—ASSUMPTION OF RISK.

Plaintiff's intestate, who was an experienced miner, while working with a helper in a room in defendant's coal mine was killed by the falling of the roof. It was the duty of defendant to furnish props to support the roof, and of deceased to set them up as the work progressed and the end of the room was extended. Two or three days before his death, he had asked defendant's superintendent or bank boss for props for use in his room, but they were not furnished; the boss telling him to keep on at work, that the roof was all right, and that he would send him props soon. Deceased continued his work, and at the time the roof fell had extended the room for 20 or 30 feet beyond the last props, which rendered the place where he was working dangerous, as he knew. On the morning of his death, he had examined the roof and then continued his work. *Held*, that in so doing with full knowledge of the conditions he assumed the risk, and that defendant, although negligent, could not be held liable for his death.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 638-647; Dec. Dig. § 221.*]

Assumption of risk incident to employment, see note to *Chesapeake & O. R. Co. v. Hennessey*, 38 C. C. A. 314.]

Shelby, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Northern District of Alabama.

Action by Leon Thomasino, administrator, against the Republic Iron & Steel Company. Judgment for plaintiff, and defendant brings error. Reversed,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied March 22, 1910.

This action was brought by Leon Thomasino, hereinafter styled "plaintiff," as administrator of the estate of Tony Thomasino, against the Republic Iron & Steel Company, hereinafter styled "defendant," claiming \$20,000 damages for the killing of plaintiff's intestate.

The complaint charges that the defendant was operating a coal mine at or near Sayreton, Jefferson county, Ala., and that on August 16, 1905, the said Tony Thomasino was in the employment of the defendant as a coal miner, and, while so engaged in and about the said service of the business of the defendant in said mine, a part of the roof or top of the said mine fell upon said Tony Thomasino, and as a proximate consequence thereof he was so injured that he died.

In the first count of the complaint it is charged that the death was caused by reason of a defect in the condition of the ways, works, and machinery or plant used in connection with the said business, to wit, the roof or top of said mine was not sufficiently propped to prevent its falling, which defect arose from or had not been discovered or remedied, owing to the negligence of the defendant or of some person in the service or employment of the defendant intrusted with the duty of seeing that the ways, works, and machinery or plant were in proper condition.

In the second count it is charged that the death was the proximate consequence of the negligence of a person in the service or employment and intrusted by the defendant with superintendence while in the exercise of such superintendence, to wit, one W. M. Mason.

And in the third count the death is charged as occurring through the proximate cause of the negligence of a person in the employment of the defendant with superintendence whilst in the exercise of such superintendence, to wit, some person unknown.

The fourth count is very similar to the second, but charges that said Mason negligently failed to sufficiently prop or secure from falling the said roof or part thereof which fell upon and killed the said intestate.

The fifth count is similar to the third, but more specific in charging that some unknown person intrusted with superintendence negligently failed to sufficiently prop or secure from falling said roof or part thereof.

The sixth count charges that the death was the proximate consequence of the negligence of said Mason intrusted by the defendant with and exercising superintendence in failing to furnish plaintiff's intestate with sufficient props to secure said roof.

And the seventh is similar to the sixth, except it varies in charging that the negligence of an unknown person in the service or employment of the defendant charged with superintendence negligently failed to furnish plaintiff's intestate at his place of work a sufficient number of props to secure said roof or part thereof, etc.

The defendant answered with a plea of not guilty; that it was the duty of plaintiff's intestate to keep his room properly timbered or propped; that he negligently failed to timber or prop said room, in that he placed the timbers or props of said room at too great a distance apart, thereby rendering said roof likely to fall; that his negligence in this regard contributed to and was the proximate cause of his death; that the fall of said roof was caused by the fact that the timbers by which the same was propped were placed at a distance of 16 feet from the face of said mine rendering the roof thereby likely to fall; that the timbering of the said room in this manner was unsafe and dangerous, and such danger was obvious and apparent to plaintiff's intestate, and, notwithstanding such obvious and apparent danger, plaintiff's intestate undertook to mine in said room with the roof thereof timbered in such manner, and thereby assumed the risk of the roof falling upon him; that plaintiff's intestate was killed by the roof falling upon him because it had been improperly propped or supported by timbers; that plaintiff's intestate had been cautioned by the defendant as to the necessity of having any such props; that, notwithstanding such caution and warning, he continued to work in said mine while such props or timbers were in there at such distance, and thereby he assumed the risk of said roof falling; and, finally, that plaintiff's intestate was aware that the roof was not propped or supported by props and was rendered unsafe, thereby and notwithstanding said knowledge plaintiff's intestate continued to mine under said roof, whereby and as a proximate consequence of which plaintiff's intestate was killed.

There was considerable skirmishing with demurrers to the complaint, to the pleas, and to the replications, not necessary to recite, and the parties went to trial on the issues as presented by the plaintiff as above mentioned, and the pleas of the defendant.

On the trial there was evidence showing that Tony Thomasino was killed while in the employment of the defendant as a coal miner. He had been in the employment of the defendant some six months. On seeking the employment, he represented himself as a practical coal miner and was given the job as such and assigned to a room with another miner, his cousin, Joe, as an assistant or "buddy." From the time he entered the service of the defendant he worked in the same room driving it 150 feet from the heading until August 16, 1905, when he was killed by the roof of his room falling upon him. The roof fell because it was not sufficiently propped or supported by timbers.

On the trial it was conceded that it was the duty of plaintiff in error to furnish the timbers for propping, and the duty of said Tony Thomasino to look after his room and set the necessary props. Both said Tony Thomasino and his assistant knew for what purpose props were used, how to set them, and that there was danger when not used; in fact, there was undisputed evidence showing that Tony Thomasino had been actually warned as to the danger if he did not prop, and, on one occasion, he had been suspended by the mine foreman because he failed to obey instructions by not setting the mine props close enough together.

There was also undisputed evidence showing that two or three days before Tony Thomasino was killed he was warned by his boss that he was not propping close enough to the face, and that it was dangerous rock, and he was told to set props closer, and promised to do so. It appears further, and on undisputed evidence, that each day a miner and his assistant in mining average from five to six feet into the face of the room, so that a new roof from five to six feet in length is over the mine as the miner does his work.

It was admitted by the plaintiff that Tony Thomasino's room was not properly propped, and that his death was due to that fact; but it was contended by the plaintiff that said Tony Thomasino had requested the defendant to furnish the necessary props, and it had failed to do so, and that upon such request the superintendent had told him, in effect, to go ahead and do the work, he would send him timbers to-day—"The top is all right. Just as soon as I can I will send you props."

The strongest and most favorable evidence in favor of the plaintiff is the evidence of Joe Thomasino, given in full as follows:

Joe Thomasino, a witness for the plaintiff, testified, in substance, as follows.

My cousin, Tony Thomasino, and myself were working for defendant company at Sayreton, on August 16, 1905, and were working together under the same roof. Tony had been working at that time about six months. I don't know what he worked at before this. I was present when Tony was killed, was about 14 or 15 feet from him. Some rock fell from the top of the room on him and killed him. The rock was four or five inches thick. Tony was killed between half after 11 and half after 1 o'clock in the morning. When we went to work that morning, Tony and I examined the roof, and it seemed all right. I had worked one month as a miner with Tony Thomasino. Tony knew better about mining than I did.

Here the witness was asked the following question: "Whose duty was it to furnish props to the miners working in the mines?" And the court stated: "Isn't that without dispute?" And it was thereupon stated by defendant's counsel that there were two things not in dispute. One was that it was the duty of the company to furnish props, and the other was that it was the duty of the miner to set the props and prop his own room, and to this statement counsel for plaintiff made no objection.

I heard the conversation on top between Tony and Mr. Mason when Tony asked him for props, and Mr. Mason said: "The top is all right. You go ahead and go to work. If you don't go to work, you can quit." Mr. Mason said: "Never mind, you go ahead. The top is all right, and after a while, as soon as I can, I will send you props." We then went to work, and the driver came into the room, and we asked him for props, and he said he didn't have any, and said: "You will have to tell it to the boss." No props were sent to our room after we asked for them. If props had been under our roof it would not have fallen. If it had been propped it would have made a motion when it

started to fall, and we could have heard it and got out of the way. The nearest prop from the face of the mine at the time the roof fell was from 20 to 30 feet. It was about two, or may be three, days after he heard Tony ask Mr. Mason for props before Tony was killed.

On cross-examination this witness testified as follows:

"I had worked in this same room ever since I had commenced mining. Tony was working in that room when I commenced working there. We had been setting props under the roof, and we set them under the roof for the purpose of keeping the roof from falling on us. I knew, and Tony knew, that the roof had to be propped, and if it had been propped the props would have held the roof, and if the roof had started to fall they would have held it until we got out of the way. Tony and I had been putting in these props together all the time we worked there. Tony was boss over me. I was his buddy, and he was a miner. Tony would direct me where to put the props, but pretty soon I learned myself how to put the props. We worked in this room about four or five days before Tony was killed without putting any props up at all."

Thereupon the witness was asked the following question: "Didn't you know that there was danger of that roof falling without you put a prop?" To this question the plaintiff objected, the court sustained the objection, and the defendant excepted.

This was, in substance, the testimony of this witness, and all the tendencies thereof.

Joe Immodino, a witness for the plaintiff, testified as follows:

"I was working for the Republic Iron & Steel Company, at Sayreton, on the 16th day of August, 1905. I knew Tony Thomasino before his death, and had known him for six or seven months. He had been working there several months before he was killed, and I had been working there about 12 months. Mr. Mason was the bank boss for the defendant company. His duties were to look after the place, and send props to prop the place. I heard Tony Thomasino ask Mr. Mason for timbers, and Mr. Mason said: 'Go on to work. I will send you timbers to-day. That the top was all right.' Tony Thomasino asked Mason for the timbers, and Mason told him to go on to work, he would send timber to-day, two or three days before Thomasino was killed. Thomasino went to work after that. It was the duty of the company to furnish the props. The conversation between Mason and Thomasino about the props occurred outside of the mine and some time inside of the mine. At the time the conversation about the props took place, Salvador Lavito and Joe Thomasino were present."

On cross-examination, this witness testified, in substance, as follows:

I have been a miner for about seven years, and have worked at Sayreton for two or three years. Every miner has a buddy who helps in the mine. It is the miner's duty to prop the roof in his room, and Tony Thomasino was a miner. The company furnished the props, but it was the miner's duty to set them up. It was customary to set the props to within 10 feet of the face of the room. I went into the room where Tony Thomasino was killed, right after he was killed, and the nearest timber to the face of the room was from 20 to 30 feet. Tony had been working in that mine six or seven months before he was killed. When the miners want timbers, they ask the driver for them, and the driver would bring them; but, if the driver didn't bring them, then you would tell the bank boss, and the bank boss would tell the driver. The bank boss never brought the timber himself, but the driver brought them. The driver for Tony was a white man named Reid. I worked at the time Tony was killed in room 40, and Tony worked in room 45. I put up my own props. I put the props in my room, and it was Tony's duty to prop his room. The conversation I heard between Tony and Mr. Mason about the props occurred two or three days before Tony was killed. It had been three or four days before this that Tony had not had any timbers. When Tony asked for props from Mason at the top of the mine, he told Mason that he had no timbers or props. In the mine at that time they averaged from four, five, or six feet a day into the face of the mine. I never saw any timbers at that time along the heading. At this time I cannot remember whether there were any timbers at the top of the mine or not. Tony had been working in the same room he was killed in, and had been the miner who has had that room, ever since he had been work-

ing for the company, and he had been working for the company about six or seven months.

This was, in substance, all the testimony of this witness, and all the tendencies thereof.

There was other evidence on the part of plaintiff and considerable on the part of defendant, all found in the transcript and bearing upon issues in the case, but not necessary to recapitulate.

The bill of exceptions shows that, after the evidence was closed, the defendant made numerous requests for charges on specific propositions arising and supposed to arise in the case, which were refused by the court and exceptions duly reserved. Among them were the following:

"The court charges the jury that if you believe the evidence in this case you cannot find for the plaintiff.

"The court charges the jury that if you believe the evidence in this case you cannot find for the plaintiff under the sixth count of the complaint.

"The court charges the jury that if you believe from the evidence that, on the day the plaintiff's intestate was killed, he tapped or sounded the room and concluded that it was safe, and that he continued to mine depending on his own judgment as to the safety of said roof, then the plaintiff cannot recover.

"The court charges the jury that if you believe from the evidence that plaintiff's intestate knew that props were necessary and were used to support the roof and prevent the same from falling in, and that without the same being used there was danger of the roof falling upon him, and that with such knowledge he continued to mine under the roof without said props, and that the roof fell upon him because it was not propped, then your verdict must be for the defendant, and this must be your verdict under such circumstances, even though you may believe from the evidence that the defendant had no props on hand, or that it negligently failed to provide them to plaintiff's intestate after it had been requested by him to do so."

The jury found for the plaintiff in the sum of \$2,500, on which verdict judgment was rendered, and defendant, after vainly seeking a new trial, sued out this writ of error.

The errors assigned are numerous, but they cover the refusals to charge as set out above.

Walker Percy and Borden Burr, for plaintiff in error.

Frank S. White and Thos. T. Huey, for defendant in error.

Before PARDEE and SHELBY, Circuit Judges, and FOSTER, District Judge.

PARDEE, Circuit Judge (after stating the facts as above). It is undisputed that it was the duty of the defendant to have furnished the plaintiff's intestate with sufficient props to support the roof of the room where he was mining, and that it was the duty of the plaintiff's intestate to properly set the props. See *Sloss Sheffield Steel & Iron Co. v. Green* (Ala.) 49 South. 302.

The evidence is conflicting as to whether the defendant did its duty in furnishing the props—it is undisputed that the plaintiff's intestate did not set any props in the last 4 to 5 days of his work nor in the last 20 to 30 feet of his room.

The plaintiff's evidence shows that plaintiff's intestate worked in his room three or four (Joe Immodino), two or three (Joe Thomasino) days without putting up props, and then called on the mine foreman for props, and the bank boss said: "Go to work. I will send you timbers to-day. That the top was all right." Joe Immodino. "Go to work. To-morrow I will send you the props." Lavito. "The top is all right. You go ahead and go to work. If you don't go to work you can quit." Or "Never mind, you go ahead. The top is all right, and after a while

as soon as I can I will send you props." Joe Thomasino. And after the application for props the plaintiff's intestate worked on two or three days extending his room and the unsupported roof thereof, when the roof fell and killed him.

The undisputed evidence shows that the plaintiff's intestate was an experienced miner, that he knew of the necessity of propping his roof as he advanced further in his work and of the danger of its falling if not properly supported, and that when he went to work the morning of his death he, with his assistant, examined the roof and it seemed all right. From this it is clear that, in continuing his mining and extending his room without propping, the plaintiff's intestate well knew and appreciated the danger, and he assumed the risk, and plaintiff cannot recover, although the defendant neglected to furnish the necessary props (see *Sloss Iron & Steel Co. v. Knowles*, 129 Ala. 414, 30 South. 584), unless the plaintiff's intestate had a right to rely upon the mine foreman's promise to furnish props and his assurance as to safety. This is not a case of a master's furnishing a defective appliance or place which he promises to have repaired or made safe, but is rather a case where assurance of safety was given to the servant who was making his own place to work which he knew as well as any one could know would be and was dangerous without using the appliances the master promised to furnish (and he knew that the master had not furnished them), and he well knew that in continuing to work therein he was in danger and was increasing the danger with every stroke of his pick, for he was an experienced miner and well knew of the necessity of propping his roof as he advanced. Surely, under these circumstances, the plaintiff's intestate had no right to rely on the promise to furnish props whether the furnishing was to be "to-day," "to-morrow," or "after a while as soon as I can."

And we think it equally clear, under the plaintiff's evidence most favorably considered, that the plaintiff's intestate had no right to rely upon the foreman's assurances that: "The top is all right." "Never mind, you go ahead. The top is all right"—because he was not only an experienced miner, but, as to the actual situation at the time the alleged assurance was given, he knew more about the situation than the foreman did, for he knew, and there is no suggestion in the evidence that the foreman knew, that he had already mined two or three days extending his roof (10 to 12 feet according to the average) without setting props, thus increasing the ordinary danger.

We conclude, on principles well supported in reason and well recognized in adjudged cases, that under the evidence, and as a matter of law, the plaintiff's intestate, in continuing to work in the mine in the absence of sufficient propping to support the roof in his room, assumed the risk of injury from the falling roof, and defendant was entitled to the peremptory charge in its favor. See *Sloss Iron & Steel Co. v. Knowles*, supra; *Alteirac & West Pratt Coal Co. (Ala.)* 49 South. 867; *Coosa Manufacturing Co. v. Williams*, 133 Ala. 606, 32 South. 232; *Musser-Sauntry Co. v. Brown*, 126 Fed. 141, 61 C. C. A. 207; *Glenmont Lumber Co. v. Roy*, 126 Fed. 524, 61 C. C. A. 506; *Kansas City S. Railway Co. v. Billingslea*, 116 Fed. 335, 54 C. C. A. 109; *Bunt v. Sierra Butte Gold Mining Co.*, 138 U. S. 484, 11 Sup. Ct. 464, 34 L.

Ed. 1031; Eureka Co. v. Bass, Adm'r, 81 Ala. 214, 8 South. 216, 60 Am. Rep. 152; Bridges, Adm'r, v. Tennessee, C. & I. R. R. Co., 109 Ala. 293, 19 South. 495.

The judgment of the Circuit Court is reversed, and the cause is remanded, with instructions to award a new trial.

SHELBY, Circuit Judge (dissenting). The question of the deceased's contributory negligence was one for the jury, and, in my opinion, it was correctly submitted to the jury by the trial judge.

The court gave the last charge copied in the statement of the case in the opinion of the majority, but added the following explanation:

"Now I give you that in connection with the general charge, provided always if he (the deceased) stayed there in pursuance of a request, under the advice that it was safe, and didn't know, and that a person of ordinary prudence would not know, it was dangerous, then, in that event, if he knew it was dangerous he could not recover; otherwise he might."

In explanation of another charge requested by the defendant company, the trial court further said:

"If you should find that Mason was negligent in not furnishing these things, and told him the roof was safe, and that he stayed there, relying on it, and the danger of mining under those circumstances was not obvious and apparent to a reasonable man, then that might excuse him from contributory negligence; but otherwise it would not, because it is the duty of a man who has sufficient experience to know that mining in the way he was was dangerous without the props, * * * If it was an apparent and known danger he would not be justified in risking his safety on it. * * * But, as I explained to you several times, that depends upon whether the danger was obvious and apparent."

These instructions, in my opinion, correctly state the rule applicable to the case.

The reasons given by the trial court for overruling the motion for a new trial also shed light on the case as it was presented to the court and jury, and show that the question involved, to some extent, the credibility of the evidence, and was, therefore, one for the jury. Here is the order:

"The court has carefully considered the briefs of counsel, and the evidence in connection with the general charge, and the refused charges, and is of the opinion that the case was fairly submitted to the jury, and that a new trial ought not to be granted. It is true Salvador Lavito testified that Mr. Mason said 'Go to work, and to-morrow I will send you the timber,' etc., and that Immodino testified that Mason said, 'Go on to work, and I will send you the timber to-day.' Joe Thomasino, when asked what the deceased said to Mr. Mason about furnishing him the props, testified, in substance, 'after awhile, or as soon as I can, I will send you the props,' and then the deceased went back to work, and he asked the driver for the props, and he did not have them. The testimony of Mr. Mason did not impress the jury, and the jury might well have found, under the circumstances, that the deceased had a right to rely upon the promise to furnish the props as soon as the defendant could, and to wait a reasonable time therefor, which reasonable time the jury, under all the circumstances, found included the period in which the accident occurred. The several versions of the promises were before the jury, and it was for the jury to say which version was true. It is therefore considered that the motion for a new trial be denied and overruled, and that the defendant have 90 days from this date in which to prepare and present a bill of exceptions. This 26th day of May, 1909.

Thos. G. Jones, U. S. Judge."

The view of the trial judge that the deceased had the right to rely on the promise of the master to furnish the props, and to continue to work, waiting a reasonable time therefor, is fully sustained by the authorities, as is, also, his conclusion that the question of reasonable time was one for the jury. 1 Labatt on Master & Servant, § 429, p. 1213, and cases cited in note 5; Dresser on Employers' Liability, §. 115, p. 591, and cases cited; C., N. O. & T. P. Ry. Co. v. Robertson, 139 Fed. 519, 71 C. C. A. 335 (opinion by Lurton, Circuit Judge).

I cannot concur in the conclusion that the deceased servant, as matter of law, assumed the risk of injury from the falling roof of the mine; the master having negligently failed to furnish the props. A risk which the master negligently created by omitting some precaution which, in the exercise of ordinary care, ought to have been taken, cannot be regarded as one of the ordinary risks of the employment which the servant, as matter of law, is presumed to have assumed. This principle "has been formulated and applied so frequently as to have become axiomatic." 1 Labatt on Master & Servant, § 270; Ford v. Fitchburg R. R. Co., 110 Mass. 240, 14 Am. Rep. 598. This view has the approval of the Supreme Court. In Hough v. Railway Company, 100 U. S. 213, 25 L. Ed. 612, that court held that it is implied in the contract of service "that the master shall supply the physical means and agencies for the conduct of his business. It is also implied, and public policy requires, that in selecting such means he shall not be wanting in proper care. His negligence in that regard is not a hazard usually or necessarily attendant upon the business. Nor is it one which the servant, in legal contemplation, is presumed to risk. * * *"

The conclusion of the court in the opinion just read can only be sustained on the theory that the danger was so obvious that a person of ordinary prudence would not have continued the work. I find nothing in the record showing that it was apparent and obvious that the roof of the mine was about to fall. It is to be presumed that the jury, as instructed by the trial judge, would have found for the defendant if such had been the fact. On the contrary, there is much to show that the danger did not appear to be imminent. It is not reasonable that Mason would have pronounced it safe and instructed the deceased to continue work if the danger had been obvious; and, besides, the instinct of self-preservation is to be considered and weighed against the supposition that the deceased incurred obvious and plain peril. The question was clearly one for the jury. Kreigh v. Westinghouse & Co., 214 U. S. 249, 29 Sup. Ct. 619, 53 L. Ed. 984.

I dissent from the opinion and the judgment of reversal.

UTAH CONSOL. MINING CO. V. BATEMAN.

(Circuit Court of Appeals, Eighth Circuit. February 16, 1910.)

No. 3,103.

*(Syllabus by the Court.)****1. MASTER AND SERVANT (§ 205*)—NEGLIGENCE—ASSUMPTION OF RISK—RELIANCE ON CARE OF MASTER.**

It is the duty of the master to exercise ordinary care to provide a reasonably safe place for the servant to work and reasonably safe appliances for him to use, and unless he knows, or the fact is obvious, that this duty has not been discharged by the master, he may assume that it has been, and may recover for any injury resulting from the failure to discharge it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 547-549; Dec. Dig. § 205.*]

Assumption of risk incident to employment, see note to Chesapeake & O. R. Co. v. Hennessey, 38 C. C. A. 314.]

2. MASTER AND SERVANT (§ 226*)—ASSUMPTION OF RISK—NEGLIGENCE OF MASTER.

But the servant assumes all the ordinary risks and dangers of the employment upon which he enters and in which he continues without complaint, including those resulting from the negligence of his master which are known and appreciated by him and those which would have been known and appreciated by a person of ordinary prudence and care in his situation.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 662; Dec. Dig. § 226.*]

3. MASTER AND SERVANT (§ 219*)—ASSUMPTION OF RISK—APPRECIATION OF DANGER—OBVIOUS DANGERS.

A servant cannot be heard to say that he did not appreciate or realize the danger where the defect from the negligence of the master was obvious and the danger from it would have been apparent to an ordinarily prudent person of his intelligence and experience in his situation.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 610-624; Dec. Dig. § 219.*]

4. MASTER AND SERVANT (§ 217*)—INJURY TO SERVANT—ASSUMPTION OF RISK.

The plaintiff below, an employé of the defendant, had for two years been and was a skimmer, one of whose duties was to skim or rake the slag from the molten metal in the converter. As he stood before the mouth of the converter to skim the metal, an explosion occurred in the clay lining of the converter, which threw the molten metal out of the mouth of the converter upon him, and burned him. He recovered a judgment against the defendant for negligence, in that it used coal mixed with the droppings from the grates of the reverberatory furnaces to dry the clay lining in this converter. For three months before the accident the plaintiff had used converters dried with this mixed fuel, and had subjected them to the test of the molten metal. The plaintiff knew that, if moisture remained in the clay lining and the molten metal came in contact with it, there might be an explosion; that the defendant had used this mixed fuel to dry the converters, and that it used it to dry this converter; that there had been explosions in converters dried by the use of this fuel; that, if an explosion occurred while he stood in front of the mouth of the converter, it might throw the molten metal out the mouth upon him and injure him. Nevertheless he remained in the employment of the defendant without complaint.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Held, the plaintiff assumed the risk and danger from the use of the mixed fuel to dry the converters, and he could not recover.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 595; Dec. Dig. § 217.*]

Riner, District Judge, dissenting.

In Error to the Circuit Court of the United States for the District of Utah.

Action by James Bateman against the Utah Consolidated Mining Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

William H. King, for plaintiff in error.

Dey & Hopough, for defendant in error.

Before SANBORN, Circuit Judge, and RINER and WILLIAM H. MUNGER, District Judges.

SANBORN, Circuit Judge. James Bateman, the plaintiff below, was burned by an explosion in a converter which threw molten metal out of its mouth upon him as he stood in front of it to skim the slag from the metal. He sued his employer, the Utah Consolidated Mining Company, a corporation, and alleged that the presence of moisture in the parts of the converter subjected to contact with the molten metal renders them liable to explode and to throw the metal out of the converter, and that the defendant was so negligent in the preparation and inspection of the converter used by him that there was moisture in the clay with which it was lined where it was liable to come in contact with the molten metal and to cause an explosion, and that this moisture came in contact with this metal and caused the explosion which injured him. The defendant denied its alleged negligence, and pleaded that the plaintiff knew and assumed the risk and danger of the accident and injury.

At the close of the trial, the evidence had conclusively disposed of every charge of negligence except the claim which was not set forth in the pleadings, but was developed during the evidence, that the defendant had used to dry the converter in question inefficient fuel consisting of a mixture of coal and the droppings from the grates of the reverberatory furnaces which consisted of unburned and partially burned coal varying in size from that of a walnut to that of a pea, and which was called by some witnesses ashes, and which will be called for convenience in this opinion "gratings." The only issues, therefore, which the court submitted to the jury were whether or not this fuel was used to dry the converter, whether or not it was negligence for the defendant to use it, whether or not the plaintiff assumed the risk of its use, and whether or not he was guilty of contributory negligence. The jury returned a verdict for the plaintiff, and the defendant now complains that the court denied its request to instruct the jury to return a verdict in its favor, because, as its counsel contends, there was no substantial evidence of the negligence of the company, and the evidence was conclusive that the plaintiff assumed the risk of the use of this mixed fuel to dry the converter which injured him.

If all conflicts in the testimony be resolved as they should be in this investigation in favor of the plaintiff, the evidence established these

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

facts: The converters used by the defendant were egg-shaped vessels eight or ten feet high with mouths in their smaller upper ends two feet in diameter. They consisted of shells of wrought iron or steel from one-half to five-eighths of an inch in thickness, made in two parts, which were joined together at a point about midway between their ends, and a lining of brick and clay. The brick was placed against the shell of each converter to keep the hot metal from the wrought iron or steel as the clay cracked, burned, or fell away. Inside this brick lining, a lining of wet clay from 16 to 24 inches in thickness at the bottom tapering to 3 inches in thickness at the top was placed. After a converter had been thus lined, coal or coal and gratings were placed within it and set on fire, and a blast was applied to dry this clay. At the base and back of the converter were twyer holes about the size of the fingers, through which a puncher pushed a rabble into the molten mass after the converter was charged for the purpose of letting the air through the molten metal to keep it rolling, and to separate the slag from the copper. Each converter was supplied with a wind box back of these holes which was capable of connection by a blast pipe with compressed air, and was used to send this air through these twyer holes to drive the fire which dried the linings and after the converter was charged to roll the molten mass and separate the slag from the metal. Each converter sat upon four wheels, and was so mounted that it could be turned down to a horizontal or nearly horizontal position and back again to an upright position by the puncher at will.

The clay linings were put into the converters at a point about 12 feet distant from the plaintiff's station so that he saw and knew how they were lined. After they had been lined each converter was taken past the plaintiff to the drying station about 30 steps distant from him where it was fired, subjected to a blast, and the clay lining was dried. It ordinarily requires from 4 to 18 hours, according to the character of the fuel and the fire, to dry a converter properly. The converter in which the accident occurred was dried 30 hours from the time it was lined and fired to the time it was taken from the drying station to be used. During and after its firing it was watched and inspected with reasonable care by the foreman and servants of the defendant, and it appeared to them to be dry and safe. The defendant's foreman sometimes delivered to the plaintiff for use immediately after a short drying of four or five hours converters that he informed the plaintiff were green, and, when Bateman skimmed or raked the slag from the metal in one of these converters, he stood to one side of its mouth in order to avoid any injury from explosions therein. But the foreman believed this converter to have been dried as well as any converter that had ever been used by the defendant, and, when Bateman asked him if it was ready, he replied that it was. A charge of molten metal was put into it, blown and skimmed by the plaintiff. He saw the lining within it during this operation, and it appeared to him to be dry and safe. The molten metal of this first charge came in contact with the inner portion of the lining and no explosion occurred, and, when the plaintiff took his station to skim the second and fatal charge, he stood directly in front of the mouth of the converter, and the explosion threw the burning metal upon him.

All the moisture is not dried out of the clay lining of converters in the customary process of drying them for this use, but some remains in the part of the lining nearest to the brick. The purpose of the drying is to dry sufficiently to form a safe crust on the side of the clay exposed to the burning metal and to drive out such moisture in the lining as will be likely to cause an explosion. It is not always possible to determine by examination or inspection whether or not there remains next to the brick too much moisture. Clay linings dried with reasonable care and apparently safe are sometimes green next to the brick. When a converter is charged, the molten metal sooner or later finds or causes cracks in the clay, makes great chunks of it fall off into the metal, and eats large holes in it, and finally destroys it. These clay linings last only about eight hours of constant use, endure only from four to eight charges, and sometimes fail during the first charge. When the lining is broken so that it is useless, the converter is again lined with clay and dried. Sometimes, if one or two holes in the lining appear, a green patch or patches of clay are placed upon the lining, and the converter is continued in use for a time.

The defendant had been using a mixture of coal and gratings to dry its converters continually from three to eight months before this accident occurred. This mixture of coal and gratings did not dry the converters as well as coal alone, and did not dry them thoroughly. There had been explosions in the converters during the three months during which this mixed fuel was used to dry them. The plaintiff had been employed by the defendant in his position as skimmer for more than two years. He knew before the accident happened that the gratings had been and were used with coal for the purpose of drying the converters, that there had been explosions while this fuel was used, and about two weeks before the accident he told one of the foremen that the boys were in some doubt in relation to this fuel, and had asked the foreman if it dried the converters thoroughly, and the latter answered that it did. The plaintiff made no complaint but continued in his employment.

Bateman was a skimmer. It was his duty to see that the punchers and helpers coupled the converters together properly so that the ore would not escape, to conduct the operation of drawing the molten metal from the furnace into the converter, blowing the molten mass so that the slag would separate from the metal, skimming or raking off the slag, and then pouring the pure metal into the moulds. On the night of this accident he directed his puncher to bring the converter in which the explosion occurred up from the drying station, and to charge it with matte drawn from the furnaces. His order was obeyed. Bateman then caused the blast of air to be put on and to blow up through the twyer holes and the molten metal until the charge was high; that is to say, until the colors in the flames indicated to him that the slag was separated. Then he ordered the craneman to bring the converter to him, and, when it arrived, he directed his puncher to turn the mouth of the converter down so that he could see into it and skim the metal within, and then to shut off the air. The puncher obeyed. Bateman then skimmed the slag from the mass, poured a half pot of metal into it, turned the converter back into an upright position, turned on the

blast, and, when the charge was high again, the puncher on his order turned the mouth of the converter down again, and shut off the air. Bateman stepped directly in front of the mouth of the converter, examined the molten metal within, found it perfectly quiet, motioned his helper to turn the mouth still further down, and the explosion at once occurred, threw the hot metal over and burned him. He testified that the explosion was unusual, and that he knew from his experience that the cause of it was wet moisture within the lining of the converter with which the hot metal had come in contact. Bateman's occupation was one in which there was great and manifest danger of personal injury from the escape of the molten metal from the mouths of the converters. Soon after the metal was introduced into a converter, it cracked or ate into the clay lining, and caused great chunks of it to fall into the hot mass and to splash it out through the mouth. When a converter was charged and the puncher was ready to turn the mouth of it up, it was necessary to put the air on in order to keep the hot metal from filling the twyer holes so that there would be no blast through the mass, but, when the mouth was turned up as the metal flowed over the holes, the blast blew it out through the mouth of the converter, often far across the building. The same result followed the turning of the mouth down for the air cannot be taken off until the metal has receded from the holes.

When a lining of a converter is green and the hot metal gets in contact with the moisture, there may be an explosion from that cause which will throw the metal out, but when the mouth of the charged converter is turned down and the air is shut off, and the metal is not moved, there is no danger in skimming it if there is no moisture in the lining with which the metal may come in contact. The plaintiff testified regarding this molten mass in the converter as follows:

"I have seen it splash out and boil out, and I have seen it blow out. * * * Q. Every time you were there you would see there would be some metal blowing out, wouldn't you? A. Yes, sir.

"Q. You never saw a converter while you were on duty a single time that you were there that some of the metal did not blow out of the mouth? A. No, sir.

"Q. It would blow from various causes, would it not? A. It would blow out from a hundred causes. * * *

"Q. You knew it would blow out when the converters were green? A. Yes; when the air is on and off.

"Q. You knew it would blow out when no air in the converter too? A. Yes, sir.

"Q. You knew moisture would cause the metal to blow out? A. Yes, sir. * * *

"Q. You knew they had been using ashes? A. Yes, sir.

"Q. You knew there had been explosions? A. Yes, sir.

"Q. And that, if a man stood right in front there and an explosion occurred, he would get hurt? A. I know if he stood there, and an explosion occurred, he would get hurt.

"Q. You knew that since they were using ashes there that there had been explosions, and you went and told him (the foreman) about it? A. Yes; about this. * * *

"Q. The converters were occasionally green, were they, because they blew out, as you say, hundreds of times? A. Yes, sir.

"Q. And you knew they were green at times? A. Yes, sir.

"Q. That is, you could tell when the explosion occurred that they were green? A. When they were reported green and brought there green.

"Q. Sometimes they would be green when you would not know it? A. No, sir.

"Q. Would there be when you would know it? A. There might have been when I didn't know it.

"Q. And then it would be possible that they would be green without being reported to you? A. Yes, sir; possibly being green without being reported to me.

"Q. Sometimes it happens, does it not, that the clay will look apparently dry, and still be green underneath? A. I suppose it does; yes.

"Q. You knew then from your long experience there that converters were being used that were green? A. Yes, sir.

"Q. And you knew what the consequence was? A. Yes, sir. * * *

"Q. And you had no reason to believe that any different rule had been followed with respect to the lining of this than had been followed in the lining of others? A. No, sir.

"Q. In fact, you knew it was lined in the same way? A. As near as I knew anything about it.

"Q. The same men? A. Yes, sir.

"Q. Blazzard and Newhold? A. Yes, sir.

"Q. Working right there with you within a few feet of you? A. Yes, sir.

"Q. And so far as you could observe they had lined this just as they had lined all the others? A. Yes, sir.

"Q. And this had been set there just as all the others had been set out? A. Yes, sir. * * *

"Q. At any rate, by reason of your long experience in connection with converters and taking charge of them and using them, you knew that explosions were frequently caused there by reason of the use of green converters? A. Yes, sir. * * *

"Q. And, of course, the green converters where you had seen the explosions, numerous explosions, which enabled you to testify as to the cause of the explosion, were those which you and others of your associates there were using right along from day to day and month to month and year to year, weren't you? A. Yes, sir.

"Q. And yet you continued to work there knowing the fact that explosions would occur? A. Yes, sir.

"Q. And knowing from your long experience there what causes the explosions? A. Yes, sir.

"Q. Knowing that when these explosions—that these explosions might come at any time? A. Yes, sir.

"Q. Knowing that they came from moisture in the converters? A. Yes, sir.

"Q. Knowing that there was apt to be moisture in the converters at any time—that is, in any converter—from your long experience there? A. No, sir.

"Q. You said half a dozen times—pardon me for recurring to it—that there would be moisture in the converters? A. Yes, sir; not in any converter.

"Q. You made the statement before, in the converters which you were using there? A. Yes, sir.

"Q. This No. 4 converter was one that was in constant use there, was it not? A. Yes, sir.

"Q. The same as the rest of them? A. Yes, sir.

"Q. And I say now, knowing the fact that there was sometimes moisture in the converters, and that it would produce explosions, you continued to work there? A. Yes, sir.

"Q. And you knew that explosions might occur at any time, didn't you? A. Yes, sir.

"Q. And you knew that if you stood right in front of the mouth of that converter, under those circumstances, you would be burned? A. Yes, sir.

"Q. And you didn't quit? A. No, sir."

If in the state of the facts and the testimony which has now been set forth the defendant was guilty of any negligence in this case, it consisted in the use of the gratings with the coal to dry the converters. But the plaintiff knew that the defendant had been using these gratings for this purpose for at least three months. He had been using and

subjecting to the actual test of trial converters dried with this fuel. It is obvious that the utmost care in drying and in inspection would be less certain to determine whether or not this fuel was drying the converters properly than the actual subjection of them to the molten metal which their linings were made to resist. It might be and probably was difficult, if not impossible, to ascertain in every case by reasonable care in drying and inspecting whether or not a converter was dried sufficiently. But the charging and the use of a converter determined that issue unerringly in every case. For three months the plaintiff had been subjecting converters dried with this fuel to this unerring test, and, if the fuel failed to dry them properly, he knew that fact better than the defendant or any of its witnesses. He also knew that, if moisture remained in the lining of a converter so that the molten metal came in contact with it, there might be an explosion. He knew that there had been explosions in the converters while the mixed fuel was used to dry them, and he knew that, if an explosion occurred when he stood in the front of the mouth of a charged converter, he would be injured. His attention had been called especially to this fuel and its effect two weeks before, for he testifies that he then told the foreman that the boys were afraid that the ashes did not thoroughly dry the converters. The foreman assured him that they did. He made no complaint, but continued in his employment.

While it is the duty of the master to exercise ordinary care to provide a reasonably safe place for the servant to work, and reasonably safe appliances for him to use, and while, unless he knows, or the fact is obvious, that this duty has not been discharged by the master, he may assume that it has been, and may recover for any injury resulting from the master's failure to discharge it, yet he assumes all the ordinary risks and dangers of the employment upon which he enters and in which he continues, including those resulting from the negligence of his master which are known to and appreciated by him, and those which would have been known to and have been appreciated by a person of ordinary prudence and care in his situation. Nor can a servant be heard to say that he did not appreciate or realize the danger when the defect or negligence was obvious and the dangers would have been apparent to an ordinarily prudent person of his intelligence in his situation. *St. Louis Cordage Co. v. Miller*, 126 Fed. 495, 501, 509, 511, 61 C. C. A. 477, 483, 491, 493, 63 L. R. A. 551; *Glenmont Lumber Co. v. Roy*, 126 Fed. 524, 528, 61 C. C. A. 506, 510; *Lamson v. American Axe & Tool Co.*, 177 Mass. 144, 145, 58 N. E. 585, 83 Am. St. Rep. 267; *Sullivan v. Simplex Electrical Co.*, 178 Mass. 35, 39, 59 N. E. 645; *Chicago, Milwaukee & St. P. Ry. Co. v. Benton*, 132 Fed. 460, 462, 65 C. C. A. 660, 662; *Choctaw, Oklahoma & Gulf R. R. Co. v. McDade*, 191 U. S. 64, 67, 68, 24 Sup. Ct. 24, 48 L. Ed. 96; *Chicago Great Western Ry. Co. v. Crotty*, 141 Fed. 913, 915, 73 C. C. A. 147, 149, 4 L. R. A. (N. S.) 832; *Burke v. Union Coal & Coke Co.*, 157 Fed. 178, 180, 181, 84 C. C. A. 626, 628, 629.

If the defendant was guilty of causal negligence by the use of the mixed fuel, it was only because explosion and injury were the natural and probable consequences thereof, and might reasonably have been anticipated therefrom. If it was the duty of the defendant to use

coal alone and to avoid the use of gratings in drying the converters, the plaintiff knew that the company had failed to discharge that duty. And, if the defendant might have reasonably anticipated and could have known and appreciated the risk and danger of the use of this fuel and of the explosion and injury therefrom, much more must the plaintiff have known and appreciated them; for, in view of his knowledge of the use of the fuel, of the danger from the moisture in the linings of the converters, and of his continual test of linings dried by this fuel for three months by their actual exposure to the molten metal, these risks and dangers were far more obvious to him, or to a man of ordinary prudence in his situation than to one in the situation of the defendant, or of its other employés. The conclusion is that the evidence established the facts that the plaintiff knew of the use of the mixed fuel by the defendant to dry the converters and knew and appreciated, and therefore assumed, the risk and danger therefrom. For this reason, the court erred in its refusal to direct a verdict for the defendant. It is unnecessary to consider other specifications of alleged error at the trial, and the judgment below must be reversed and the case must be remanded for a new trial; and it is so ordered.

RINER, District Judge, dissents.

JEWELL v. STATE LIFE INS. CO. OF INDIANAPOLIS, IND. et al.

(Circuit Court of Appeals, Fifth Circuit. February 8, 1910.)

No. 2,002.

EQUITY (§ 369*)—TIME FOR TAKING PROOFS—PRACTICE IN FEDERAL COURTS.

Equity rule 69 gives a party to a suit in equity in a federal court, on whose pleading an issue of fact is joined, three months in which to take evidence in support of the allegations so put in issue; and unless such right is waived it is error for the court to hear the cause and enter in final decree before the expiration of that time.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 779; Dec. Dig. § 369.*]

Appeal from the Circuit Court of the United States for the Northern District of Florida.

Bill of interpleader by the State Life Insurance Company of Indianapolis, Ind., against C. D. Frink, Mrs. C. D. Frink, and Jessie M. Jewell. Decree awarding the fund paid into court by complainant to Mrs. C. D. Frink, and defendant Jessie M. Jewell appeals. Reversed.

William W. Flournoy, for appellant.

J. W. Kehoe and W. R. Chapman, for appellees.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge. In August, 1905, the State Life Insurance Company of Indianapolis, Ind., issued and delivered to Eddie M. Jewell its policy of life insurance, covering the life of said Eddie M. Jewell in the amount of \$5,000. Mrs. C. D. Frink, a sister of the in-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

sured, was designated as the beneficiary in said policy who should receive the said sum in case of the death of the insured. On June 2, 1906, the insured died; the policy at that time being in full force and effect and all premiums paid. The said insured was unmarried when the said policy was issued; but on June 2, 1906, when he died, he was married, and Jessie M. Jewell, appellant, his widow, survives him.

The appellees, C. D. Frink and Mrs. C. D. Frink, contended there had been no change of beneficiary, and that they were entitled to the amount of the policy, and so notified the insurance company. Mrs. Jessie M. Jewell contended that the insured, before his death, changed the beneficiary from his sister, Mrs. C. D. Frink, to his wife, Mrs. Jessie M. Jewell, and, further, that if by the proceedings had the beneficiary was not actually changed on the books of the company, yet by what the said Eddie M. Jewell did and attempted to do, and the notification given by him to the company, the said beneficiary was changed in justice and equity, and that the amount of the policy should be paid to her. In pursuance of this demand, on the 7th day of September, 1906, the said Jessie M. Jewell filed in the chancery court of Geneva county, Ala., a bill of complaint against the insurance company and said Mrs. Frink for the purpose of enforcing her claim and right to the proceeds of said policy of insurance. Thereupon the insurance company, on the 2d day of November, 1907, filed its bill of interpleader against both Mrs. Frink and Mrs. Jewell in the Circuit Court of the United States for the Northern District of Florida. To this bill both the defendants named, Mrs. Frink and Mrs. Jessie M. Jewell, entered appearances.

Mrs. Frink and her husband on the 6th day of January, 1908, filed a demurrer to this bill of interpleader. Afterwards, on the 4th day of February, 1908, the complainant on leave of the court filed an amendment to its original bill, on which the court ordered notice to be served upon counsel for the parties defendant and directed them to plead on or before the next rule day, February, 1908. On February 17, 1908, Mr. and Mrs. C. D. Frink filed an answer, asserting their title to the fund in controversy, and reciting facts tending to attack and controvert the right of Mrs. Jessie M. Jewell. Afterwards, on leave of the court, on the 17th day of March, 1909, complainant filed another and lengthy amendment to the original bill of complaint, therein setting out in considerable detail the several contentions of Mrs. Frink and Mrs. Jessie M. Jewell as to their rights to receive the amount of the policy issued on the life of Eddie M. Jewell.

Mrs. C. D. Frink followed this bill with an answer on the 22d day of March, 1909, objecting and protesting against the defendant Mrs. Jessie M. Jewell being permitted to file any answer herein for certain reasons given. Thereupon the judge caused to be entered an order to the effect that Mrs. Jessie M. Jewell should not be allowed to file an answer until she had given a bond for costs on or before the 1st day of May next following. On the 14th day of April, 1909, Mrs. Jessie M. Jewell filed an answer to the bill of complaint, therein, among other matters, charging that the said Eddie M. Jewell in his lifetime changed the beneficiary in the policy from Mrs. C. D. Frink to Jessie M. Jewell, which change was made in writing, signed and

executed by the said Eddie M. Jewell, duly attested and witnessed; that the same was duly mailed to and received by the said insurance company; and setting forth other facts and circumstances in connection with the alleged change of beneficiary, and particularly the following:

"This respondent, further answering, says that on the 26th day of May, 1908, the said Eddie M. Jewell was shot, and lived thereafter until the 2d day of June, 1908, on which day he died; that from the date upon which he was shot until the date of his death he was seriously ill; that during his said illness he requested that the said policy in question be turned over to his wife, and that it was his express will and desire that she, his wife, now this respondent, should have the full amount of the proceeds of said policy in the event of his death; that during the time of his said illness the said Mrs. C. D. Frink stated that she was perfectly willing for the amount of said policy to be turned over to his wife, now this respondent; that the said Mrs. C. D. Frink soon after his death often said that she was glad that the said policy was changed and left to be paid to his wife, now this respondent, for the reason, as she, the said Mrs. C. D. Frink, stated, that she (the said Mrs. C. D. Frink) well knew that she, Mrs. Jessie M. Jewell, would thereby be well provided for, and further stated that under no circumstances would she (Mrs. C. D. Frink) interpose claim to said policy."

On the 27th day of April, the complainant filed replications to the answers of Mrs. Jessie M. Jewell and Mrs. C. D. Frink and her husband. On the 5th day of May, Mr. and Mrs. C. D. Frink filed a paper styled "a replication" to the answer of Mrs. Jewell, putting the same in issue as to facts. On the 4th day of June, 1909, counsel for C. D. Frink and Mrs. C. D. Frink filed a notice, directed to the counsel for Mrs. Jessie M. Jewell, that on Friday, June 11th, the case would be called up for final hearing, and counsel at the same time made affidavit that he had mailed a copy of said notice to counsel for Mrs. Jewell. On the 29th day of June the case was taken up for final hearing, and thereupon the solicitor for Mrs. C. D. Frink filed certain exhibits in support of the claims of the said Mrs. Frink, and the court decreed as follows:

"This cause coming on for final hearing upon bill of complaint, and answers and amended answers by the defendants C. D. Frink and Mrs. C. D. Frink, and answers and amended answers by the defendant Jessie M. Jewell, and upon replication of the complainant to said answers and amended answers, the court, after consideration of same, and after argument made by solicitor for the defendants C. D. Frink and Mrs. C. D. Frink, it appearing that due and timely notice had been served upon the defendant Jessie M. Jewell, and her solicitor of record, W. W. Flournoy, of this hearing, and it further appearing that this court had heretofore made an order allowing the complainant to require the defendants C. D. Frink and Mrs. C. D. Frink and Jessie M. Jewell to interplead, and that the complainant, the said State Life Insurance Company, should pay into the registry of this court the amount due upon the policy of insurance, the subject-matter of this suit, and it further appearing that said complainant, the State Life Insurance Company, did on the 17th day of March, 1909, pay into the registry of this court the sum of six thousand and forty-four dollars (\$6,044), the same being the principal and interest due on said policy to said date, the court, after consideration of said bill, answers, and amended answers, and replication thereto, after argument on behalf of the solicitor for the defendants C. D. Frink and Mrs. C. D. Frink, being advised of its opinion, it is hereby ordered, adjudged, and decreed: First, that the State Life Insurance Company, the complainant, having paid the proceeds of the policy into the registry of the court, as per order of this court, they, the said State Life Insurance Company, are discharged from further liability to any of the parties to this suit; second, that the defendant Mrs. C. D. Frink, the beneficiary named

In said policy, is entitled to the proceeds of the said policy of insurance; third, that the clerk of this court shall pay over to J. W. Kehoe, solicitor of record for the defendants, C. D. Frink and Mrs. C. D. Frink, the full sum of six thousand and forty-four dollars (\$6,044), less the costs in her behalf expended, and take his receipt therefor; fourth, that the costs of these proceedings be and they are hereby taxed against the defendants C. D. Frink and his wife, Mrs. C. D. Frink. Done and ordered and decreed at chambers, in the city of Pensacola, state of Florida, on this the 29th day of June, 1909.

"Wm. B. Sheppard, Judge."

With this full history of the pleadings and proceedings, it is apparent that at the time of the alleged final hearing the case, while ready for a decree between the complainant and the two defendants, was not ripe for final hearing and decree between the contesting defendants, unless, indeed, the defendants Frink had withdrawn their replication to Mrs. Jewell's answer. Mrs. Jewell's answer sets up facts which she was entitled to prove and have the benefit of. When it was put at issue by the complainant April 27, 1909, and the contesting defendant Frink on May 5, 1909, Mrs. Jewell had three months thereafter in which to take evidence to prove the facts alleged in her answer. Equity rule 69. This time does not appear to have been waived.

Counsel for appellees Frink contends that the court can decree the complainant's right to interplead and the claimant's right to the fund, at the same time citing 11 Enc. Pl. & Pr. This can only be true when the case is ripe for hearing and decision. See 11 Enc. Pl. & Pr. 473.

Counsel for same appellees say in their brief:

"The burden of the proof was upon Jessie M. Jewell, the interposing claimant. She offered nothing to support the allegations of her answer, and the allegations of her answer, even had they been supported by proof, or even taken or accepted as true, were not sufficient to warrant the court in making a decree in her favor."

The last part of this excerpt non sequitur.

The decree appealed from should be reversed, and the cause remanded, with instructions to fix a reasonable time within which parties shall take their evidence and thereafter proceed according to equity and good conscience.

And it is so ordered

QUINALTY et al. v. TEMPLE et al.

(Circuit Court of Appeals, Fifth Circuit. February 15, 1910.)

No. 1,881.

EVIDENCE (§ 106*)—TITLE—RECITALS IN DEED—EVIDENCE OF CHARACTER OF GRANTOR.

In an action of trespass to try title, where the record title was in plaintiffs' ancestor, and defendants claimed through a deed from one since deceased, who was a stranger to such title, but whose deed recited that the land had been conveyed to him by plaintiffs' ancestor by deed of a certain date, evidence of the general good character and reputation for truth and veracity of such grantor is not admissible in support of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

such recital, nor is evidence of the character and habits of plaintiffs' ancestor.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 183; Dec. Dig. § 106.*]

In Error to the Circuit Court of the United States for the Eastern District of Texas.

Action by Thomas Quinalty and another against T. L. L. Temple and others. Judgment for defendants, and plaintiffs bring error. Reversed.

Oliver J. Todd and John Hamman, for plaintiffs in error.

F. D. Minor (Geo. C. Greer and Greer, Minor & Miller, on the brief), for defendants in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge. This is an action to recover 1,107 acres of land situated in Sabine county, Tex., brought in the court below by Thomas Quinalty and Charles Quinalty against T. L. L. Temple and others. John L. Quinalty obtained title to the land from the Mexican government in 1835, and he died about the year 1855. The plaintiffs were proved to be his sons and only heirs. The record shows that the plaintiffs are entitled to recover the land, if it was owned by John L. Quinalty at the time he died. The case turns on the question whether John L. Quinalty died seised and possessed of the land.

The defendants contend that he parted with the title before he died. To sustain this contention, they offered a deed of John Forbes to D. C. Barrett, dated February 17, 1837, conveying the land in question. John L. Quinalty is not a party to the deed, and, standing alone, it had no effect on his interest. This deed, however, contains a recital which, if true, shows that Quinalty had conveyed the land in question to Forbes. The recital refers to the land as "being the same land which he [Forbes, the vendor] purchased of John S. Quinalty by deed, bearing date October 7, 1836, now delivered to the present purchaser, who hereby acknowledges the receipt thereof." (The variance in the initial of the middle name—"S" for an "L"—was treated as immaterial.) This deed was received in evidence, and the recital submitted to the jury as a circumstance to be considered by them in determining the question whether or not Quinalty, in his lifetime, had parted with the title. And the learned trial judge instructed the jury that, if he had not parted with the title, the plaintiffs were entitled to recover, and added:

"But, if you believe from the evidence in this case, taking all the circumstances into consideration as a whole that Quinalty had parted with his title, your verdict will be for the defendants."

The question submitted to the jury, therefore, was whether the recital in the deed to Barrett, that Quinalty had conveyed the land to Forbes, was true or untrue. Unless the jury was satisfied of its truth, they were instructed to find for the plaintiffs.

The defendants, to sustain and support the truth of the recital, were permitted to prove, against the objection and exception of the plain-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tiffs, that John Forbes, who conveyed to Barrett, was a man of good reputation "for honesty and fairness in his business transactions," and that the witness never heard "his integrity in land transactions questioned." Evidence as to the general character of John Forbes was offered and received, of course, on the theory that a man of good character for fairness in business transactions would not probably represent by a recital in a paper signed by him that the land had been conveyed to him, when it had not been. If, as a witness on the stand, he had testified to the recited facts, the same argument would apply—that his statement would be supported and strengthened by proof of his general good character for truth and veracity; yet it is well settled that evidence of the good character of a witness, whose character has not been attacked, is not admissible. Until an attack is made on it, the character of a witness is not in question. 2 Wigmore on Evidence, § 1104. The same is true as to the character of a defendant in a civil suit, where the nature of the action itself does not involve his general character; therefore evidence of his character cannot be received to contradict an imputation of dishonesty or fraud. *Smets v. Plunket*, 1 Strob. (S. C.) 372; *Roach v. Crume* (Tex. Civ. App.) 41 S. W. 86; *Fowler v. Ætna Fire Ins. Co.*, 6 Cow. (N. Y.) 673, 16 Am. Dec. 460; *Gebhart v. Burkett*, 57 Ind. 378, 26 Am. Rep. 61; *Porter v. Seiler*, 23 Pa. 424, 62 Am. Dec. 341; *McCowen v. Gulf, C. & S. F. Ry. Co.* (Tex. Civ. App.) 73 S. W. 46; *Timmony v. Burns* (Tex. Civ. App.) 42 S. W. 133; *Barton v. Thompson*, 56 Iowa, 571, 9 N. W. 899, 41 Am. Rep. 119; *Elliott v. Russell*, 92 Ind. 526; *Gertz v. Fitchburg R. R. Co.*, 137 Mass. 77, 50 Am. Rep. 285.

The recital of an alleged fact by John Forbes in a deed places him, to some extent, in the attitude of a witness; it is a written statement made by him which is in evidence. But, if we consider his position analogous to that of a witness, his evidence could not be bolstered and supported, no attack having been made on him, by proof of his general good character. Forbes, in his deed to Barrett, in which the recital is made, warrants the title conveyed by him. To that extent, he, or his estate, he being dead, may have an interest in the result of the suit. This makes his position somewhat analogous to that of a party to the suit. It is well settled that a party to a civil suit cannot offer proof of his general good character, it not being attacked or directly in issue, even to rebut an imputation of dishonesty or fraud. We see no reason for making a distinction between the position of Forbes and that of a witness or a party to the suit. The reasons for rejecting such evidence are equally applicable to him as a warranting vendor whose recitals of fact are in evidence. Evidence of character in such cases has but a remote bearing as proof to show that the act in question has or has not been committed. It is uncertain in its nature, because true character is ascertained with difficulty, and those who are called to testify are reluctant to disparage the influential and often too willing to disparage one under a cloud. At best, such evidence is a mere matter of opinion, and, in matters of opinion, witnesses are apt to be influenced by prejudice or partisanship, of which they may be unconscious, or by the opinions of those who first approach them on the subject. The introduction of such evidence, in civil cases, to bolster the character of parties

and witnesses who have not been impeached, would make trials intolerably tedious and greatly increase the expense and delay of litigation. The rule that would admit evidence of the good character of the writer of the deed in question here would admit it as to the writer of any paper offered, whose statement was contested by other proof or circumstances. The fact that a witness or a written statement in evidence is contradicted by other evidence in the case does not put the veracity of the witness or the writer in issue. The purpose of the contradicting evidence is to show that the witness or writer is not to be believed in this instance. The reason why he is not to be believed is not important. It may be his forgetfulness or mistake, or that he is deceived. The disbelief sought to be produced by the conflicting evidence is perfectly consistent with an admission of the witness' or the writer's general good character for veracity; and, until the character of the witness or writer is assailed, it cannot be fortified by evidence. *Gertz v. Fitchburg R. R. Co.*, 137 Mass. 77, 78, 50 Am. Rep. 285; *Tedens v. Schumers*, 112 Ill. 263, 266.

Against the objections and exceptions of the plaintiffs, the defendants were permitted to offer evidence to show the character and habits of John L. Quinalty, the ancestor of the plaintiffs. The witnesses testified that he was of a roving disposition; that he did not care for anything; that he did not accumulate, but spent as fast as he made; that he ran horses across the river to avoid paying duty on same; that he danced, drank whisky, played the fiddle, etc. The tendency and purpose of the evidence was to show that he was thriftless and dissolute. The theory upon which it was received is probably best shown by an excerpt from the brief of the learned counsel for the defendants in error:

"It is believed that all of this evidence was relevant and material, the question for the jury being: Is it probable, under all the facts and circumstances in evidence, that the recital of John Forbes in his deed to D. C. Barrett as trustee is true? Evidence of the traits, characteristics, propensities, habits, and general manner of life of Quinalty was very material and relevant upon this issue."

The idea intended to be fixed on the minds of the jury was that a man like Quinalty would not have held the title to the land, but would have sold it. To adopt the words of the Supreme Court, in *Xenia Bank v. Stewart*, 114 U. S. 224, 231, 5 Sup. Ct. 845, 849, 29 L. Ed. 101:

"The evidence offered was inadmissible, because too remote and conjectural. The law requires an open and visible connection between the principal and evidentiary facts and the deductions from them, and does not permit a decision to be made from remote inferences."

In *Thompson v. Bowie*, 4 Wall. 463, 18 L. Ed. 423, the issue was whether certain promissory notes were given for a gambling debt, and testimony was offered to prove that the maker of the notes was, on the day of the date of the notes, intoxicated, and that, when intoxicated, he had a propensity to gamble. The judgment of the Circuit Court was reversed for receiving this evidence.

We cannot consent to the view that the traits, characteristics, propensities, and general manner of life of Quinalty were material and relevant upon the issue submitted to the jury. The evidence was re-

mote and conjectural. The fact that he drank whisky and played the fiddle no more tends to prove that he conveyed the land to John Forbes than proof that he kept sober and said his prayers would prove that he did not convey it.

We are of opinion that the trial court erred in overruling the objections to the evidence.

We express no opinion on other questions argued by counsel, as they may not be again presented in the same aspect.

The judgment of the Circuit Court is reversed, and the cause remanded for a new trial.

CHICAGO, R. I. & P. RY. CO. V. HALE

(Circuit Court of Appeals, Eighth Circuit. February 14, 1910.)

No. 3,003.

(Syllabus by the Court.)

1. EVIDENCE (§§ 471, 508*)—EXPERT AND OPINION TESTIMONY—TEST OF ADMISSIBILITY.

The general rule is that witnesses must state facts, and may not state their opinions.

There is an exception to this rule to the effect that the opinions of witnesses who possess peculiar skill or knowledge may be received when the facts are such that persons without such skill or knowledge are likely to prove incapable of forming a correct judgment relative to the matter in hand without such opinions.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149-2151, 2311; Dec. Dig. §§ 471, 508.*]

2. DAMAGES (§ 173*)—PERSONAL INJURY—EVIDENCE OF EARNINGS ADMISSIBLE—PROFITS OF LABOR AND CAPITAL COMBINED INADMISSIBLE.

In an action for damages for personal injury, the profits of a business enterprise in which are combined capital and labor do not constitute a sound basis for estimating the earning capacity of him who furnishes the labor.

But one whose earnings are derived from the use of his labor, skill, or knowledge without the use of substantial capital may prove the amount of such earnings at and for a reasonable time before the occasion of his wrongful injury and the decrease thereof caused by the injury.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 490-492; Dec. Dig. § 173.*]

3. RAILROADS (§ 282*)—PERSONAL INJURY—FACTS—CONCLUSION.

H. made a contract with a railroad company to load cars with gravel in a gravel pit. The railroad company placed the empty cars on a spur which extended down into the gravel pit on an inclined plane. H. examined the brake upon one of them, and it appeared to be sound, and he then undertook to lower two of them into the pit by the use of the brake. The brake was so inefficient that it did not retard the cars at all and he was injured.

Held, there was no error in the refusal of the court to instruct the jury for the defendant.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 282.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

4. APPEAL AND ERROR (§ 273*)—CHARGE—GOOD IN PART—GENERAL EXCEPTION FUTILE.

A general exception which specifies no ground to a charge or a portion of a charge to a jury that embodies several propositions of law is futile if any of the propositions are sound.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1620-1622; Dec. Dig. § 273;* Trial, Cent. Dig. § 689.]

5. TRIAL (§ 261*)—REFUSAL OF REQUEST CONTAINING SOUND AND UNSOUND PROPOSITIONS.

Where a request for an instruction contains several propositions of law, any one of which is unsound, it is not error to refuse it.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 660, 671, 675; Dec. Dig. § 261.*]

In Error to the Circuit Court of the United States for the Western District of Oklahoma.

Action by John R. Hale against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

M. A. Low, C. O. Blake, H. B. Low, and W. C. Stevens, on the brief for plaintiff in error.

R. N. McConnell and B. M. Parmenter, on the brief for defendant in error.

Before SANBORN and ADAMS, Circuit Judges, and McPHERSON, District Judge.

SANBORN, Circuit Judge. The plaintiff below, John R. Hale, made a written agreement with the Chicago, Rock Island & Pacific Railway Company to load gravel into its cars at certain traps on a spur track which extended down into its gravel pits near Lawton, in the state of Oklahoma, for 15 cents per cubic yard. The spur connected with the main track, and ran down into the gravel pits upon an inclined plane a distance of about 1,200 feet. In these pits there were traps for loading the cars. The practice of the railroad company was to set several empty cars on the spur track upon the brink of the pits so that the plaintiff could let them down to the traps from time to time as he wanted to load them without the use of an engine. When the loading of a car was about completed at one of the traps on the 27th day of September, 1905, the plaintiff went up to the place where there were 10 or 12 empty cars upon the spur track for the purpose of letting some of them down the inclined plane, a distance of about 100 feet, to the trap that he might load them. He found a large heavy car with a brake that upon careful examination appeared to be good and a small car just back of it whose brake staff was broken. He separated these cars from those behind them, mounted the larger car, started the two cars down the incline, and then by the use of a stick and with his hands he tried in vain to retard and control their motion down the hill, and the forward car struck the loaded car with such violence that it threw him against a timber, and seriously injured him. He brought an action against the railway company, and recovered a judgment which this writ was sued out to reverse.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The plaintiff testified that he had been working at the gravel pits letting down cars as occasion required for two months; that he had safely lowered two cars down the spur track before this occasion where he had one good brake and one that was useless. It is specified as error that, after the plaintiff had given this testimony, the court permitted him to make the following answer over the objections of the defendant that his testimony was incompetent, immaterial, irrelevant, that no proper foundation was laid for it, and that the question called for the conclusion of the witness:

"Q. I will ask you now whether based on your experience and observation there at the gravel bed two cars could be handled safely down that incline when one brake was a good one and the brake on the other car was a bad one?"

"A. Yes, sir; we took one good car and handled a bad one, let two down at once."

The general rule is that witnesses must testify to the facts within their knowledge, and that they may not state their opinions. But there is a well-established exception to this rule to the effect that the opinions of witnesses who possess peculiar skill or knowledge may be received when the facts are such that persons without such skill or knowledge, and presumptively the jurors, are likely to prove incapable of forming a correct judgment relative to the matter in hand without the aid of such opinions. *Chicago Great Western Ry. Co. v. Price*, 97 Fed. 423, 426, 38 C. C. A. 239, 242; *Lake v. Shenango Furnace Company*, 160 Fed. 887, 894, 88 C. C. A. 69, 76; *United States Smelting Co. v. Parry*, 166 Fed. 407, 411, 92 C. C. A. 159, 163. The jurors in this case who were undoubtedly without the special knowledge which the witness had of the grade of the spur track and of the operation of two cars down the incline with a single brake were incapable of forming a correct judgment whether or not such a method of operation was reasonably safe while the experience and knowledge of the plaintiff enabled him to do so. His opinion, therefore, fell under the exception to the rule, and it was properly received in evidence.

He testified that he resided on a farm at the time of the accident; that for three years before it he had not been in any business particularly; that he had been looking after the work of loading the cars for the railroad company in their gravel pits at this place for about two months; that, when he was short a man, it was his habit to operate a wheeler or to do any work that it was necessary to have done; that he had been engaged in contracting with various parties for the performance of work for about 20 years; and that he had worked with and in the place of his men in the same way during that time that he was doing when he was engaged in the performance of this contract. It is specified as error that in this state of the record the court permitted the witness over the objections of the defendant to answer these questions:

"Q. I will ask you if you know what was your fair and average earning capacity on the 25th day of September, 1905, and just prior thereto? (Objected to as incompetent, irrelevant, immaterial, calling for conclusion of witness, not proper element of damages.) * * * A. Yes, sir; I know. * * * Q. I will ask you to state to the jury what you were earning. (Objected to as incompetent, irrelevant, immaterial, not proper measure of damages, calling for conclusion, speculative.) * * * A. About \$12 a day."

The admission of this testimony is assailed in argument in the light of the facts which were subsequently proved at the trial that the plaintiff had in his employment 15 men whom he paid \$1.75 per day, and 4 or 6 teams that cost him \$3 per day, and 2 teams of his own, and counsel invoke the conceded rule that the profits of a business enterprise combining capital and labor do not constitute a legitimate basis for estimating the earning power of one personally contributing the element of labor where he has been wrongfully injured so as to be unable as usual to furnish that element. *Boston & Albany R. R. Co. v. O'Reilly*, 158 U. S. 334, 336, 15 Sup. Ct. 880, 39 L. Ed. 1006; *Leeds v. Metropolitan Gaslight Co.*, 90 N. Y. 26, 29; *Masterton v. Mt. Vernon*, 58 N. Y. 391, 396; *Johnson v. Manhattan Railway Company*, 52 Hun, 111, 114, 4 N. Y. Supp. 848; *Bierbach v. Goodyear Rubber Company*, 54 Wis. 208, 211, 11 N. W. 514, 41 Am. Rep. 19.

But the ruling of the court must be judged by the state of the record when it was made. At that time there was no evidence before the court that the plaintiff had combined any substantial capital with his labor in loading the cars. The contract that he was engaged in performing and the fact that other workmen were assisting him were the only pertinent facts in the record, and the case as it then stood fell fairly within the rule that one whose earnings are derived from his labor, skill, or knowledge, without the use of substantial capital, may prove the amount of those earnings at and for a reasonable time anterior to the occasion of his wrongful injury and the decrease of these earnings necessarily effected by the injury. *Ehrgott v. Mayor*, 96 N. Y. 264, 276, 48 Am. Rep. 622; *Winter v. Central Iowa Railway Co.*, 80 Iowa, 443, 45 N. W. 737, 738; *Walker v. Erie Railway Co.*, 63 Barb. (N. Y.) 260, 265; *Finken v. Elm City Brass Co.*, 73 Conn. 423, 47 Atl. 670, 671. There was no error in the ruling of the court here challenged. Counsel insist that the refusal of the court to instruct the jury to return a verdict for the defendant was error: (1) Because the plaintiff agreed in the written contract to hold the defendant harmless from all damages caused by injuries growing out of the negligence of the defendant or its servants, but a careful reading of the contract has convinced that the agreement of indemnity which it contains was limited and was intended to be restricted to damages from injuries to the officers, agents, and servants of the plaintiff, and that it did not extend to damages from injuries to him. (2) Because the defective brake was not the proximate cause, and the act of the plaintiff in attempting to lower two cars with one brake was the intervening independent cause of the injury, but there was evidence that these cars were empty, that two cars previously had been lowered into the gravel pit safely with one brake, and that the brake in question was so defective that it had no effect whatever to retard the cars so that its defect would have been equally futile if the plaintiff had lowered but one car with it. (3) Because the injury could not have been reasonably anticipated from the defective brake, but the plaintiff had contracted to load the cars in the pit and the defendant had agreed to furnish them. It placed them, not at the traps in the pit, but above upon the spur track, whence it knew that the plaintiff must lower them by hand, and that he would

naturally lower them by the use of the brakes upon them, which when in proper condition were safe and effective for this purpose. The duty of reasonable inspection and test of these brakes to learn whether they were in proper condition for such work was upon the company, for it agreed to furnish the cars for this purpose. There was substantial evidence that an inspection and test of this brake when the car was moving would have disclosed the hidden defect which caused the injury, and the natural and probable effect of placing a car on the brink of this pit with a brake apparently sound, but actually useless, was injury to him who attempted to lower the car to the trap for the purpose of loading it. (4) Because the uncontradicted evidence is alleged to be that the plaintiff was guilty of negligence which contributed to his injury, but the record fails to sustain this averment. It contains evidence that the plaintiff examined the brake with reasonable care before he started the car, and that it had the appearance of a safe and efficient instrument. The motion to direct the verdict for the defendant was therefore properly denied.

Several excerpts from the charge of the court and several refusals to give requested instructions are specified as error. But the charge covers eight printed pages of the transcript, and the only exception to it is in these words:

"To the giving of the charge as given by the court and to each and every part thereof the defendant objects and excepts."

Many sound and pertinent propositions of law and statements of fact are contained in the charge and a general exception which specifies no ground to a charge or a portion of a charge to a jury which embodies several propositions of law is futile if any of the propositions are sound. *St. Louis, I. M. & S. Ry. Co. v. Spencer*, 71 Fed. 93, 95, 18 C. C. A. 114, 116; *Union Pacific R. Co. v. Thomas*, 152 Fed. 365, 372, 81 C. C. A. 491, 498.

The defendant made a single request that the court give nine separate instructions which cover three printed pages of the record. The court denied that request, and the defendant objected and excepted to that denial. This exception was futile because one of the nine requests was that the court should instruct the jury to return a verdict for the defendant, and this request was unsound. Where a request for an instruction contains two or more propositions of law, one of which is unsound, there is no error in the refusal to grant it. *United States v. Hough*, 103 U. S. 71, 72, 73, 26 L. Ed. 305; *Monarch Cycle Co. v. Royer Wheel Co.*, 44 C. C. A. 523, 526, 105 Fed. 324, 328; *Chicago Great Western Ry. Co. v. Roddy*, 131 Fed. 712, 718, 65 C. C. A. 470, 476.

The judgment below must be affirmed; and it is so ordered.

FRIES-BRESLIN CO. v. BERGEN et al.

(Circuit Court of Appeals, Third Circuit. November 29, 1909.)

1. INSURANCE (§ 104*)—BROKERS—DUTIES AND LIABILITIES TO PRINCIPAL—ACTION FOR NEGLIGENCE.

Plaintiff, a manufacturing company, employed defendants, who were insurance brokers, to secure good insurance on its property, and they acted under such employment for several years, renewing the insurance from time to time, and retaining the policies in their possession. During such time the president of plaintiff called upon them and stated that the company had given a mortgage on its entire plant, and desired the policies to take to the attorney for the mortgagee for the purpose of having an indorsement thereon making the loss, if any, payable to the mortgagee as his interest might appear. They were so indorsed and returned to defendants; no objection being made by the attorney to their form. Later the president again told defendants that plaintiff had made another mortgage "of the same kind." The policies were of the standard form, containing a provision that they should be void if the subject of insurance was personal property and it should become incumbered by chattel mortgage. *Held*, that there was nothing in plaintiff's communication to defendants to advise them that the mortgages covered personal property, so as to affect the validity of the policies, especially as they were accepted without objection by the mortgagee's attorney, and that defendants were under no duty to examine the records, and were not chargeable with negligence in permitting the policies to stand or renewing the same when they expired.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 179; Dec. Dig. § 104.*]

2. INSURANCE (§ 104*)—BROKERS—DUTIES AND LIABILITIES TO PRINCIPAL.

Insurance brokers, employed by an owner of property to effect insurance thereon, which they do, the policies being of usual and standard form, are under no duty to inform the insured as to the provisions and conditions of the written policies unless requested; but it devolves upon the insured to inform himself in respect to the terms of the contracts.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 179; Dec. Dig. § 104.*]

3. COURTS (§ 354*)—FEDERAL COURTS—CONFORMITY TO STATE PRACTICE.

The procedure prescribed by the Pennsylvania practice act of April 22, 1905 (P. L. 236), giving a party requesting binding instructions, which have been refused, or the point reserved, the right to "move the court to have all the evidence taken upon the trial duly certified and filed, so as to become a part of the record, and for judgment non obstante veredicto upon the whole record," is adaptable to the federal courts, and one which the conformity statute (Rev. St. § 914 [U. S. Comp. St. 1901, p. 684]) requires Circuit Courts within the state to follow.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 934; Dec. Dig. § 354.*]

Conformity of practice in common-law actions to that of state court, see notes to *O'Connell v. Reed*, 5 C. C. A. 594; *Nederland Life Ins. Co. v. Hall*, 27 C. C. A. 392.]

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

Action by the Fries-Breslin Company against William Bergen and John A. Snyder. Judgment for defendants (168 Fed. 360), and plaintiff brings error. Affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Graham C. Woodward, Roger Foster, and Moses Jaffe, for plaintiff in error.

Frank R. Shattuck and Alex. Simpson, Jr., for defendant in error.

Before GRAY, BUFFINGTON, and LANNING, Circuit Judges.

GRAY, Circuit Judge. Suit in the court below was brought by the plaintiff in error, a corporation of the state of New Jersey, against the defendants, citizens of the state of Pennsylvania, to recover damages alleged to have been incurred by reason of defendants' negligence in the performance of their undertaking with the plaintiff to keep its property safely insured. The case was submitted to the jury, and resulted in a verdict in favor of the plaintiff. At the close of the evidence, the defendants requested the court to charge the jury that the verdict must be for the defendants. This was refused by the court, and, after the verdict, under the Pennsylvania practice act of 1905 (P. L. 286), the defendants requested the court to have all evidence taken upon the trial duly certified and filed, so as to become part of the record and moved for judgment non obstante veredicto. This motion was granted by the court below and judgment accordingly entered for the defendants, notwithstanding the verdict. To this judgment this writ of error has been sued out by the plaintiff below.

From the evidence certified in the record, it appears that, some years prior to October 3, 1904, the date of the fire in question, John N. Carroll, president of the plaintiff company, which was engaged in the manufacture of rugs in the city of Camden, in the state of New Jersey, on behalf of said company employed the defendants, as insurance brokers, to place insurance upon the buildings, fixtures of said company there situate, and upon its rugs and yarns, and other materials of manufacture. The amount of this insurance at first was about \$100,000, but there was thereafter an increase in the insurance to about \$300,000, which was supposed to be outstanding when the fire occurred. The policies taken out by the defendants pursuant to their instructions, which seem to have been, according to the witness Carroll, simply "to get us good insurance and at the best rate they could get," were kept by the defendant, presumably pursuant to an understanding to that effect on the part of the plaintiff, and were renewed or changed from time to time, as occasion required. The amount of premiums of about \$3,000 was paid in checks or notes to the order of the defendant, Bergen. The policies were issued by many companies, and were all of what is known as the standard form used in Pennsylvania and New Jersey, and contained the following clause required by that form:

"This entire policy, unless otherwise provided by agreement indorsed thereon or added thereto, shall be void * * * if the subject of insurance be personal property and be or become incumbered by chattel mortgage."

So far as appears from the record, at the time defendants were so employed by the plaintiff in 1893, and thereafter until April, 1902, about two years before the fire in question, there was no mortgage upon either its real or personal property. Somewhere about the last mentioned date, it appears by the testimony of Carroll, president of the plaintiff company, that he went to the defendants' office and told

them that they "had placed a mortgage on the place; that they had placed a mortgage of \$50,000 on the entire plant"; that he came for the purpose of getting the policies and taking them over to the attorney of a certain Mr. Fitzgerald, the mortgagee, for the purpose of having indorsed thereon, that "loss, if any, would be payable to said mortgagee as his interest might appear." A little more than a year thereafter when his second mortgage was made, he told the defendants that they "had placed another mortgage, the same as the first one but that the mortgagee did not want any policy. They said that was all right." The two defendants whose offices were in Philadelphia, also testified as follows: One of the defendants, Snyder, in reply to the question, "What knowledge had you of the character of the Wilson Fitzgerald mortgage which has been here referred to?" answered:

"The statement of Mr. Carroll, that he had placed a mortgage of \$50,000 on the property at Camden. Q. Did he state what was the character of the mortgage? A. No. sir. Q. When did you first learn that the Wilson Fitzgerald mortgage covered other than the buildings and machinery in the buildings? A. At a meeting of the adjusters after the fire."

He further testifies that the only information that he had in regard to this mortgage was that "Mr. Carroll came to our office and stated that a mortgage had been placed upon the property and he wanted the policies to take over to the attorney's office (in New Jersey) representing the mortgagee"; that he got them and took them over himself; that they were afterward brought back, a number of them having been indorsed as above stated, "loss, if any, payable to Wilson Fitzgerald."

The other defendant, Bergen, testifies that he first learned of the existence of the Fitzgerald mortgage about the time, or shortly after, it was created, "through Mr. Carroll, who told us that such a mortgage was created, and it was necessary to have the policy so indorsed." In reply to the question, "Did he say what that mortgage covered?" he answered, "I cannot positively say. I presumed at the time it was on the buildings and machinery;" that he knew of the sending of the policies over to Mr. Fitzgerald, or his counsel, for the purpose of having the indorsement of the loss payable on them; that Mr. Carroll took the policies away and also brought them back. Mr. Carroll on the other hand, testifies that he did not take the policies away, but that the defendants sent them to the attorney of the mortgagee in New Jersey at his request.

This is the substance of all the testimony, as disclosed by the record, bearing upon the information alleged in the statement of claim to have been given to the defendants, as to the character of these mortgages. There is positively no evidence that defendants were informed that these mortgages covered personal as well as real property. The mortgages were not produced, and they were only mentioned by the president of the company as incident to his request that the policies should be sent to the attorney of the mortgagee for the indorsement usual in such cases. It is insisted, however, by the plaintiff in error, that it was the duty of the defendants under their general undertaking as insurance brokers, to specially notify plaintiff in error of this condition of the policy in regard to chattel mortgages, and that, not having done so, they thereby permitted or induced the plaintiff to execute the mort-

gages referred to, including therein both real and personal property. The statement of claim contains no distinct charge of negligence on this ground, the only reference thereto being as follows:

"The plaintiff moreover avers that it had no knowledge of the terms and conditions of the said insurance policies, but acted on the sole advice of the said defendants, who were acting as its skilled insurance agents or brokers."

It is not stated in what respect plaintiff "acted on the sole advice of said defendants," but there is not a particle of evidence that defendants gave any advice in regard to the placing of the mortgages in question, or had any knowledge of the existence of such mortgages, other than as above referred to, or had any direct information from the plaintiff, or otherwise, that the said mortgages covered the personal property of the plaintiff. In the absence of such information, and without request or inquiry by the plaintiff in that regard we do not conceive it to have been the duty of the defendants, under the circumstances disclosed in this record to have specially informed plaintiff as to the existence in the standard policies of this proviso against chattel mortgages any more than it was their duty to inform plaintiff of the other numerous conditions embodied in such policy. The duty of the defendants as insurance brokers, was to place and keep placed the insurance he was instructed to secure on the property of the plaintiff, in reputable companies of good standing and at reasonable rates. They were agents of the plaintiff for that purpose. They did not make the contract with the insurance companies as agents on behalf of the plaintiff as their principal, but performed the brokers' duty of bringing the insured and the insurer into contractual relation. As such contractual party, it devolved on the plaintiff to inform itself of the stipulations and conditions contained in the contracts made between it and the insurance companies. As these contracts were in writing, it did not devolve upon the defendants, as brokers, to inform the plaintiff as to what these stipulations and conditions were, or explain their meaning, in the absence of a request so to do, or of an exigency created by some particular situation not disclosed in this record. It may be conceded however, as the learned judge of the court below concedes, that if the chattel mortgages were placed upon the property by the advice of the defendants, or they were afterward informed of their existence by plaintiff, and they in the face of this knowledge, secured new policies, or renewed or maintained policies, containing the prohibition against chattel mortgages resulting in avoiding all the insurance, the defendants would be liable for negligence. Or if, having the policies in their possession, they had been asked whether any proposed action on the part of the plaintiff was within the prohibition of the policies, they had answered falsely, or without duly informing themselves as to the fact, to the injury of the plaintiff, or if in any other respect where their counsel or advice, as to matters of fact, was to their knowledge relied upon by the plaintiff they had not used due care and diligence in giving such counsel or advice, they would be liable.

But negligence when averred as a ground of liability must be proved as a fact, and cannot be presumed in this case any more than in others.

The charge of negligence made by the plaintiff is expressly founded

on the averment that the defendants, when renewing, or changing or maintaining the policies from time to time, after the creation of the mortgages in question, had been informed by the plaintiff, or otherwise had knowledge, that said mortgages covered both real and personal property, and were chattel mortgages within the inhibition of the proviso in the policies as above quoted. The burden is upon the plaintiff to prove this averment as a matter of fact, and it has not been successfully sustained by the mere showing that, on a certain occasion after the creation of these mortgages, defendants were applied to by the president of the plaintiff company for the policies, for the purpose of having them delivered in another state to the attorney of the mortgagee, for inspection and indorsement as collateral security to the mortgage, it being conceded that no information was then or at any time given, as to the character of the mortgages, other than that it was upon the place or plant or property. Inasmuch as mortgages on real property are among the oldest forms of security for debt known to our laws, and that chattel mortgages are of comparatively recent origin and infrequent in comparison with the older real estate mortgages, the assumption would have been a natural one on the part of the defendants, that the mortgages incidentally referred to, but not produced were the ordinary real estate mortgages on the buildings, ground and plant of the plaintiff company. Clearly there was neither direct information that the mortgage included chattels nor information that should have put them upon inquiry as to its character. The defendants were still the brokers of the plaintiff, acting under its instructions, as to the renewal of policies whose stipulations and conditions it was bound to know. In this situation, the defendants, as said by the learned judge of the court below, were warranted in concluding that a renewal of the policies, in the form theretofore secured, would be a compliance with their duty as agents under the instructions of the plaintiff. Carroll did not call on them for information, or to know what he might do under the policies. He called to get the policies for his purpose, about which he had not consulted the defendants and merely told them what he wanted to do with the policies; that is, he wanted them as collateral for a mortgage he had placed on the plant and the mortgagee and his attorney accepted the same for that purpose.

This leads us to remark that the acceptance by the attorney of the mortgagee of these policies as collateral, so far from supporting the contention of the plaintiff, might well have assisted to confirm the assurance given by the absence of information to the contrary, that the mortgage referred to by Carroll was merely a real estate mortgage, or, at least, not one that would have vacated the policies that were accepted by the legal adviser of the mortgagee as collateral.

Moreover, it is not without significance that the plaintiff, in its statement of claim, has predicated its charge of negligence upon the express averment, that the defendants were informed or had knowledge that the mortgage placed upon the property some two years before the fire included certain chattels, as well as the real estate of the plaintiff. The language of the said statement of claim in this respect is as follows:

"The plaintiff avers that at the time of such employment it informed the defendants that the said property was incumbered by a mortgage which included in its lien all the real and personal property of the plaintiff and that subsequently when a second mortgage was negotiated it informed the defendants that the said property was incumbered by the mortgages which included in their lien all the real and personal property of the plaintiff, to wit, one mortgage to Wilson Fitzgerald in the sum of \$50,000 and one to John J. Burleigh in the sum of \$80,000, and defendants well knew that the said mortgages were outstanding and valid liens against all the real and personal property of the plaintiff company and were chattel mortgages as well as mortgages of the realty. It then and there became and was the duty of the defendants," etc.

The learned counsel of the plaintiff were correct in the theory upon which they sought to establish the liability of the defendants. We have already shown how far short of supporting this theory is the evidence disclosed by the record. Not only was there a variance between the probata and the allegata, but, as we have already indicated in our opinion, the things proved, even if properly averred, are not sufficient to warrant a finding by the jury of negligence on the part of the defendants.

We think, therefore, the court below did not err in granting the motion for judgment non obstante veredicto.

It is necessary, however, to notice the contention of the plaintiff in error, that the federal courts are without jurisdiction to entertain the motion for judgment non obstante veredicto, and the accompanying procedure prescribed by the Pennsylvania practice act of 1905. It is urged that this procedure is peculiar to the practice of the state courts and is required to be reviewed by courts specially named in the statute. This Pennsylvania practice act has been referred to, and has not infrequently been brought to the attention of this court in cases where the granting or refusal of judgments non obstante veredicto have been the subjects of review. The act enlarges the scope of the common law motion for judgment for plaintiff, notwithstanding the verdict for the defendant, by permitting it to be made by either plaintiff or defendant, when the verdict is against either. It is in general a more convenient method, so far as a defendant is concerned, of reaching practically the same result as was sought by a motion for a compulsory nonsuit, or for peremptory instructions at the close of the evidence, or by a motion in arrest of judgment, made by the defendant after the verdict or by the practice prevalent in the Pennsylvania courts, of directing a verdict for the plaintiff and reserving the question, whether there is any evidence in the case entitling the plaintiff to recover. We think, under the conformity provisions of section 914 of the Revised Statutes (U. S. Comp. St. 1901, p. 684), the Circuit Court was required to recognize the practice authorized by the said Pennsylvania act of 1905, there being nothing incongruous therein with the organization of the federal courts or their settled rules of procedure. It appears that under the Pennsylvania act a motion may be made for a new trial, simultaneously with a motion for judgment non obstante. The view taken by this court, that the judgment below should be affirmed, makes it unnecessary to consider the interesting question, whether the court below could have reserved the question of a new trial, to be disposed of in the event of a reversal.

The judgment of the court below is hereby affirmed.

MCFARLANE v. WADHAMS.

(Circuit Court of Appeals, Seventh Circuit. January 4, 1910.)

No. 1,560.

1. GUARANTY (§ 2*)—LAW GOVERNING—PLACE OF CONTRACT.

Where defendant wrote from Milwaukee, offering to become guarantor of a contract by which plaintiff was to furnish certain machinery to a corporation, which offer was accepted by letter addressed to defendant at Milwaukee, the contract of guaranty was a Wisconsin contract, and governed by the laws of that state.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 29; Dec. Dig. § 2.*]

2. FRAUDS, STATUTE OF (§ 108*)—CONSTRUCTION—CONTRACT OF GUARANTY.

The statute of frauds of Wisconsin, which provides that an agreement to answer for the debt of another shall be void, unless "such agreement or some note or memorandum thereof expressing the consideration be in writing and subscribed by the party to be charged therewith," does not require that the consideration shall be expressed in the main document or agreement, nor that it shall be stated in express terms; but it is sufficient if it appear by necessary inference from the terms of the writing.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 216-218; Dec. Dig. § 108.*]

3. FRAUDS, STATUTE OF (§ 108*)—SUFFICIENCY OF WRITING—STATEMENT OF CONSIDERATION.

Plaintiff contracted to build certain machinery for a corporation of which defendant was a stockholder; the contract containing no provision as to the terms of payment. While the contract was still executory, defendant, with full knowledge of the facts, wrote plaintiff, asking for certain terms of credit for the company, and offering to guarantee the bill, and plaintiff answered, acceding to the terms, and accepting the guaranty. *Held*, that the correspondence clearly disclosed by inference a good and valuable consideration for the guaranty, within the statute of frauds of Wisconsin requiring such consideration to be expressed in some written note or memorandum signed by the party to be charged, and that the guaranty was valid and enforceable.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 216-218; Dec. Dig. § 108.*]

Sufficiency of expression of consideration in memorandum within statute of frauds, see note to *Choate v. Hoogstraet*, 46 C. C. A. 183.]

4. GUARANTY (§ 61*)—DISCHARGE OF GUARANTOR—ACCEPTANCE OF NOTE BY CREDITOR.

A guarantor of the debt of another is not discharged from liability by the acceptance by the creditor of a note for the debt signed by both principal and guarantor; but the creditor may surrender such note and sue on the contract of guaranty.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 71; Dec. Dig. § 61.*]

In Error to the Circuit Court of the United States for the Eastern District of Wisconsin.

Action by Peter McFarlane against E. A. Wadhams. Judgment for defendant (165 Fed. 987), and plaintiff brings error. Reversed.

Plaintiff in error, hereinafter termed plaintiff, a citizen and resident of the state of Colorado, brought this action against defendant in error, hereinafter termed defendant, doing business as a sole trader under the name and style of McFarlane & Co., a citizen and resident of the state of Wisconsin, to re-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

cover a balance due for the iron work for a stamp mill made for and delivered to the Milwaukee Leasing Company at Denver, Colo. The allegations of the complaint are as follows, viz.:

On May 5, 1906, plaintiff, on request of one Tarbet, general superintendent of said Milwaukee Leasing Company, theretofore preferred, made by letter to said Tarbet, as such superintendent, a proposition to supply the iron work for a 20-stamp long-drop, Gilpin county type mill, at a cost of \$2,930, f. o. b. cars at Denver, Colo. Thereafter, and on May 14, 1906, the defendant, who was at the time one of the principal officers and the principal stockholder of said Milwaukee Leasing Company, telegraphed plaintiff: "Commence work on the stamp mills as per specifications." On the same day defendant wrote plaintiff from Milwaukee, Wis.: "I wired to-day to commence work on the stamp mills. This refers to the 20 stamps according to the specifications sent Mr. Tarbet." On May 17th thereafter plaintiff sent the following letter to Tarbet at Milford, Utah, at which place said Milwaukee Leasing Company was engaged in the mining business, viz.:

"Dear Sir: We received on the 14th a telegram from Mr. E. A. Wadhams to commence work on mill, which we immediately did. To-day we got Mr. Wadhams' letter confirming the telegram, and we are now hard at work filling the order and hope to ship within the specified time. In a few days we will have foundation plans, ready for mailing to you. In regard to payments, there has been nothing said thus far about that part of it, and I ask you to kindly write me and state how you would like to meet them. We would prefer to have some one man of your company, yourself or Mr. Wadhams, to become personally responsible. We ask this because we do not know anything about your organization or company; but we will await your letter of advice in regard to this before saying anything to Mr. Wadhams.

"Very truly yours,

McFarlane & Co."

To this letter the defendant, on May 28, 1906, writing from Milwaukee, replied as follows, viz.:

"Gentlemen: I am in receipt of your letter of May 17th, to Mr. Tarbet, at Milford. I note your remarks in regard to payment. The mill we purchased of the Power Mining Mach'y Co. we paid for some few weeks after the mill was in operation; i. e., two or three. We imagine that payments in that time for your mill would be satisfactory. I will say that I will personally guarantee the payment of this bill by the Milwaukee Leasing Company. Trusting this will be satisfactory and that you will make as early shipment as possible, I remain,
Yours truly,
E. A. Wadhams.

"E. A. W.—1."

Thereafter, on May 28, 1906, the plaintiff sent to defendant, at Milwaukee, Wis., the following letter, viz.:

"Dear Sir: We have yours of the 26th inst. in regard to the payments of your 20-stamp mill for Milford. We will say in reply that we note that you will personally guarantee the payments on contract, and we thank you for that favor; but we think the time you require is too long, as it may take from two to three months to erect the mill ready to run after it is on the ground. We do not object seriously to your proposition, but we think we are entitled to \$1,000 on account on receipt by you of invoice and bill of lading showing whole shipment. Trusting you may see your way clear to pay us that \$1,000 at that time, we are,

"Very truly yours,

McFarlane & Co."

The receipt by the respective parties hereto, respectively, of the telegram and letters above set out in due course of mail, is conceded. The complaint further alleges that the guaranty of defendant so made was accepted. It further alleges on information and belief that the contract so made was a Colorado contract; that, whether a Colorado or a Wisconsin contract of guaranty, it was valid. It is further stated that thereafter, and in pursuance of the said order and guaranty so made by defendant, plaintiff manufactured and delivered said iron work to the Milwaukee Leasing Company as agreed, and thereafter, on or about July 1, 1906, sent to defendant an invoice or bill for said sum of \$2,930 as per his contract; that on July 14, 1906, defendant wrote to plaintiff acknowledging the receipt of the letter last named and saying: "I

received a letter from Mr. Tarbet saying the mill has arrived and apparently all right. As soon as he checks up, will either send you some money on account, or send you paper you can use; possibly both." It is further alleged that thereafter, on September 12, 1906, the defendant wrote plaintiff inclosing a check or draft for \$475, being \$430 on account of the purchase price and \$45 interest, and two notes, signed by said Milwaukee Leasing Company, each indorsed by defendant, one for \$1,000 for three months, and the other for \$1,500 for four months. It is further alleged that said notes were respectively renewed from time to time; that the last renewal of the \$1,000 note was under date of March 15, 1907, and of the \$1,500 note, on January 15, 1907; that neither of said notes, nor any part thereof, has been paid; that there is now due and owing on the purchase price for said machinery, the sum of \$2,500, with interest on said \$1,000 from March 15, 1907, and on said \$1,500, from January 15, 1907; and that payment thereof has been demanded and refused. Wherefore he brings suit, etc.

To this complaint defendant filed his demurrer, which was sustained by the Circuit Court. No amendment having been made to the complaint, the same was on November 4, 1908, on defendant's motion, dismissed, and judgment for costs rendered. Whereupon, in due season, plaintiff sued out the writ of error upon which said cause is now before this court. The only error assigned is that the court erred in sustaining the demurrer.

Jackson B. Kemper, for plaintiff in error.

J. H. Marshutz, for defendant in error.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

KOHLSAAT, Circuit Judge (after stating the facts as above). The contract here in suit is a Wisconsin contract. After giving his terms, and acceptance thereof by defendant, plaintiff awoke to the fact that nothing had been said about time and manner of payment, and thereupon, on May 17, 1906, wrote Tarbet, whom he knew to be general superintendent of the Milwaukee Leasing Company, to state how the same were to be met, and to have the payment assumed by Tarbet or defendant, as he did not know anything about the Milwaukee Leasing Company. To this letter defendant replied from Milwaukee, giving two or three weeks after the mill was installed and put in operation as time for payment, and adding, "I will say that I will personally guarantee the payment of this bill by the Milwaukee Leasing Company," thus complying with plaintiff's request as to payment and guaranty. To this plaintiff replied, thanking defendant for that favor, and, while not objecting seriously to the time of payment, stating that he thought the time too long, and that he would be entitled to receive \$1,000 when whole shipment was shown, and adding, "Trusting you may see your way clear to pay us that \$1,000 at that time," etc., clearly thus accepting the terms of defendant's letter, and asking for the favor of an earlier payment of \$1,000. This request was in no way a condition imposed, but simply an appeal for the anticipation of the agreed time of payment. It is therefore apparent that the agreement was perfected at Milwaukee, and is, therefore, subject to the laws of Wisconsin. *Davis v. Wells*, 104 U. S. 159, 26 L. Ed. 686.

The Wisconsin statutes require that an agreement to become liable for the debt of another shall be void unless "such agreement or some note or memorandum thereof expressing the consideration be in writing and subscribed by the party to be charged therewith." For the defendant it is insisted that the facts at bar fail to take the case out of the statute, for the reason that the consideration is not, as defendant

claims, expressed in a writing signed by defendant. It will be observed that the statute does not in terms require that the consideration shall be expressed in the main document or agreement, but that it must appear "in some note or memorandum thereof" subscribed by the party charged therewith. *Singleton v. Hill*, 91 Wis. 51, 64 N. W. 588, 51 Am. St. Rep. 868. Nor is it necessary that the consideration for the undertaking should be stated in express terms. It is sufficient if it appear by necessary inference from the terms of the writings. *Houghton v. Ely*, 26 Wis. 181, 7 Am. Rep. 52; *Miami Co. Nat. Bank v. Goldberg*, 133 Wis. 175, 113 N. W. 391, 15 L. R. A. (N. S.) 1115, 126 Am. St. Rep. 967.

Since, in the present instance, no consideration is in terms expressed in the agreement of guaranty, it becomes necessary to consider all the facts, as disclosed in the correspondence, which are relied upon by plaintiff to make a complete contract of guaranty. Some point is made by plaintiff as to defendant's liability upon the original contract. While defendant, by the telegram of May 14, 1906, the letter confirmatory thereof of the same date, and the general circumstances attending the transaction, assumes to speak in his own name, nevertheless, plaintiff knew of his relation to the Milwaukee Leasing Company. He directed his correspondence to Mr. Tarbet, the superintendent of the company, and was aware of the fact that defendant was speaking for his company. We do not deem the position of plaintiff in this behalf well taken. The record, however, discloses the fact that defendant was placed in full possession of every step of the negotiations. He was advised that plaintiff was working upon the mill, and that, as matters stood at the time plaintiff's letter of May 17, 1906, was written, the Milwaukee Leasing Company, so far as the complaint discloses, was obligated to pay cash for the mill on delivery. The request for extension of time, and the guaranty, were parts of the same letter, made at the time when the contract was still executory. Plaintiff's proposition in the letter of May 17th covered both the fixing of the time of payment and the guaranty. Here there was clearly a good and valuable consideration necessarily inferred. The facts are such as to take the case out of both the statutes of Wisconsin and Colorado.

With reference to the giving of notes and the transactions incident thereto, it is the well-established rule of law that those acts did not constitute payment of the original account, or release defendant from his liability under his contract of guaranty. *Matteson v. Ellsworth*, 33 Wis. 488, 14 Am. Rep. 766; *Willow River Lumber Co. v. Luger Furniture Co.*, 102 Wis. 636, 78 N. W. 762; *Crocker v. Huntzicker*, 113 Wis. 181, 88 N. W. 232; *First National Bank of Pueblo v. Newton*, 10 Colo. 161, 14 Pac. 428; *Union Gold Mining Co. v. Rocky Mt. National Bank*, 2 Colo. 565; *The Kimball*, 3 Wall. (70 U. S.) 37, 18 L. Ed. 50.

The complaint offers to bring in the notes, and prays for judgment on the contract of guaranty. We are of the opinion that on its face the complaint states a good case, and the demurrer should have been overruled.

The judgment of the Circuit Court is reversed, with directions to overrule the demurrer.

TUTTLE BROS. & BRUCE v. CITY OF CEDAR RAPIDS, IOWA, et al.

(Circuit Court of Appeals, Eighth Circuit. February 21, 1910.)

No. 3,117.

*(Syllabus by the Court.)***1. CONTRACTS (§§ 75, 103*)—CONSIDERATION—PERFORMANCE OF LEGAL OBLIGATION—CONTRAVENTION OF LAW.**

A city had express power to approve and certify plats and to accept the dedication of, and to improve and repair, streets. It was its duty to approve and certify the plaintiffs' plat of a certain addition without compensation, but it declined to do so. Thereupon it covenanted to approve and certify the plat, and to accept the dedication of and to grade the streets and alleys shown thereon, in consideration of the undertaking of the plaintiffs to pay it \$2,250.

Held: (1) The city had power to make all the covenants contained in this agreement, and the contract was valid, although the covenant to approve and certify the plat was valueless, because it was its duty to do those acts.

(2) While the refusal of the city to certify and approve the plat without compensation was a clear breach of its duty, there was nothing violative of any moral or civil law, or of any rule of public policy, in its contract to discharge that duty, and to perform other acts which it was not required to do, in consideration of the plaintiffs' promise to pay the \$2,250.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 273, 468; Dec. Dig. §§ 75, 103.*]

2. MUNICIPAL CORPORATIONS (§§ 226, 265*)—"GOVERNMENTAL" AND "BUSINESS" POWERS—POWER TO ACCEPT AND GRADE STREETS IS A BUSINESS POWER.

Municipal corporations have two classes of powers—the one "governmental," in the exercise of which their officers may not bind the municipality beyond their terms of office; the other "business," or proprietary, in the exercise of which they are governed by the same rules as individuals or private corporations. A city exercises its business and not its governmental power in making a contract to accept the dedication of and to grade streets and alleys within its limits.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 645, 711; Dec. Dig. §§ 226, 265.*]

For other definitions, see Words and Phrases, vol. 4, p. 3140.]

Appeal from the Circuit Court of the United States for the Northern District of Iowa.

Bill by H. O. Tuttle and others, partners as Tuttle Bros. & Bruce, against the City of Cedar Rapids, Iowa, the Cedar Rapids Savings Bank, and J. M. Dinwiddie. Decree for defendants, and complainants appeal. Affirmed.

John N. Hughes (John A. Reed, on the brief), for appellants.

John M. Redmond and John D. Stewart, for appellees.

Before SANBORN, Circuit Judge, and RINER and WILLIAM H. MUNGER, District Judges.

SANBORN, Circuit Judge. This is an appeal from a decree which sustained a demurrer to and dismissed the bill exhibited by H. O. Tuttle, R. B. Tuttle, and George Q. Bruce, partners as Tuttle Bros. & Bruce, to avoid a contract between them and the city of Cedar Rapids,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and to enjoin the Cedar Rapids Savings Bank and J. M. Dinwiddie, its cashier, from paying to the city the sum of \$2,250, which by the terms of the contract it was entitled to receive from them. The bill disclosed these material facts: The complainants purchased a tract of land within the limits of the city of Cedar Rapids, platted it into lots, blocks, and streets, filed it with the city recorder, whose duties were those of the clerk of the city, and requested that the plat be considered and approved by the city council, and that the latter direct the mayor and recorder to certify the council's approval thereof, so that the plat could be recorded and lots could be sold according to it. Under the statutes of Iowa it was the legal duty of the city to approve this plat and to certify its approval to the recorder. Code Iowa 1897, § 916; *Giltner v. City of Albia*, 128 Iowa, 658, 105 N. W. 194. The city council refused to approve and certify the plat, so that it could be recorded, and the complainants brought an action for a mandamus to compel it to do so. While this action was pending the complainants and the city entered into a written agreement to the effect that the Savings Bank, which was authorized to collect the selling price of the lots in the addition, should pay to the city \$2,250 out of the first moneys which it received from such sales that should belong to the complainants, and that the city (1) would approve and certify the plat; (2) would accept the dedication of the streets, avenues, and alleys shown thereon; and (3) would establish grades of these streets, avenues, and alleys; would, within a reasonable time, expend the \$2,250 in grading; and would grade at its own expense the streets, avenues, and alleys portrayed by the plat. When the bill was filed the Savings Bank had collected from the sales of the lots \$2,250, which belonged to the complainant, the city had approved and certified the plat, but it had not performed its contract in any other respect.

Counsel for the complainants insist that the contract here in question is voidable, and that its performance should be enjoined, because, as they aver, it was without consideration. To the answer that one covenant or promise is a lawful consideration for another, and that for the covenant of the complainants to cause the \$2,250 to be paid to the city the latter agreed (1) to approve and certify the plat, (2) to accept the dedication of the streets and alleys shown thereon, and (3) to expend the \$2,250 in grading and to grade the streets and alleys, they reply that the first covenant of the city provided no consideration for the agreement, because it was the duty of the city to approve and certify the plat without compensation, that it refused to do so until it extorted from the complainants their agreement to pay it this \$2,250, and that these acts rendered the entire contract immoral, illegal, and against public policy, and that as to the other covenants of the city it had no lawful authority to make them. It was undoubtedly the duty of the city to accept and certify the plat, and if its covenant to do so had been the only consideration for the agreement there is no doubt that it would be without consideration and void. But the city owed the plaintiffs no duty to accept the streets and alleys, to grade them, or to expend the \$2,250 in the work of grading them (Code Iowa 1897, § 751); and its covenants to do these things provided ample consideration to sustain the agreement, unless they were ultra vires.

The city had express authority to establish, improve, and repair streets and alleys within its limits. Section 751, *supra*. Why was not this power ample to warrant it in making the covenants in question? Counsel answer: Because the city had the discretion to accept the dedication of and to grade the streets and alleys, or to refuse to do so, and an agreement so to do deprived it of that discretion, and was, therefore, beyond its powers; and they cite *Stewart v. City of Council Bluffs*, 50 Iowa, 668, 670, in support of this position, where an agreement of a city to build a ditch was stricken down upon the ground that a city may not deprive itself by such a contract of the future right to exercise this discretion. But that decision does not seem to have been followed or cited in subsequent cases. It is unique, does not commend itself to our judgment, and in the opinion upon which it rests the court conceded that the city had power to make an agreement with the contractor that he should grade one of its streets for it, and that if the city subsequently abandoned the improvement, and thus prevented the performance of the contract, it must respond in damages to the contractor for its breach of the agreement. If a city has power to make a binding contract, solvable in damages, that a third party shall grade one of its streets and it will pay him therefor, it is difficult to perceive why it has not equal power to agree to grade such a street itself in consideration of payment therefor by another.

The truth is that a city has two classes of powers—the one legislative or governmental, by which it controls its people as their sovereign; the other proprietary or business, by means of which it acts and contracts for the private advantage of the inhabitants of the city and of the city itself. In the exercise of powers which are strictly governmental or legislative the officers of a city are trustees for the public, and they may make no grant or contract which will bind the municipality beyond the terms of their offices, because they may not lawfully circumscribe the legislative powers of their successors. But in the exercise of the business powers of a city the municipality and its officers are controlled by no such rule, and they may lawfully exercise these powers in the same way, and in their exercise the city will be governed by the same rules, which control a private individual or a business corporation under like circumstances. In contracting to accept the dedication of streets and alleys, to establish their grades, and to grade them, a city is exercising, not its governmental or proprietary, but its business powers. The purpose of such contracts is not to govern the inhabitants of the city, but to secure a private benefit for the city and its people. The grant to this city of the power to accept the dedication of, to improve, and to repair the streets and alleys within its limits gave it plenary power to make the covenants in question in this case, or any other reasonable agreements relating to these subjects. *Illinois Trust & Savings Bank v. City of Arkansas City*, 76 Fed. 271, 281, 282, 22 C. C. A. 171, 181, 182, 34 L. R. A. 518, and cases there cited; *Omaha Water Company v. City of Omaha*, 147 Fed. 1, 5, 77 C. C. A. 267, 271, 12 L. R. A. (N. S.) 736; *Pike's Peak Power Co. v. City of Colorado Springs*, 105 Fed. 1, 11, 44 C. C. A. 333, 343.

There was nothing evil in itself or against public policy in the agreement. Concede that the city's refusal to approve and certify the plat

was a breach of its duty. Nevertheless its agreement to discharge that duty, and to do other acts which it was empowered, but was not required by the law, to perform, was not violative of any public policy or of any moral or civil law.

The result is that by the contract in hand the city gave three covenants, one of which was valueless and two of which were legal and valuable, for the plaintiffs' promise that the \$2,250 should be paid to the city; the plaintiffs were not induced to make this agreement by fraud, mistake, or accident; they knew it was the duty of the city to accept and certify the plat without compensation when they signed the contract; the covenants to accept and grade the streets and alleys constituted ample consideration for the plaintiffs' undertaking; and there is no equitable ground upon which a decree to avoid this contract or to enjoin its performance can lawfully stand.

The decree which dismissed the bill must accordingly be affirmed, and it is so ordered.

MAPES v. GERMAN BANK OF TILDEN, OF TILDEN, NEB.

(Circuit Court of Appeals, Eighth Circuit. February 14, 1910.)

No. 3,088.

(Syllabus by the Court.)

1. CORPORATIONS (§ 484*)—ULTRA VIRES—GUARANTY OR PAYMENT OF ANOTHER'S DEBT IS.

The guaranty or payment by a corporation, without benefit to itself, of the debt of another, in which it has no interest, is beyond its powers.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1815; Dec. Dig. § 484.*]

2. BANKRUPTCY (§ 316*)—CLAIMS PROVABLE—NOTE.

A corporation gave its promissory note to a bank for the indebtedness of third parties for which it was in no way responsible, and also for its own debt.

Held, to the extent of the amount of the debts of the third parties the note was invalid in the hands of the bank which knew these facts, and the claim of the bank against the estate of the bankrupt corporation must be reduced to the amount which the corporation owed the bank when the note was given and the interest thereon.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 476; Dec. Dig. § 316.*]

Appeal from the District Court of the United States for the District of Nebraska.

In the matter of the bankruptcy of the Hansen Mercantile Company. From an allowance of claim of the German Bank of Tilden, of Tilden, Neb., Burt Mapes, trustee in bankruptcy, appeals. Reversed and remanded, with directions.

E. G. McGilton (F. H. Gaines and Sidney W. Smith, on the brief), for appellant.

N. D. Jackson, H. C. Brome, and F. L. Putney, for appellee.

Before SANBORN and ADAMS, Circuit Judges, and McPHERSON, District Judge.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

SANBORN, Circuit Judge. Edward B. Hansen and H. M. Culbertson were the stockholders, and Hansen was the president, of the Hansen Mercantile Company, a corporation, which commenced business on September 1, 1907, and was adjudged bankrupt on April 4, 1908, on a petition filed December 10, 1907. The German Bank of Tilden, a corporation, presented, and the court below allowed, its claim against the estate of the bankrupt for \$6,360.20, upon a promissory note for \$6,610.20, dated November 20, 1907, upon which an indorsement of payment of \$260 had been made. There is some conflict in the evidence, but these are the facts which in our opinion the testimony establishes:

The consideration for this note of the corporation was: (1) A promissory note for \$760.20 and interest at 8 per cent. dated August 10, 1907, made by E. B. Hansen and H. M. Culbertson to Fred Ruegge, the former partner of Hansen, which the bank had bought, and which Hansen originally gave to Ruegge in part payment for his interest in their partnership property. (2) A promissory note for \$3,000 and interest at 8 per cent., dated August 20, 1907, made by E. B. Hansen, H. M. Culbertson, and Addie M. Culbertson, which Hansen gave to the bank for money he borrowed of it to pay his indebtedness to the Elkhorn Valley Bank, and \$2,700 of the proceeds of which were used for that purpose. The proceeds of this note were placed by the German Bank to the credit of, and were checked out by, E. B. Hansen under the name of "Hansen Merc. Co." in August, 1907, before the corporation commenced business, and while Hansen was conducting the business which he subsequently turned over to that corporation. (3) A promissory note of \$1,500 and interest at 8 per cent., dated August 10, 1907, payable to the German Bank, made by Louis Hansen, a brother of E. B. Hansen. (4) A promissory note of the Hansen Mercantile Company, given to the bank for an overdraft which it had made thereon.

The note for \$6,610.20 raised the legal presumption that the Mercantile Company was indebted to the bank in that amount. But the evidence is convincing that the corporation derived no benefit from, and that it never, for any valuable consideration, assumed or agreed to pay, either E. B. Hansen's note for \$760.20, or the \$2,700 used to pay Hansen's note to the Elkhorn Valley Bank, or Louis Hansen's note for \$1,500, or the interest on these amounts; and this fact necessitates a reduction of the claim of the bank by these amounts, and by \$260, which was indorsed upon the note when it was made, and renders the just amount of its claim \$1,322.32 and interest from November 20, 1907, at 8 per cent. per annum.

The officers of a trading corporation undoubtedly have authority to make and deliver its promissory notes for the just debts of the corporation, and the acts of such officers in this regard are presumed to be lawfully done, when no notice to the contrary is received by the holder of the paper. But it is beyond the powers of the corporation and of its officers alike to make accommodation paper, or to guarantee or to pay the obligations of others in which it has no interest, and from which it derives no benefit. *Park Hotel Company v. Fourth National Bank*, 30 C. C. A. 409, 414, 86 Fed. 742, 747, and cases there cited; *Bowen v.*

Needles National Bank, 94 Fed. 925, 36 C. C. A. 553; Merchants' Bank of Valdosta v. Baird, 160 Fed. 642, 645, 90 C. C. A. 338, 341, 17 L. R. A. (N. S.) 526. The officer of the German Bank who took this note for \$6,610.20 knew, and through him the bank itself knew, that Hansen gave it on behalf of his corporation to pay the notes of himself and of others which the bank itself owned, that this mercantile corporation derived no benefit from the payment of these notes, and that to the amount thereof its note must be invalid under the law in the hands of its payee. In this state of the case the bank assumed the burden and the risk of proving in the teeth of its knowledge that the note was given by the Mercantile Company for some legal consideration sufficiently beneficial to it to support its promise to pay these debts of others. It has not only failed to bear this burden, but the proof is that there never was any such consideration.

The order of the court below must accordingly be reversed, and the case must be remanded, with directions to allow the claim of the German Bank for \$1,322.32 and interest thereon at 8 per cent. per annum from November 20, 1907; and it is so ordered.

SALT LAKE VALLEY CANNING CO. et al. v. COLLINS.

(Circuit Court of Appeals, Ninth Circuit. February 7, 1910.)

No. 1,728.

BANKRUPTCY (§ 96*) — ADMINISTRATION OF ESTATES — CONSOLIDATION OF PROCEEDINGS.

Bankruptcy proceedings against a partnership and its members may properly be consolidated with those against a corporation which is entirely owned by one of the partners, in the interest of economy of administration.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 96.*]

Petition for Revision of Proceedings of the District Court of the United States for the District of Montana, in Bankruptcy.

In the matter of Cooney Bros. & Walsh, a corporation, bankrupt. The Salt Lake Valley Canning Company petitions for revision. Petition dismissed.

Nicholas A. Rotering and Louis P. Donovan, for petitioners.

Robert McBride, for respondent.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. The question presented by this petition is whether or not the District Court erred in confirming an order made by the referee in the bankruptcy proceedings against Cooney Bros., a partnership, and F. H. and B. E. Cooney as individuals, consolidating therewith the bankruptcy proceedings against Cooney Bros. & Walsh, a corporation, upon evidence which showed that the corporation styled Cooney Bros. & Walsh was a mere form under which F. H. Cooney also transacted business, and of the property of which corporation F. H. Cooney was the real owner.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

We see no error in the action of the court in affirming the action of the referee, for, so far from resulting in injury to any right of any creditor of Cooney Bros. & Walsh, the creditors of that corporation can, as said by the court below, be better protected "through one administration than by having several, with the attendant burden of doubling expenses and costs." As also said by the District Court, the trustee chosen in the prior proceedings against Cooney Bros. and F. H. and B. E. Cooney may readily be changed in the event any of the creditors shall be able to show that he is not the proper person.

The petition for revision is dismissed, at the petitioner's cost.

FOUNTAIN v. SAWYER et al.

(Circuit Court of Appeals, Fifth Circuit. January 18, 1910.)

No. 1,912.

SALVAGE (§ 51*)—AMOUNT OF COMPENSATION—REVIEW ON APPEAL.

The proper amount to allow for a salvage service is a matter of opinion, based upon the evidence as to the facts and circumstances surrounding the services, and the rule on appeal is that the amount allowed by the lower court should not be reduced, unless some important error has been committed, such as a violation of just principles, or clear and palpable mistake, or gross overallowance.

[Ed. Note.—For other cases, see *Salvage*, Cent. Dig. § 133; Dec. Dig. § 51.*]

Awards in federal courts, see note to *The Lamington*, 30 C. C. A. 280.]

Appeal from the District Court of the United States for the Southern District of Florida.

Suit in admiralty by Thomas Sawyer and others for salvage services. Decree for libelants, and James Fountain, claimant, appeals. Affirmed.

G. Bowne Patterson, for appellant.

Jefferson B. Browne, for appellees.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. The services rendered by the libelants in the court below were unquestionably salvage services, and the only question before this court is as to the amount of salvage compensation.

The proper amount to allow is a matter of opinion, based upon the evidence as to the facts and circumstances surrounding the services, and the rule on appeal is that the amount allowed by the lower court should not be reduced, unless some important error has been committed, such as the violation of just principles, or clear and palpable mistake, or gross overallowance. See *The Sybil*, 4 Wheat. 98, 4 L. Ed. 522; *The Camanche*, 8 Wall. 448, 19 L. Ed. 397; *The Connemara*, 108 U. S. 359, 2 Sup. Ct. 754, 27 L. Ed. 751. In this case we find no important error, no violation of just principles, nor clear mistake, nor gross overallowance.

The judgment of the District Court is therefore affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

McKAY v. GULF REFINING CO.

(Circuit Court of Appeals, Fifth Circuit. January 18, 1910.)

No. 1,947.

1. MARITIME LIENS (§ 17*)—LIEN FOR SUPPLIES—FLORIDA STATUTE.

Rev. St. Fla. 1892, § 1738 (Gen. St. Fla. 1906, § 2204), giving a lien for supplies furnished to vessels, was not repealed by Act June 4, 1903 (Laws 1903, c. 5143), providing for mechanics' liens.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 22; Dec. Dig. § 17.*]

2. MARITIME LIENS (§ 60*)—ENFORCEMENT OF STATUTORY LIENS—ADMIRALTY JURISDICTION.

Contracts for supplies to a vessel at her home port are maritime in their nature, and liens therefor created by state statutes are within the admiralty jurisdiction, and enforceable only by proceedings in rem in the federal courts.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 98; Dec. Dig. § 60.*]

Created by state laws, see note to *The Electron*, 21 C. O. A. 21.]

Appeal from the District Court of the United States for the Southern District of Florida.

Suit in rem in admiralty by the Gulf Refining Company to enforce a statutory lien. Decree for libellant, and claimant, James McKay, appeals. Affirmed.

W. A. Carter and John P. Wall, for appellant.

Peter O. Knight, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. The law of Florida giving a lien for supplies furnished to vessels within her borders (section 1738, Rev. St. Fla. 1892; Gen. St. Fla. 1906, § 2204) was not repealed by act of June 4, 1903 (Laws Fla. 1903, c. 5143), entitled "An act to provide liens for materialmen, mechanics," etc.

Contracts for supplies to a vessel at her home port are maritime in their nature, and liens therefor created by state statutes are within the admiralty jurisdiction, and enforceable by proceedings in rem only, in the federal courts. *The Madrid* (C. C.) 40 Fed. 677.

The decree of the District Court is affirmed.

In re KAUFMAN.

(Circuit Court of Appeals, Second Circuit. January 11, 1910.)

No. 25.

BANKRUPTCY (§ 96*)—INVOLUNTARY PROCEEDINGS—AMENDMENT TO INCLUDE PARTNERSHIP.

Involutary proceedings in bankruptcy against an individual cannot be changed, during their pendency and after testimony has been taken, by a mere order amending the title, so as to embrace also a proceeding against a partnership, of which the original defendant is one member.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 96.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Petition to Review Order of the District Court of the United States for the Southern District of New York.

In the matter of Isaac Kaufman, bankrupt. On petition by Lena Kaufman to revise an order which amended the title of the proceeding so as to read "In the Matter of Isaac Kaufman, Individually, and Isaac Kaufman, a Copartnership Consisting of Isaac Kaufman and Lena Kaufman, Bankrupts." It also adjudged that "Lena Kaufman, the wife of Isaac Kaufman, is a copartner in the copartnership Isaac Kaufman." Reversed.

Wolf & Kohn and Sol. Kohn (Charles L. Grad, of counsel), for petitioner.

Cohen, Creevey & Richter (Julius H. Cohen and Ralph W. Gwinn, of counsel), for respondent.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

PER CURIAM. Counsel for Lena Kaufman contends that the record does not sustain the finding that she was a partner with her husband; but it is not necessary to go into that branch of the case. For the purposes of this appeal it may be assumed that for some time prior to the filing of the petition in bankruptcy there was a firm in the district doing business under the name of Isaac Kaufman, the partners in which were Isaac Kaufman and Lena Kaufman. The existence of the firm, however, was not known, or even suspected, and in consequence the proceeding was instituted, not against any partnership, but against Isaac Kaufman individually.

The difficulty with the order is that, after proceedings against the individual had progressed for a considerable time, much testimony having been taken, it undertakes to establish the pendency *pari passu* of another proceeding against the firm, which was never begun by filing any petition against it, and to put that second proceeding in the same condition as the first. In our opinion this cannot be done by a mere order. Such a procedure would deprive the firm and the partner now sought to be brought in of the opportunity which the statute gives them to controvert the facts alleged in the petition, and to have, if they so desire, a trial by jury on the question of insolvency and any act of bankruptcy alleged to have been committed. Act July 1, 1898, c. 541, §§ 18d, 19a, 30 Stat. 551 (U. S. Comp. St. 1901, p. 3429).

This case is to be distinguished from those cited on the brief, where the original proceeding was against a firm, and, upon the discovery of a partner not originally named or known, he was brought in as one of the members of the firm.

The order is reversed.

FUERST BROS. & CO. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. December 7, 1909.)

No. 84 (4,168).

1. CUSTOMS DUTIES (§ 38*)—CLASSIFICATION—"COCOANUT OIL"—REFINED OIL.
In Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 626, 30 Stat. 199 (U. S. Comp. St. 1901, p. 1685), the provision for "cocoanut oil" includes refined as well as unrefined oil.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 38.*]

2. CUSTOMS DUTIES (§ 30*)—CLASSIFICATION—REFINED COCOANUT OIL—"COCOA BUTTERINE."

Refined cocoanut oil is not "cocoa butterine," within the meaning of Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 282, 30 Stat. 172 (U. S. Comp. St. 1901, p. 1652).

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 30.*]

For other definitions, see Words and Phrases, vol. 8, p. 7605.]

3. CUSTOMS DUTIES (§ 38*)—CLASSIFICATION—SPECIFIC DESIGNATION.

"Cocoanut oil," in Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 626, 30 Stat. 199 (U. S. Comp. St. 1901, p. 1685), is a more specific term than "cocoa butterine," in section 1, Schedule G, par. 282, 30 Stat. 172 (U. S. Comp. St. 1901, p. 1652).

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 38.*]

Appeal from the Circuit Court of the United States for the Southern District of New York.

Appeal from a decision (166 Fed. 1014) of the Circuit Court, Southern District of New York, in a customs case. The importation in question is refined cocoanut oil. The importers in their protest claimed that it was entitled to free entry as "cocoanut oil," under Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 626, 30 Stat. 199 (U. S. Comp. St. 1901, p. 1685). The collector assessed it for duty under section 1, Schedule G, par. 282, of said act (30 Stat. 172 [U. S. Comp. St. 1901, p. 1652]), which reads as follows:

"Cocoa butter or cocoa butterine, three and one-half cents per pound."

The Board of General Appraisers affirmed the action of the collector, and the Circuit Court affirmed the Board. The importers appeal. Reversed.

Comstock & Washburn (J. Stuart Tompkins, of counsel), for importers.

D. Frank Lloyd, Deputy Asst. Atty. Gen. (William A. Robertson, Sp. Atty., of counsel), for the United States.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

NOYES, Circuit Judge (after stating the facts as above). The term "cocoanut oil" in the free list is broad enough to include refined

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

as well as unrefined oil. The merchandise in question is refined cocoanut oil, and consequently it is entitled to free entry unless it is more specifically provided for elsewhere.

The Circuit Court and the Board of Appraisers apparently held that the merchandise was properly assessed for duty as "cocoa butterine" because the importers had failed to show that it was not suitable for use as a substitute for cocoa butter.

We are by no means certain that the importers, having shown that the provision of the free list applied to this article, were obliged to go further and offer evidence to negative the application of the cocoa butterine paragraph. Refined and unrefined cocoanut oil might both be used as substitutes for cocoa butter without making "cocoa butterine" a more specific designation for them than "cocoanut oil."

But, assuming that the burden was upon the importers to show the nonapplication of the "cocoa butterine" paragraph, we think that they sustained it. We are fully satisfied from the evidence that refined cocoanut oil is not cocoa butterine, and that if it could be used as a substitute for cocoa butter, still it is more specifically described in the provision of the free list than in paragraph 282 (Act July 24, 1897, c. 11, § 1, Schedule G, 30 Stat. 172 [U. S. Comp. St. 1901, p. 1652]).

The case of *United States v. Oriental American Co.* (C. C.) 129 Fed. 249, T. D. 25,179, is directly in point and is approved.

The decision of the Circuit Court is reversed.

E. L. WATROUS MFG. CO. v. AMERICAN HARDWARE MFG. CO.

(Circuit Court of Appeals. Seventh Circuit. January 5, 1910.)

No. 1,528.

PATENTS (§ 328*)—INFRINGEMENT—DOOR CHECK AND CLOSER.

The Bailey patent, No. 652,828, for a door check and closer, as limited by its terms to meet the requirements of the Patent Office, in view of the prior art, held not infringed.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

Suit in equity by the E. L. Watrous Manufacturing Company against the American Hardware Manufacturing Company. Decree for defendant (161 Fed. 362), and complainant appeals. Affirmed.

The bill in the court below was to restrain the infringement of letters patent No. 652,828, issued to Herbert L. Bailey, July 3, 1900, for an improvement in door checks and closers. Upon hearing, the bill was dismissed for want of equity. The facts are stated in the opinion.

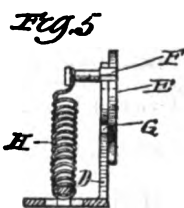
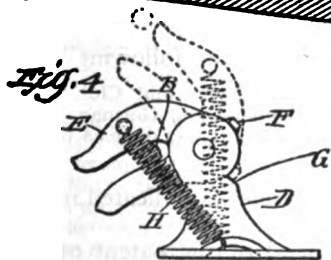
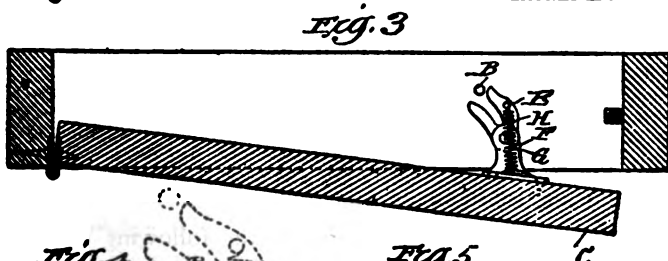
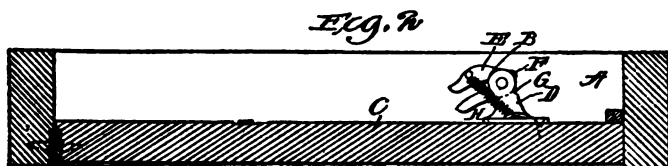
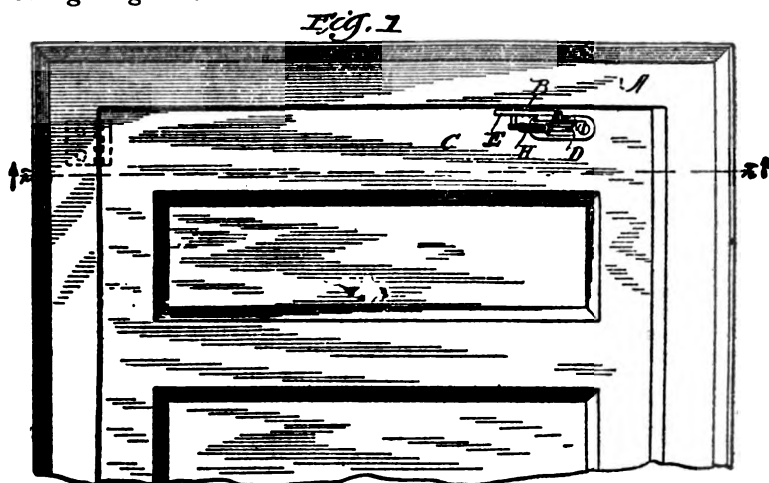
Wallace R. Lane, for appellant.

Henry L. Clapp, for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

GROSSCUP, Circuit Judge. Appellant's patent is illustrated in the following diagram:



The operation of the device patented is clearly described in the descriptive portion of the patent, especially when read in connection with Fig. 4 of the diagram, as follows:

"Referring by letter to the accompanying drawings, A indicates the door-frame; B, a pin or projection depending from the top of the frame; C, the door; D, a bracket secured to the inner side of the door near the top thereof, and E a bifurcated jaw pivoted to the bracket and adapted and arranged to engage the pin B upon the door-frame when the door is closed. The pivoted bifurcated

jaw is provided with an angular tailpiece or projection *F*, adapted and arranged to engage a shoulder *G* upon the bracket when the jaw is swung out or extending in position to engage the pin on the door as the door swings to. A spiral spring *H* is secured at its ends, respectively, to the bracket and to the jaw at such points as that it shall swing across the dead-center formed by its two points of attachment and the pivot connecting the jaw to the bracket, so that when the jaw is open—that is, swung out in the position shown in Fig. 3—the contractile force of the spring tends to yieldingly maintain the jaw in such position. When, however, the jaw is forcibly swung upon its pivot, as by engagement therewith of the pin *B*, as soon as the jaw has swung sufficiently for the spring to pass the dead-center the contractile force thereof will tend to draw the jaw inward to the position illustrated in Fig. 2. This tendency of the spring causes the device to forcibly close the door after the door has been checked by the engagement of the jaw with the pin *B*, the checking force resulting from force necessary to swing the spring across the dead-center. Of course when the door is forcibly drawn open the jaw will be caused to swing out again in the opposite direction, and the shape of the notch therein and the location of the pin *B* are such that at the time the jaw becomes disengaged from the pin the jaw will have been swung outward on its pivot until the spring *H* has passed the dead-center, when the parts will be retained in this position until the door is again closed."

The functions of the device are to use the spring, first, as a buffer, to resist the strength of the slam of the door, and secondly, as a means to pull the door shut, and to hold it shut—these functions being brought about in succession by the arrangement of the spring and the frog, whereby, due to the angle of the frog, the pressure of the spring is exerted against the forcible closing of the door until the dead center has been passed, but the dead center passed, the tension of the spring is exerted toward drawing the door shut and holding it shut.

Bailey's claim, as originally filed and as subsequently allowed (the interlineations and the erasures indicating the changes in the claim as originally applied for, and showing it as finally allowed), is as follows:

"In a door check and closer, the combination with a bracket secured to the near the upper edge thereof depending from the top of the door frame door *A* and a pin or projection ~~on the door frame adjacent thereto~~ *A*, of a bifurcated jaw pivoted to the bracket and adapted and arranged to engage said pin, a spring secured at its ends, respectively, to said jaw and bracket so as to swing across the dead center when the jaw is swung upon its pivot and a stop for said jaw, substantially as described."

The original claim being disallowed on the following citations:

"Becker, #354,087, Dec. 14, 1836, Door Checks and Closers, and Mallory, #512,202, Jan. 2, 1894, 'Door Checks-Trippers' and German patent to Hoing, #86,732, Door Checks. The most that applicant has done is to add the spring of Mallory to the device of Hoing."

Thereupon the amendments were made, as indicated in the insertions and erasures.

An inspection of these patents, and of the patent of Conklin, No. 589,418, and the English patent of Schou, No. 10,955, convinces us that the claim, as thus filed, was too broad—Mallory, Conklin and Schou clearly embodying the functions and the arrangement of angle and frog, whereby, upon the passing of the dead center, the line of draft is changed, as above set forth. The mechanical adjustments, only, are somewhat different, and by amending the claim upon these citations, Bailey has limited himself to the mechanical respects in which his device differs from the preceding devices.

Considering the Bailey patent, therefore, as a limited one, the Wells device, patent No. 770,837, does not answer to the call of his claim. True, it reaches the same result, and through the performance by the device of the same functions, but in this larger respect it follows only the prior art. It does not use a bracket secured to the door "near the upper edge thereof" (and this is one of the amendments that saved the Bailey patent in the Patent Office from citations of the prior art); nor is "a pin or projection depending from the top of the door frame" employed to engage with the jaw—another amendment that saved the Bailey patent in the Patent Office from the prior art. The Bailey patent, in terms being so limited—and made so to meet the requirements of the Patent Office—we are not at liberty to enlarge or alter it.

The decree of the Circuit Court is affirmed.

JONES et al. v. F. A. HARDY & CO.

(Circuit Court of Appeals, Seventh Circuit. January 4, 1910.)

No. 1,557.

PATENTS (§ 328*)—INFRINGEMENT—EYEGLASSES.

The Finch patent, No. 666,928, for eyeglasses, construed, and held not infringed.

Appeal from the Circuit Court of the United States for the Eastern Division of the Northern District of Illinois.

Suit in equity by Edwin T. Jones and others against F. A. Hardy & Co. Decree for defendants, and complainants appeal. Affirmed.

For opinion below, see 162 Fed. 320.

H. P. Doolittle and Wm. M. Stockbridge, for appellants.

L. M. Hopkins, for appellees.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

BAKER, Circuit Judge. Appellants' bill for alleged infringement of patent No. 666,928, January 29, 1901, to Finch, assignor, was dismissed for want of equity on the ground that appellees' device did not infringe.

The claim reads:

"In eyeglasses the combination, with the eyeglass-frame or lens-mountings, of a bridge having bends at the extremities of its bow portion, said bends being substantially perpendicular to the plane of the lenses, and projections extending forwardly from the bends to the frame or lens-mountings, and spring-held lever-arms extending across the bridge, and suitably fulcrumed on the frame or mountings, their inner extremities or nose-pieces being normally spring-pressed toward the bow of the bridge, whereby there is co-operative gripping action between the nose-pieces of the lever-arms and the bow of the bridge, in a plane substantially perpendicular to that of the lenses."

The bridge described in the claim is the "saddle-bridge" of the prior art, quite generally used in spectacles; that is, in glasses having hold-arms that extend back over the ears of the wearer. Spring-held lever-arms, with nose-pieces at the inner ends thereof, were likewise old, and had frequently been used in eyeglasses or "nose-pincers." We find it unnecessary to set forth the prior art in relation to the controversy whether Finch was broadly entitled to a monopoly of the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

combination of the saddle-bridge and spring-operated nose-pieces, for such a combination is not broadly claimed. The claim is distinctly limited to that combination of the elements in which there is a co-operative gripping action between the saddle-bridge and nose-pieces in a plane substantially perpendicular to that of the lenses. What kind of construction would afford this action is not set forth in the claim. We must therefore turn from the claim to the disclosure. Therein Finch said:

"My improvement embraces the combination of a saddle-bridge and a lever-guard having but a small bearing surface, namely, the disk, 10. The said bridge, which extends well down on the nose on both sides, supports the glasses, while the guard maintains the bridge in place and prevents the glasses from turning or falling forward. The small area of the guard-disk is amply sufficient for this purpose. The lever-guards heretofore used have been provided with a long bearing-surface which grips the nose on opposite sides and in some instances causes such irritation that the eyeglasses cannot be worn."

Finch's idea, as we gather it from reading the claim in connection with the specification, was that the saddle-bridge should support the eyeglasses just as it supported the spectacles, and that, just as the arms of the spectacles extending back over the ears in a plane substantially perpendicular to that of the lenses held the saddle-bridge firmly in place, so should his spring-operated nose-pieces by pulling back in a plane substantially perpendicular to that of the lenses hold the saddle-bridge firmly in place. This result was to be obtained and the objections to the long bearing-surfaces were to be obviated by the use of small bearing-surfaces that should grip the soft part of the nose between the eyes, and by their forward motion in the plane perpendicular to that of the lenses should draw the saddle-bridge back against the nose.

The action of appellants, who are extensive manufacturers of eyeglasses, in marketing saddle-bridge eyeglasses only in connection with spring-operated nose-pieces having long bearing-surfaces, might be considered as corroboration of appellees' expert's opinion that the combination of the Finch patent was for all practical purposes inoperative. But we will not pursue that inquiry, because appellees do not use the invention as we have defined it. Appellees' eyeglasses have the elongated nose-pieces which afford support independently of the bridge—a combination of saddle-bridge and nose-pieces beyond the letter and the spirit of Finch's patent.

The decree is affirmed.

MORGAN ENGINEERING CO. v. ALLIANCE MACH. CO.

(Circuit Court of Appeals, Sixth Circuit. November 2, 1909.)

No. 1,917.

1. PATENTS (§ 165*)—CONSTRUCTION—ADVANTAGES NOT CLAIMED.

A patentee is entitled to have his patent considered with reference to an advantage over the prior art necessarily secured by the operation of the device as described, even though such advantage is not specifically claimed.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 241; Dec. Dig. § 165.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—TRAVELING CRANE.

The Shem patent, No. 791,951, for improvements in double trolley traveling cranes, was not anticipated, and discloses patentable invention in view of the marked superiority in safety and economy, in more extended use and constant operation of the patented structure over those of the prior art, although claims 1 and 2 are void as too broad. The remaining claims also held infringed.

Appeal from the Circuit Court of the United States for the Northern District of Ohio.

Suit in equity by the Alliance Machine Company against the Morgan Engineering Company. Decree for complainant, and defendant appeals. Affirmed.

This suit was brought by the Alliance Machine Company, assignee of one George W. Shem, to obtain relief against alleged infringement by the Morgan Engineering Company of patent No. 791,951, granted by the United States March 17, 1905, to Shem for certain improvements in cranes.

It is admitted by the answer that the letters patent were granted to Shem, but it is denied that he was the original inventor; and, after the usual denials, it is alleged that the improvements do not constitute patentable invention or discovery, and also that the material parts of the invention had prior to its date been described and patented in divers printed publications and patents, and a number are specified in paragraph 8 of the answer, and in an amendment made thereto, among which are letters patent No. 528,621, granted by the United States to A. J. Shaw, November 7, 1904, for improvements in hoisting machinery, and letters patent No. 78,579, granted in Germany to Bock and Henkel, in 1894; also in a certain design made by one Sawyer for the Shaw Electric Company. Thereupon replication was filed. Proofs were taken, the cause was heard, and on November 25, 1908, decree was entered finding for complainant, allowing recovery of gains and profits, ordering reference and accounting and granting writ of injunction. From this decree the Morgan company appealed.

The nature and object of the patent in suit are in part thus stated in the specifications: "My invention relates to that class of traveling cranes which carry both a main hoisting-trolley and an auxiliary hoisting-trolley. The object of my invention is to so construct such a crane as to permit ready accessibility to the supplementary trolley, to reduce the strain upon the girders which constitute the side members of the crane-bridge, to permit of the mounting at any desired point on the bridge, preferably at the longitudinal center of the same, of the motor which drives the bridge-traversing mechanism, to increase the range of movement of both of the trolleys, and to permit of a more compact arrangement of the hoisting mechanism on the main trolley than is possible with the ordinary construction of crane."

The manner of obtaining the advantages mentioned is thereupon shown by descriptive words and drawings. The first drawing displays a side elevation of the crane made according to the invention, and the second one an end view or cross-section of the crane. Further description, with copies of drawings, will be found in the opinion. It is stated in the specifications that the invention "is shown as applied to a ladle-crane." It is then stated that the ordinary construction of ladle-cranes was open to many objections: That the weight of the supplementary trolley and its load caused excessive strain upon the girders supporting the crane-bridge; that so suspending and supporting the supplementary trolley required the hoisting-chains of the main trolley to be placed outside of the girders, also requiring a wide separation of the hoisting-drums, prevented locating the bridge-driving motor on any part of the bridge except at its extreme end, also required a shaft almost as long as the crane-bridge for transmitting power from the motor to one end of the bridge-trucks, and so limited the range of movements of trolleys on the crane-bridge.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The plan adopted for overcoming these objections in substance was to widen the space between the bridge girders, place between them two parallel girders, operate the supplementary trolley on these intermediate girders, and suspend the hoisting-chains depending from the main trolley inside instead of outside of the main girders. It is then stated that the plan proposed overcomes the objections to the usual construction thus: " * * * The parts are compactly disposed, the strains are divided and distributed, a central location of the bridge-driving motor upon the bridge is permitted with its accompanying advantage of relatively short lengths of transmitting-shaft between the motor and the bridge-supporting trucks, and in which, furthermore, the range of travel of either trolley is not restricted by the presence of said motor or other appendances of the crane, a full travel of the trolley from one end of the bridge to the other being permitted."

The claims are as follows:

"1. A crane having a bridge with main hoisting-trolley mounted upon the main girders of said bridge, and a supplementary trolley mounted upon supplementary girders independent of said main girders, substantially as specified.

"2. A crane having a bridge with main hoisting-trolley mounted upon the main girders of said bridge, and a supplementary trolley mounted upon supplementary girders independent of said main girders, said supplementary girders being located between the main girders, substantially as specified.

"3. A crane having a bridge with main and supplementary hoisting-trolleys, the main hoisting-trolley being mounted upon the main outer girders of the bridge, and the supplementary trolley being mounted upon supplementary interior girders, the hoisting-chains from the main trolley depending between the said main and supplementary girders, substantially as specified.

"4. A crane having a bridge with main and supplementary hoisting-trolleys, the main hoisting-trolley being mounted upon the main outer girders of the bridge, and the supplementary trolley being mounted upon supplementary interior girders, the hoisting-chains from the main trolley depending between the said main and supplementary girders, and the hoisting-chains from the supplementary trolley depending between the supplementary girders which carry said trolley, substantially as specified.

"5. A crane having a traveling bridge with outer main girders, supplementary inner girders, main hoisting-trolley mounted upon the main girders, and having its hoisting-chains depending between the main and supplementary girders, a supplementary hoisting-trolley mounted upon said supplementary girders, and a bridge-driving motor centrally mounted upon one of the outer girders, substantially as specified."

H. A. Seymour and F. P. Fish, for appellant.

C. P. Byrnes, for appellee.

Before LURTON, SEVERENS, and WARRINGTON, Circuit Judges.

WARRINGTON, Circuit Judge (after stating the facts as above). In the view we take of this case, it is necessary first to consider whether the patent involves the quality of invention. It is claimed that Sherm's improvements over the prior art consisted in the relocation and rearrangement of the parts of the well-known double trolley traveling crane, without the result of any new function or mode of operation, and that this does not amount to patentable invention. The relevance and force of this contention may be tested by a comparison of the advantages of a crane made according to this invention, with the disadvantages of the type of crane in use at the date of the patent. The comparison will be more accurate and helpful if it is applied, as patentee in his specifications applied his invention, to ladle-cranes.

The description given of the prior state of the art in the specifications of the letters patent, as in substance pointed out in the statement, seems to us to be borne out by the evidence. The same is true of the advantages attained by the invention, as there stated.

This is a combination patent. It has relation to hoisting and transporting mechanism as applied to ladle-cranes. As stated by learned counsel for appellant, this type of traveling crane "is most properly used for the handling of molten steel delivered from the furnaces of the steel plant into a ladle, and for carrying this ladle to a place where the contents of the ladle are discharged into ingot molds." Necessarily the inventor had to do with an old subject and an existing art. The movement and uses made of any substance as necessary and dangerous as is molten metal must always have engaged the faculties of men in contriving new and improved safety devices for its control.

An illustration of the old form of ladle-crane is, we think, fairly represented by the following sketch:

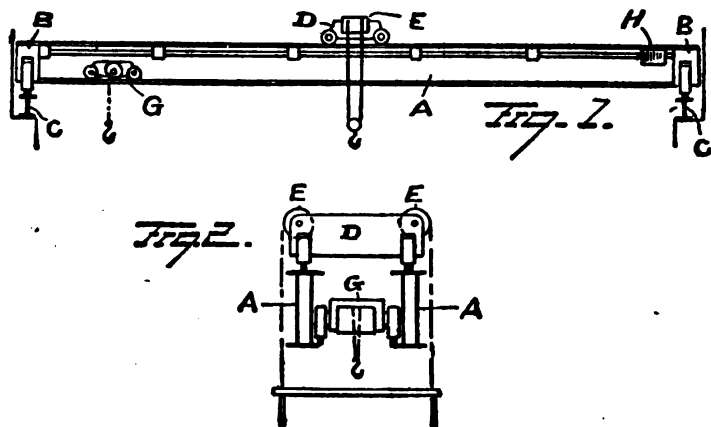
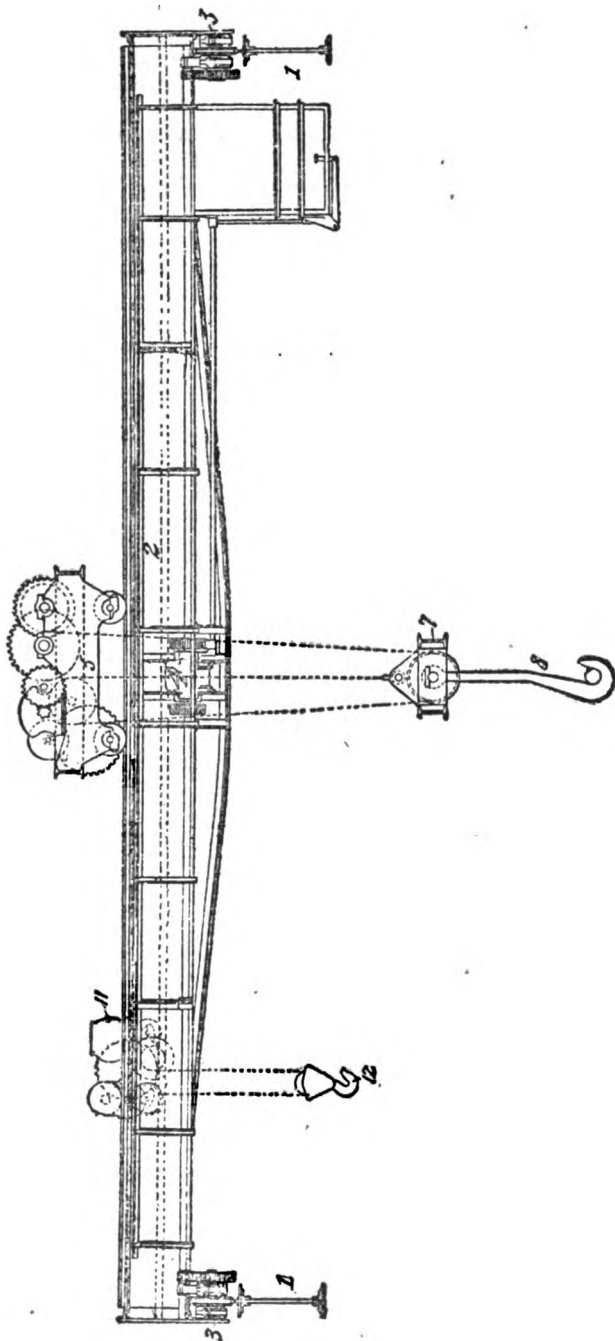
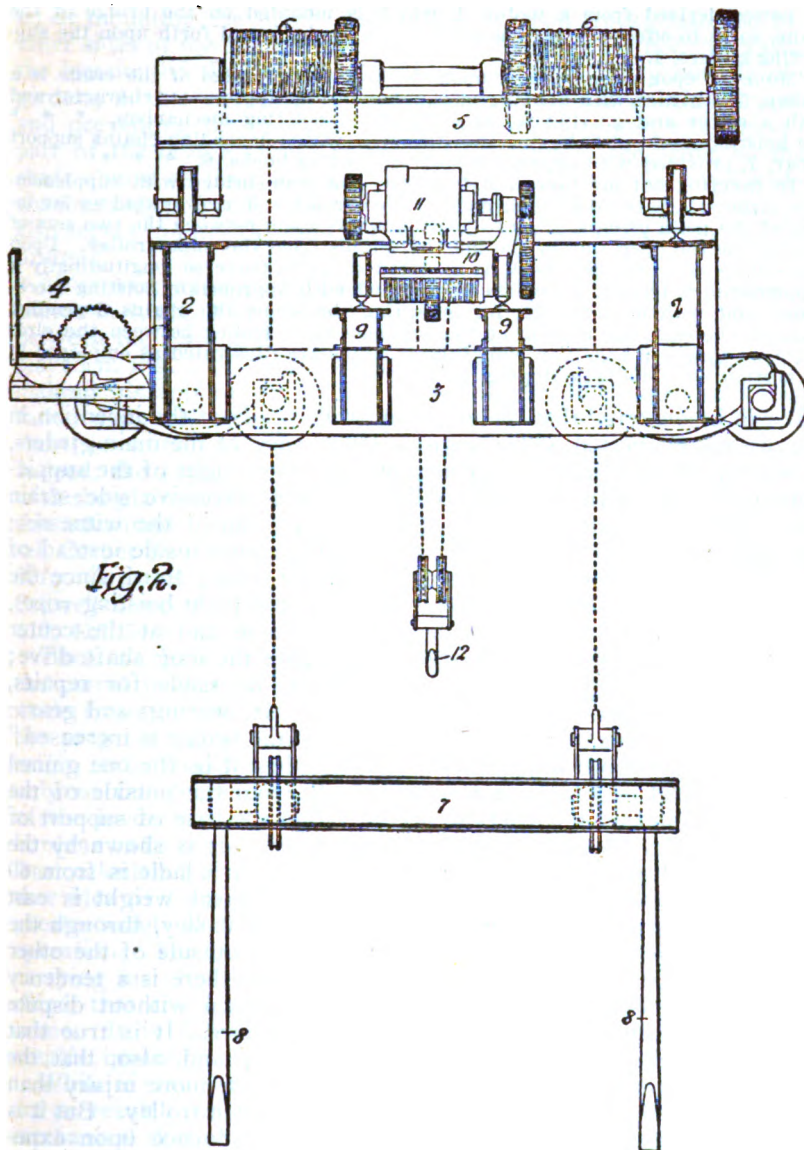


Fig. 1 represents the bridge of the crane in side elevation, and Fig. 2 represents it in cross-section. A, A, are the main girders attached to the end carriages, B, B, having wheeled trucks that run on tracks, C, C. The main trolley, D, is carried on tracks of the main girders, A, A, and is provided with hoisting drums, E, E, from which the hoisting chains are suspended on the outside of the main trolley, D, and outside of the main girders, A, A. Each hoisting-chain as shown on Fig. 2 is fastened on the lower end to a cross-bar, from the ends of which are suspended hooks for engaging the trunnions of the ladles. The auxiliary trolley, G, is operated over runways attached to the inside lower edges of the two main girders, A, A. The auxiliary trolley is equipped with one hoisting-chain carrying a hook on its end, used for operating the ladles. This is what is known as the overhanging ladle-crane.

The following are copies of the drawings of the patent in suit:

Fig. 1.



These are described in the specifications thus:

"Fig. 1 is a side elevation of a crane constructed in accordance with my invention, and Fig. 2 is an end view of the same on a larger scale.

"Referring in the first instance to Fig. 1 of the drawings, 1, 1, represent the main girders upon which the bridge of the crane is mounted and upon which it can travel, said bridge consisting of a pair of longitudinal side girders, 2, with suitable transverse connections at the ends, which connections constitute end carriages, 3, each of the latter having a wheeled truck running upon rails on the main girder, 1, and some of the wheels of these trucks being rotated

by power derived from a motor, 4, which is mounted on the bridge of the crane, so as to effect the movement of the latter back and forth upon the supporting-girders, 1.

"Mounted upon suitable rails upon the traversing bridge of the crane is a trolley, 5, provided with hoisting mechanism of any appropriate character and with a motor and gearing for operating said hoisting mechanism, * * * the hoisting mechanism having two drums, 6, whose depending chains support a bar, 7, provided with depending ladle-supporting hooks, 8. * * *

"In carrying out my invention I provide the crane-bridge with supplementary girders, 9, secured at their ends to the carriages, 3, and located so far inside of the main girders, 2, as to provide ample room between the two sets of girders for the operation of the hoisting-chains from the main trolley. Upon these supplementary girders, 9, is mounted so as to traverse longitudinally a supplementary trolley, 10, which is provided with appropriate hoisting mechanism and with a motor, 11, for operating the same, the chains depending from the hoisting mechanism of the supplementary trolley between the girders, 9, as shown in Fig. 2, in which these chains are illustrated as employed in connection with the ladle-tipping hook, 12."

It will be observed that the auxiliary trolley rails of the invention in suit are not connected with the inside lower edge of the main girders, as were the flanges in the prior art, and that the weight of the supplementary trolley with its load no longer exerts excessive side strain upon the girders, also, as succinctly stated by one of the witnesses: "second, the draft of the main hoisting tackle comes inside instead of outside the base of the supports to the main trolley; third, since the outside of the main girders is now free from the main hoisting ropes, the bridge-driving motor may be located outside and at the center instead of at one end of the bridge to eliminate the long shaft drive; fourth, the auxiliary trolley becomes readily accessible for repairs, particularly the renewal of the supporting wheels, bearings and gears; and, fifth, the range of travel of the trolley on the bridge is increased."

We think these advantages are obvious, unless it be the one gained by the removal of the main hoisting tackle from the outside of the main trolley and main girders to points within the base of support of the main trolley and inside of the main girders. It is shown by the evidence that the weight of molten metal carried in a ladle is from 60 to 125 tons, and that when the shock of this great weight is cast upon the hoisting tackle over one end of a main trolley, through the breakage of the hoisting tackle depending on the outside of the other end of the main trolley of an overhanging crane, there is a tendency to tilt and overturn the main trolley. It is shown without dispute that this actually happened in at least one instance. It is true that it occurred under conditions somewhat peculiar; and, also, that the escape in such a case of molten metal might cause more injury than would be caused by the overturning alone of the main trolley. But it is equally true that the accident caused such an influence upon experienced users of overhanging cranes, as to create an unusual demand for a crane with hoisting tackle depending within and not without the base of support of the main trolley. It is not claimed that a trolley could be upset upon a crane with the hoisting tackle so arranged.

The claim made that this advantage cannot be considered for the reason that it is not enumerated among the advantages stated in the letters patent is, we think, not well founded. In one of the objections stated in the specifications to the overhanging trolley of the old meth-

od of mounting the supplementary trolley upon tracks fastened to the inner sides of the main bridge girders is that such method "necessitates the location of the hoisting-chains of the main trolley outside of the girders, 2, thus requiring a wide separation of the hoisting-drums, 6, and preventing the location of the bridge-driving motor, 4, upon any part of the bridge except at the extreme end of the same, so that a shaft almost as long as the crane-bridge itself must be employed for transmitting power from such motor to one of the bridge-trucks. This also serves to limit the range of movement of the trolleys on the crane-bridge."

Moreover, as appears in the statement, it is expressly stated in claims 3, 4, and 5 of the letters patent that the hoisting-chains depend between the main and supplementary girders, and this fact is also displayed in Fig. 2 of the drawings. Even if the patentee at the time of making his application did not know of this advantage, or knowing failed distinctly to express it, he, in view of what he did state and show, is entitled to have his invention considered with reference to it. Indeed, the crane cannot be constructed and operated in accordance with the plain terms of his description without observing and securing this advantage. This alone is sufficient. *Goshen Sweeper Co. v. Bissell Carpet Sweeper Co.*, 72 Fed. 67, 73, 75, 19 C. C. A. 13; *Dowagiac Mfg. Co. v. Superior Drill Co.*, 115 Fed. 886, 895, 53 C. C. A. 36; *Stilwell-Bierce & Smith-Vaile Co. v. Eufaula Cotton Oil Co.*, 117 Fed. 410, 415, 54 C. C. A. 584.

Thus we have only to assemble and consider the advantages of the patent in suit, in order to gain an appreciation of the departure made from the old art. The sum of these advantages not only marks the progress made, but suggests inquiry into their origin. Is their origin to be found in mental operation of the degree of invention, or only of the degree exercised in mechanical skill? The advantages of the invention seem to be traceable to the idea of so carrying the burdens to be borne by the machine as to avoid strains upon the parts least calculated to bear them; and they are traceable also to the further idea of so adjusting the new parts to the old parts as to attain greater safety and economy and also more extended use and constant operation. The inventor then devised the plan before described for carrying his ideas into execution. This involved at once a novel machine, that could not be rightly classed with the overhanging ladle-crane. It is difficult to understand why this conception is not patentable invention.

While it may not always be helpful in determining whether a given act or result involves the exercise of constructive faculty rather than mechanical skill to resort either to the fact that the matter in dispute has been allowed to lie dormant for years in the face of needed solution, or to the approval accorded to such solution by men of scientific knowledge and practical experience immediately upon becoming aware of it, yet it is not always easy or advisable to repel the influence of such facts. The evidence reveals persistent and repeated attempts for as much as 10 years prior to the date of the patent in suit to overcome the difficulties solved by this patentee. Then, as soon as the patent in suit became known, cranes offered and made under it met with

the approval of quite a number of mechanical engineers and skilled mechanics, and with sales to experienced users of ladle-cranes. The appellee commenced business with efforts to manufacture and sell ladle-cranes of the overhung type, but failed. When, however, it began the offer and sale of cranes made under the patent in suit, the appellee, according to the evidence and in view of the large cost of the machines, met with remarkable success.

The experts for appellant referred to divers earlier patents and designs for the purpose of showing anticipation, either wholly or partly, of the patent in suit. But, considering the entire evidence, we think these were fairly differentiated. No ladle-crane was ever devised and built which contained the combination of improvements here displayed, prior to the date of this patent. The nearest approach to any substantial portion of this form of crane in the way of design, as distinguished from patent and construction, was in a blueprint devised by one Sawyer and sent with a proposal to build a crane for the Illinois Steel Company; but the proposal was not accepted and no publication of either the proposal or the blueprint was ever made, and the whole matter seems to have been forgotten if not abandoned by the parties themselves, until a representative of appellant, in search of evidence for the trial of this cause, discovered the papers.

The claim of counsel for appellant is not as under the authorities it could not be that this unused prior drawing is an anticipation within the meaning of the patent statute. The blueprint is offered in support of the claim that the invention in suit lacks patentable quality; and this is upon the theory that the fact that Sawyer devised a plan having certain features corresponding with some portions of the patent in suit indicates that the present patent was obvious to the skilled mechanic. The facts disclosed in the decisions offered in support of the effect that should be given to the blueprint differ so widely in substance and legal effect from the import of the facts disclosed here as to render present discussion of those cases unimportant.

The claim that the patent granted in Germany to Beck & Henkel for a meat hanger is an anticipation of the patent in suit does not seem to be based upon analogy either in purpose or function between the two devices, but rather upon similarity in definition that can be applied to parts of both; and also upon the fact that it is asserted in each patent that it is not limited to the particular device therein described.

We may as well say now as later that we regard claims 1 and 2 of the patent in suit as too broad, both with respect to the prior art and the express objects and scope of the crane described and illustrated. There can be no doubt that the rest of the patent, considered either as a whole or with reference to the remaining claims, contemplates a traveling-crane and motors to drive the bridge mechanism. These main objects and features of the patent in suit are not disclosed and are plainly not intended by the German patent. In view of the weight of the evidence touching the marked differences in mechanism and combination of parts in the two inventions, and of the palpable difference in purpose and use of the two machines, we are satisfied that nothing in either of them would afford material suggestion for the

other. See decision of this court in *National Tube Co. v. Aiken*, 163 Fed. 254, 258, 91 C. C. A. 114; also *Eames v. Andrews*, 122 U. S. 40, 55, 7 Sup. Ct. 1073, 30 L. Ed. 1064.

As it seems to us, therefore, the patent in suit discloses novelty and merit sufficient to show patentable invention, and falls well within rules of decision of this court. *Goshen Sweeper Co. v. Bissell Carpet Sweeper Co.*, 72 Fed. 67, 74, 19 C. C. A. 13 (cited above); *Muller v. Lodge & Davis Machine Tool Co.*, 77 Fed. 621, 629, 23 C. C. A. 357; *Star Brass Works v. General Electric Co.*, 111 Fed. 398, 400, 49 C. C. A. 409; *Dowagiac Mfg. Co. v. Superior Drill Co.*, 115 Fed. 886, 895, 53 C. C. A. 36; *A. R. Milner Seating Co. v. Yesbera*, 133 Fed. 916, 919, 67 C. C. A. 210; *Rich v. Baldwin, Tuthill & Bolton*, 133 Fed. 920, 66 C. C. A. 464; *National Tube Co. v. Aiken*, 163 Fed. 254, 91 C. C. A. 114. See, also, *Ide v. Trorlicht, Duncker & Renard Carpet Co.*, 115 Fed. 137, 143, 53 C. C. A. 341; *National Hollow B. B. Co. v. Interchangeable B. B. Co.*, 106 Fed. 693, 707, 45 C. C. A. 544; *Anderson v. Collins*, 122 Fed. 451, 459, 58 C. C. A. 669; *Loom Co. v. Higgins*, 105 U. S. 580, 591, 26 L. Ed. 1177; *The Barbed Wire Patent*, 143 U. S. 275, 283, 12 Sup. Ct. 443, 36 L. Ed. 154; *Cash Reg. Co. v. Cash Indicator Co.*, 156 U. S. 502, 515, 15 Sup. Ct. 434, 39 L. Ed. 511. See, also, discussion of Mr. Justice Day, applicable in principle, in *Expanded Metal Co. v. Bradford*, 214 U. S. 366, 381, 29 Sup. Ct. 652, 53 L. Ed. 1034.

Upon the question of infringement, we think the evidence shows that appellant's crane is a substantial embodiment of appellee's invention. It appears that prior to the date of the patent in controversy all of appellant's cranes were of the overhanging type, and that, after that date, it constructed and sold ladle-cranes which are the subject of the alleged infringement. The claim of infringement is urged by appellee in several ways. One is that appellant has eliminated from its later type of ladle-crane precisely those objectionable features of ladle-cranes of the old art, as those objections are stated in the specifications of the patent in suit. Another is that appellant has in substance and effect adopted the plan of the inventor of the patent in suit for constructing and operating the alleged infringing machines, and so has taken to itself the advantages of appellee's invention.

The appellant has changed the draft of the hoisting tackle of the main trolley to points within instead of without the base of its support, and so has escaped the objectionable overturning feature. It does this by splitting the main girder of the old type and placing the two parts or their equivalents in parallel so as to furnish space for operating the hoisting chains depending from the main trolley between these girders. It lengthens the main trolley and supports it by doubling its wheel bearings so as to carry its trucks on eight wheels instead of the old bearings of four wheels. It gains accessibility to the supplementary trolley and lessens materially if it does not avoid lateral strain upon each interior main girder by placing two smaller girders between and parallel to the interior main girders aforesaid, and fastening the smaller girders to the larger interior girders by braces or lace-work. Upon this interior trackway the supplementary trolley is operated; and the accessibility mentioned is obtained over the passage-

way furnished along this lacework. Under this method of construction, the main and auxiliary trolleys are operated over the entire length of their respective tracks. Moreover, this method furnishes the means of placing the bridge motor centrally on the principal outside girder instead of at its end.

Much is said in the evidence and briefs in support of the respective claims that appellant's plan does and does not amount to infringement. Efforts are made through processes of most literal interpretation to differentiate appellant's design from the patent in suit. Ingenious as this method is, we think it fails in ascertaining the intent of either the inventor or the alleged infringer. It sacrifices substance to form. Indeed, after careful consideration of the evidence and comparison of the drawings and models, we are constrained to believe that the differences in design and operation of the infringing device are but colorable. It follows that the question urged under the doctrine of equivalents cannot arise.

Subject to the qualification that claims 1 and 2 of the patent in suit are void, the decree must be affirmed, and it is so ordered.

NOTE. On petition of appellant to modify decree and mandate of this court, its mandate was recalled, and modification allowed, affirming decree below except as to claims 1 and 2 of the patent in suit, but without costs in this court, and disallowing complainant costs in the Circuit Court. Disclaimer by the latter of said claims 1 and 2 was required to be filed in the Patent Office, and a certified copy thereof in the court below, before final decree entered. No direction given as to further costs, if accounting had.

UNITED STATES v. MARTIN.

(District Court, N. D. Iowa, W. D. February 4, 1910.)

No. 1,262.

1. CRIMINAL LAW (§ 89*)—NATURE AND ELEMENTS OF CRIME—OFFENSES AGAINST UNITED STATES.

There are no common-law offenses against the United States, and the courts of the United States have only such jurisdiction as Congress has conferred on them to try and punish such acts as it shall have previously declared to be crimes and fixed the penalty therefor.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 128; Dec. Dig. § 89.*]

2. CRIMINAL LAW (§ 59*)—AIDERS AND ABETTORS IN MISDEMEANORS—PROSECUTION AS PRINCIPALS.

The rule that all persons concerned in the commission of misdemeanors if guilty are guilty as principals, and may be indicted, tried and convicted as such, is applicable to statutory misdemeanors, whether the aiders and abettors are referred to in the statute or not.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 74; Dec. Dig. § 59.*]

3. CARRIERS (§ 38*)—INTERSTATE COMMERCE LAW—OFFENSES—USE OF FREE PASS.

Under Interstate Commerce Act June 29, 1906, c. 3591, § 1, 34 Stat. 584, as amended by Act April 13, 1908, c. 143, 35 Stat. 60 (U. S. Comp. St.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Supp. 1900, p. 1151), which makes it a misdemeanor for any common carrier subject to its provisions to issue any free ticket, free pass, or free transportation for passengers, except to persons therein excepted, and further provides that "any person other than the persons excepted in this provision who uses any such interstate free ticket, free pass or free transportation shall be subject to a like penalty," one who, having in his possession an interstate free ticket or pass issued by a railroad company, sells it to another, knowing that he is not the person named therein, and is not entitled to ride thereon, with intent that he shall so use it, which he does by riding free on an interstate journey, is guilty of using the ticket in violation of the statute.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 38.*]

On demurrer to indictment. Overruled

F. F. Faville, U. S. Atty.

J. W. Hallam, for defendant.

REED, District Judge. The indictment charges, in substance, that the defendant in November, 1908, within the jurisdiction of this court, did knowingly and unlawfully aid, assist and abet one F. T. Phillips to violate the act of Congress as amended, commonly known as the "Act to regulate commerce," for that on or about November 6, 1908, the said defendant then had in his possession a certain interstate free ticket or pass which had been issued jointly by the Chicago & Northwestern Railway Company and the Chicago, St. Paul, Minneapolis & Omaha Railway Company to one C. R. Nelson, which pass authorized and provided for the free transportation of said Nelson from Sioux City, in the state of Iowa, to Chicago, in the state of Illinois, and return over the lines of said railway companies; that defendant on or about said date, so having possession of such free pass or free ticket, did unlawfully dispose of and deliver the same to said Phillips for the purpose and with the intent of enabling him, the said Phillips, to travel free thereon over the lines of said railway companies from Sioux City, in the state of Iowa, to Chicago, in the state of Illinois, well knowing that he, the said Phillips, was not the person named in said pass, was not entitled to travel thereon, and was not a person authorized or permitted by said act of Congress to use an interstate free ticket or pass for the purpose of riding free upon either of said lines of railway from Sioux City, in the state of Iowa, to Chicago, in the state of Illinois; that said Phillips after so receiving the same from the defendant did on or about the 6th day of November, 1908, use said ticket and ride thereon free over the said Chicago, St. Paul, Minneapolis & Omaha Railway within this district, as a part of an interstate journey from Sioux City, in the state of Iowa, to the city of Chicago, in the state of Illinois, contrary to and in violation of the said act of Congress.

The demurrer challenges the sufficiency of this indictment upon the ground that the act of Congress upon which it rests only forbids under the penalty prescribed (1) the issuance of an interstate free ticket or free pass by a railway company engaged in interstate commerce to any person not authorized by the act to use such ticket; and (2) the unlawful use of such free ticket or free pass by one not of the class to whom it may be rightly issued by the carrier, that the indictment

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

charges only a sale by the defendant of the ticket described therein to Phillips, and therefore charges no violation of the act of Congress by the defendant.

The act of Congress under which the indictment is drawn, as amended by Act June 26, 1906, c. 3591, 34 Stat. 584, and chapter 143, Act April 13, 1908, 35 Stat. 60 (U. S. Comp. St. Supp. 1909, p. 1150), provides:

"Section 1. * * * No common carrier subject to the provisions of this Act shall, after January first, nineteen hundred and seven, directly or indirectly issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employes and their families (and to other persons, particularly specifying them). * * * Any common carrier violating this provision shall be deemed guilty of a misdemeanor and for each offense, on conviction, shall pay to the United States a penalty of not less than one hundred dollars, nor more than two thousand dollars, and any person, other than the persons excepted in this provision, who uses any such free ticket, free pass, or free transportation shall be subject to a like penalty."

It is a misconception of the allegations of the indictment to say that it only charges the defendant with selling to F. T. Phillips an interstate free ticket or free pass that had been issued by the railway companies to one Nelson. The charge is that the defendant, being in possession of a free ticket issued by the railway companies to Nelson, did unlawfully aid, assist, and abet one F. T. Phillips to use the same in violation of the act of Congress by unlawfully disposing of and delivering such ticket to Phillips, well knowing that he, the said Phillips, was not the person to whom said ticket was issued, and was not a person to whom under the act of Congress the railway companies might lawfully issue the ticket, and that Phillips, after so receiving it from the defendant, did unlawfully use the same for the purpose of riding free in this district as a passenger upon a train of one of the companies issuing the ticket as a part of an interstate journey between the city of Sioux City, Iowa, and the city of Chicago, in the state of Illinois, without lawful right to do so, and in violation of the act to regulate commerce. The indictment therefore plainly charges the defendant with using the ticket to aid, assist, and abet Phillips to violate the act of Congress above set forth. Does this charge a crime against the defendant? That there are no common-law offenses, so called, against the United States, and that the courts of the United States have only such jurisdiction as Congress has conferred upon them to try and punish such acts as it shall have previously declared to be crimes against the United States and fixed the penalty for such violations, may be conceded. *United States v. Hudson*, 7 Cranch, 32, 3 L. Ed. 259; *United States v. Hall*, 98 U. S. 343-345, 25 L. Ed. 180; *United States v. Eaton*, 144 U. S. 677-687, 12 Sup. Ct. 764, 36 L. Ed. 591.

But the Congress has declared by the act to regulate commerce that the use by any person other than one excepted from its provisions of an interstate free ticket or free pass issued by a common carrier engaged in interstate commerce shall be guilty of a misdemeanor and suffer the penalty prescribed therefor. It is true that it is only the carrier who issues or the person who uses the ticket in violation of the act that commits the offense, and the question arises: What constitutes an unlawful use, within the meaning of the act, of a free ticket law-

fully issued by the carrier? The contention of the defendant is that it is the use of the ticket only for the purpose of riding as a passenger in an interstate journey without payment of fare to the carrier, and that the person so using it alone commits the offense, and, inasmuch as the act does not forbid the aiding or abetting in such a use, that one knowingly and intentionally so aiding and abetting commits no offense. Undoubtedly the use of the ticket for the purpose of riding as a passenger without compensation to the carrier in an interstate journey upon the line of the carrier issuing it by one not authorized to so ride is necessary to complete the offense. But does such riding alone constitute the use of the ticket denounced by the act? If so, why was not the use expressly limited to that of riding as a passenger without payment of fare to the carrier? Instead the language of the act is: "And any person * * * who uses any such free ticket shall be subject to a like penalty." But how use it? This language not only restricts the use of the ticket for the purpose of riding free as a passenger upon the line of the carrier in an interstate journey, but it is sufficiently broad to forbid its use by any person for the purpose of so riding, or for the purpose of aiding, assisting, or abetting another to so ride who under the act is not authorized to ride free, and the statute is obviously intended to so forbid. While penal statutes are not to be enlarged by implication or extended to cases not fairly within their meaning, the rule is firmly settled that they must be given a sensible interpretation, and one not so narrow as to defeat the obvious intention of the Legislature. *United States v. Lacher*, 134 U. S. 624-628, 629, 10 Sup. Ct. 625, 33 L. Ed. 1080. At common law participants in the commission of the higher grades of felony were early classified as principals and accessories, the designation being as follows: (1) Those who actually perpetrate the crime as principals; (2) those present at its commission and aiding or abetting therein, as accessories at the fact, or as principals in the second degree; (3) those not actually present, and participating in its perpetration, but who had previously advised, counseled, or encouraged the commission, as accessories before the fact; and (4) those having no connection with its perpetration, but who thereafter, and, knowing of its commission, aid or abet the felon to escape punishment, as accessories after the fact; and it was required that accessories before or after the fact, as the case might be, must be indicted and tried as such, and could only be convicted after the conviction of the principal. 4 Black. Com. 35; 1 Arch. Cr. Pr. & Pl. 55 (*Pomeroy's Notes*). But these rules were never applicable in cases of treason, misdemeanor, or in any of the crimes below the grade of felony; and all persons concerned in the commission of such crimes, if guilty, were deemed guilty as principals, and might be indicted, tried, and convicted as such. 4 Black. Com. 36; 1 Arch. Cr. Pr. & Pl. 66; *Whart. Cr. Law*, § 233 et seq.; *McClain's Cr. Law*, § 210; *United States v. Gooding*, 12 Wheat. 460-475, 6 L. Ed. 693; *United States v. Mills*, 7 Pet. 138, 8 L. Ed. 636; *Bliss v. United States*, 44 C. C. A. 324, and note (105 Fed. 508); *Pearce v. Oklahoma*, 55 C. C. A. 550 (118 Fed. 425); *United States v. VanSchaick* (C. C.) 134 Fed. 592-601, 602; *United States v. Williams* (D. C.) 159 Fed. 310. And this is true in statutory

misdemeanors, whether the aiders and abettors are referred to in the statute or not. *United States v. Bayer*, 4 Dill. 407, Fed. Cas. No. 14,548; *United States v. Snyder* (C. C.) 14 Fed. 554.

In *United States v. Gooding*, 12 Wheat. 460-475, 6 L. Ed. 693, above, it is said:

"The fifth instruction turns upon a doctrine applicable to principal and accessory in cases of felony, either at the common law or by statute. The present is the case of a misdemeanor, and the doctrine therefore cannot be applied to it; for in cases of misdemeanor all those who are concerned in aiding and abetting, as well as in perpetrating the act, are principals. Under such circumstances, there is no room for the question of actual or constructive presence or absence; for, whether present or absent, all are principals. They may be indicted and punished accordingly. Nor is the trial or conviction of an actor indispensable to furnish a right to try the person who aids or abets the act. Each in the eye of the law is deemed guilty as a principal."

It must be presumed that Congress, when it declared the offense described in its act above quoted to be a misdemeanor, intended that all who should aid or abet in the commission of that offense might be charged and tried as principals, regardless of the rules of the common law applicable in cases of felony.

This indictment does not charge that the free ticket or pass was unlawfully issued by the railway companies, nor how the defendant obtained possession thereof. Presumptively the ticket was rightly issued by the railway companies, and from the argument at the bar the inference is that it was in some manner obtained by defendant as a ticket broker; but, however this may be, when it is charged that the defendant having possession of such ticket and knowing that Phillips was not the person in whose favor it was issued, but was a person not authorized to use the same, and unlawfully delivered it to him for the purpose of enabling him to use the same in violation of the act, and that Phillips did so use the same, the defendant is sufficiently charged with the offense denounced by this act.

The conclusion therefore is that the demurrer should be overruled; and it is accordingly so ordered.

UNITED STATES v. BALTIMORE & O. R. CO.

(District Court, W. D. Pennsylvania. January 18, 1910.)

No. 85.

1. RAILROADS (§ 254*)—SAFETY APPLIANCE ACT—CONSTRUCTION—USE OF POWER BRAKES.

The provision of the Safety Appliance Act of March 2, 1893, c. 196, § 1, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), requiring all railroad trains used in interstate traffic to have a sufficient number of cars equipped with power or train brakes so that the engineer can control their speed without requiring brakemen to use the hand brake for that purpose, as amended by Act March 2, 1903, c. 976, § 2, 32 Stat. 943 (U. S. Comp. St. Supp. 1909, p. 1144), fixing 50 per cent. of the cars in each train as the minimum number which must be so equipped, which number was increased to 75 per cent. by order of the Interstate Commerce Commission, cannot be construed to prohibit the use of hand brakes, and evidence that under a gen-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

eral order of a railroad company brakemen were required to set hand brakes on trains while going down a certain grade as a precaution against accidents is not sufficient to establish a violation of the statute, there being no claim or evidence that the required percentage of cars were not equipped with power brakes.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 254.*]

2. RAILROADS (§ 229*)—SAFETY APPLIANCE ACT—CONSTRUCTION—USE OF POWER BRAKES.

The Safety Appliance Act of March 2, 1903, c. 976, § 2, 32 Stat. 943 (U. S. Comp. St. Supp. 1909, p. 1144), providing that at least 50 per cent. of the cars in every train shall have their brakes used and operated by the engineer, and that "all power braked cars in such train which are associated together with said fifty per centum shall have their brakes so used and operated," is not violated where the required percentage of cars in a train are equipped with power brakes which are used because the train also contains other cars so equipped, but the brakes of which are out of repair and cannot be operated, and are therefore cut out.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 229.*]

Action by the United States against the Baltimore & Ohio Railroad Company. On motion to take off nonsuit. Motion denied.

John H. Jordan, for the United States.

McCleave & Wendt, for Baltimore & O. R. Co.

ORR, District Judge. This is an action to recover penalties for violations of the provisions of what is commonly called the "Safety Appliance Act." Act March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174). The plaintiff's statement sets forth 37 causes of action, and demands \$2,200 aggregate penalties. At the trial the plaintiff elected to proceed on 22 causes only. These causes of action are the second, third, fifth, seventh, eighth, tenth, eleventh, thirteenth, fifteenth, seventeenth, nineteenth, twentieth, twenty-second, twenty-fourth, twenty-fifth, twenty-seventh, twenty-ninth, thirty-first, thirty-second, thirty-third, thirty-fifth, and thirty-sixth. Of these 21 are alike and 1 only, being the second cause of action, is in a class by itself. The 21 alleged violations of the first section of the act, which provides that it shall be unlawful to run any train in interstate traffic "that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose." The second cause alleges a violation of the second section of the act amending said act, passed March 2, 1903 (Act March 2, 1903, c. 976, 32 Stat. 943 [U. S. Comp. St. Supp. 1909, p. 1144]), and the order of the Interstate Commerce Commission relating thereto, which provide that "when any train is operated with power or train brakes, not less than 75% of the cars in such train shall have their brakes used and operated by the engineer of the locomotive drawing such train, and all power braked cars in such train, which are associated together with said 75% shall have their brakes so used and operated." After plaintiff had closed its testimony the defendant moved the court for judgment of nonsuit for the reason that there was not evidence sufficient to show a violation of the pro-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

visions of the statute by the company. The court sustained the motion. And now upon the motion to take off the nonsuit, it must be determined whether the trial judge erred. This necessarily involves construction of the acts of Congress as well as consideration of the allegations and proofs. The purpose of the act as stated in its title is "to promote the safety of employees and travelers upon railroads," etc. The mischiefs it was intended to remedy are well known and need not be dwelt upon. It has received, as it should, such liberal construction as to best promote the ends desired. This court is now asked to rule that it forbids the use of a hand brake on trains except in "emergencies arising from unforeseen or wholly exceptional causes." It is urged that the habitual use of hand brakes on Sand Patch grade in accordance with written orders which were offered in evidence is evidence that the trains have not a sufficient number of cars so equipped with power or train brakes that the engineers can control the speed, and that the use of hand brakes on such grade is a violation of the act. This contention disregards the purpose of the railroad as disclosed by the orders which is not to control the speed, but to insure the safe movement of the trains.

The act of 1893 by its terms was not to take effect until January 1, 1898. By section 7 of that act the Interstate Commerce Commission was authorized to extend the period within which railroads should comply with the act. This was due doubtless to the inability of all the railroads immediately to equip all their rolling stock in the manner prescribed. The act of 1893 was amended by the act of 1903. By the latter the number of cars in any train to have their brakes used and operated by the engineer is fixed at a minimum of 50 per cent. In this respect section 1 of the act of 1893 was amended. In that act the minimum was expressed by "sufficient," a word than which no clearer could be chosen from our language to indicate a minimum quantity, and yet a word indicating various requirements to various men operating railroads under various conditions. It is therefore apparent that one of the purposes of the amendment was to render certain that which was uncertain. If, however, this were not so, yet the power given to the Commission to extend the time for compliance with the original act was not taken away by the later act, but rather affirmed therein by the provision that the Commission could from time to time increase the minimum of 50 per cent. In the exercise of that power the minimum was increased and is now 75 per cent. It seems, therefore, that if a train now has 75 per cent. of its cars used and operated by the engineer, and if there is no other infraction of the law, a jury should not be permitted to find that the train has not a "sufficient" number of cars equipped as required. But whether the train is improperly equipped is a question of fact, and must be proven by the party who asserts the affirmative. This action is a civil action, although for penalties, and there is no greater burden of proof imposed upon the United States than upon the plaintiff in any other civil action. In none of the 21 causes of action was any evidence offered that the train was not equipped as provided by law, as the court understands it. As to the great majority, the witnesses on the part of the plaintiff testified to facts showing proper equipment. As to the few, the evi-

dence (given with respect to all) that hand brakes were operated on the long Sand Patch grade, was the only parcel evidence offered.

Plaintiff contends that evidence of the use of hand brakes is all that need be shown to justify the submission to the jury of the question whether the train was properly equipped. It was not shown that the hand brakes were used to control the speed of the train. The burden was upon the plaintiff to show this. Plaintiff's evidence tended to show the contrary. That the act of 1893 and its amendments did not prohibit the use of hand brakes is clear. There is no such prohibition in them. The first section of the act of 1893 intends that the engineer should control the speed of the train without requiring brakemen to use the common hand brake for that purpose. The power to the Interstate Commerce Commission to extend the time for compliance with the act and to enlarge the minimum requirement, and the indefinite extension as indicated by fixing the minimum at 75 per cent., all support the same view.

Plaintiff offered in evidence two orders issued by the defendant to its locomotive engineers and trainmen and which were in effect upon the defendant's railroad at the time at which the alleged violations of the act occurred. The material portions of these orders are as follows:

"Trains must have the air brakes operative on not less than 75% of the cars in the train, which must be tested as follows:

"As soon as the locomotive is coupled to the train and the pressure is equalized throughout the train, the engineer upon request of a trainman or inspector, will make a full service application (25lb. reduction of pressure) of the brakes, and hold them on until the trainmen or inspectors have examined the brakes on the tender and on each car."

"This must be done at the points designated in order to know, before starting, that brakes are in good condition.

"Trains on descending grades must be controlled by use of the air brakes, supplemented by the application of such hand brakes as may be necessary to insure the safe movement of the train.

"The conductor must be in his proper place out on the train, and will be held responsible for properly instructing the trainmen, and know that they are located at their appropriate stations on the train, and that the handles of the pressure retaining valves on each car in the train are turned to the position for service as may be required.

"The conductor must also assist in holding the train, by the application of hand brakes, when necessary.

"Sufficient hand brakes must be applied at the top of grade and so manipulated on the descending grades that in controlling the speed of the train by the air brake, the full application will not be necessary, thus leaving some reserve power within control of the engineer.

"These instructions are issued to prevent excessive heating of car wheels, thus reducing the liability for accident from such a cause.

"On freight trains descending the eastern slope of the mountain, trainmen must not leave the hand brakes applied to any car for the entire distance from Sand Patch to Hyndman.

"When leaving Sand Patch, commencing with the head end of the train, a sufficient number of hand brakes must be applied on alternate cars to properly supplement the air brakes (see Circular of February 10th, 1908, to locomotive engineers and trainmen), and the number of hand brakes so set must be left applied until the train reaches Glencoe.

"At Glencoe, the hand brakes on alternate cars will be applied and released, successively, until all hand brakes applied at Sand Patch have been released and a like number have been set.

"On arrival at Hyndman, all hand brakes must be released.

"Trainmen must at all times make close observation for indications of extreme heating of wheels due to either hand or air brakes and must change the hand brakes or pressure retaining valves at any points between Sand Patch and Hyndman if necessary to prevent excessive heating of wheels."

These orders having become part of plaintiff's case, evidence of the use of hand brakes, in the absence of evidence that the trains were not properly equipped, was evidence only that the orders were being obeyed, that the trainmen were insuring the safe movement of the train, and that they were anticipating "emergencies which might arise from unforeseen and wholly exceptional cases."

The plaintiff called witnesses McManamy and Ensign as experts to show that such orders were not necessary or reasonable, but their testimony is not entitled to weight for the reason that the former "had no experience on Sand Patch grade," and did not know anything about the average tonnage per brake on defendant's railroad, and the latter did not know the practice in the operation of air brakes on Eastern mountain grades.

The question raised by the plaintiff in the 21 causes has not been decided in any jurisdiction. It is urged, however, that the air brake provision is so similar to the coupler provision of the act (in the second section) that decisions construing the latter should apply to the former. The coupler provision of the act makes it unlawful to use any car in interstate traffic "not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the cars." Clearly it prohibits the use of certain couplers. As stated in *Johnson v. Southern Pacific Company*, 196 U. S. 19, 25 Sup. Ct. 158, 49 L. Ed. 363, the test of compliance is whether men must go between the cars to couple or uncouple them. The act does not prohibit men from going between the cars. It is a well-known fact, and admitted by plaintiff at the trial, that men are required to go between the cars for the purpose of connecting the air line of the power brake system in use as required by the act. Proof of the mere fact that men would go between the cars would not be proof that the couplings were not such as were required. Just as in the case at bar, proof of the mere fact that hand brakes were used on the Sand Patch grade would not be evidence that the trains were not properly equipped with the requisite number of power brake cars. There appears to have been no error in regard to the 21 causes of action.

With respect to the second cause of action, however, as has been said, a different question is presented. It is averred in plaintiff's statement of claim that, while the train had 75 per cent. of its cars used and operated by the engineer, there were associated together in said train with said 75 per cent. four additional train brake cars which did not have their brakes operated by the engineer. This charges a breach of the provisions of section 2 of the act of March 2, 1903, above quoted. It was admitted at the trial that said four cars were defective and out of repair. It did not appear how long their brakes had been unused. The testimony showed that they had their air "cut out"—that is, cut off in the pipes extending from the main air line of the train to the brakes. The air was not interfered with in passing through said cars to other cars. It seems plain that with brakes cut

out for defects they ceased to be power braked cars and became part of the allowed percentage of hand braked cars. The act nowhere imposes a penalty for using an air braked car with a cut out brake, as it does for using one with a defective coupler, or one without grab irons or handholds. Again, the act does not say all power braked cars in a train shall have their brakes used and operated. There is a qualification which must mean that only such power braked cars "which are associated together with said" 75 per cent. shall have their brakes used. That clearly contemplated that there might be some power braked cars not associated with the 75 per cent., which need not have their air brakes used and operated. All the cars in the train, except the four cut-out cars, and the caboose, not complained of, were associated together in the air brake operations by the engineer of the locomotive. When the Interstate Commerce Commission shall, in the exercise of its powers, fix a minimum percentage of cars in any train required to be operated with power or train brakes, which must have their brakes used and operated as required by the act, at a minimum much greater than that which now is the standard, there may be some right to recover upon a cause of action in which the allegations and proofs are similar to those in the case at bar.

Inasmuch, therefore, as the plaintiff did not offer evidence sufficient to sustain a verdict upon any one of the several causes of action, the motion to take off the nonsuit must be refused.

ALLEN-WEST COMMISSION CO. V. BRASHEAR et al.

(Circuit Court, E. D. Arkansas, E. D. February 28, 1910.)

No. 1,677.

(Syllabus by the Court.)

1. COURTS (§ 317*)—FEDERAL COURTS—JURISDICTION—DIVERSITY OF CITIZENSHIP.

For the purpose of determining the jurisdiction of a national court when it is invoked upon the ground of a diversity of citizenship, it is the duty of the court to look beyond the pleadings and arrange the parties according to their real interests in the dispute, and not according to the arbitrary arrangement of the pleader, and if, after such rearrangement, it clearly appears that some of the plaintiffs and defendants are citizens of the same state, it is the duty of the court to dismiss the cause for want of jurisdiction.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 317.*]

Diverse citizenship as a ground of federal jurisdiction, see note to *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullaghan*, 27 C. C. A. 298.]

2. COURTS (§ 310*)—FEDERAL COURTS—JURISDICTION—DIVERSITY OF CITIZENSHIP.

Trustees of a mortgage, who are invested with the power of sale upon breach of the conditions, are not merely formal parties, but are indispensable parties, the legal title being in them, and their interests being antagonistic to those of the mortgagors must be treated as plaintiffs in an action of foreclosure, even if for a refusal to act they are properly made defendants in an action by the beneficiary.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 310.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. COURTS (§ 310*)—FEDERAL COURTS—JURISDICTION—DIVERSITY OF CITIZENSHIP.

While the beneficiaries in such a mortgage are proper parties, they are not indispensable parties, and, if the necessary diversity of citizenship exists between the trustees and mortgagors, a national court has jurisdiction of an action to foreclose the mortgage, although the beneficiary and the mortgagors are citizens of the same state, provided he is not made a party to the action.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 857; Dec. Dig. § 310.*]

Bill by the Allen-West Commission Company against W. M. Brashcar and others. On demurrer to the jurisdiction. Bill dismissed for want of jurisdiction.

This is a bill brought to foreclose a deed of trust in the nature of a mortgage executed to the defendants F. H. Phillips and R. W. Irvin, as trustees, by two of the codefendants for the purpose of securing the payment of certain indebtedness due to a number of creditors of the mortgagors, one of whom is the commission company, which is the sole complainant in this action. The bill alleges that complainant is a corporation created by and existing under the laws of the state of Missouri, and that all of the defendants are citizens of the state of Arkansas. It charges that all the debts secured by the deed of trust, except that due the complainant, have been paid off, and that there is now due it a balance of several thousand dollars. The mortgagors and trustees under the mortgage and subsequent mortgagees, all of whom are alleged to be citizens of the State of Arkansas, are made parties defendants. The deed of trust, which is made a part of the bill, authorizes the trustees to sell the mortgaged premises upon default in the payment of the debts, and there is no allegation in the bill showing a refusal or disqualification to act on the part of the trustees. The defendants demurred to the jurisdiction of the court upon the ground that the interest of the trustees makes them indispensable parties plaintiffs, and that, although the pleader has made them parties defendants, it is the duty of the court to rearrange the parties and treat the trustees as complainants, and, if that is done, the diversity of citizenship necessary to give a national court jurisdiction does not exist, as the trustees and the mortgagors, as well as the junior mortgagees are all alleged in the bill to be citizens of the state of Arkansas.

Moore, Smith & Moore, for complainant.

Davis & Pace and U. L. Meade, for defendants.

TRIEBER, District Judge (after stating the facts as above). As the parties are arranged in the bill of complaint, the diversity of citizenship necessary to confer jurisdiction on this court exists; the complainant being a corporation created by and existing under the laws of the state of Missouri, and all the defendants citizens of the state of Arkansas. But it is now well settled by an unbroken line of decisions that, for the purpose of determining the jurisdiction of a national court when it is invoked upon the ground of diversity of citizenship, it is the duty of the court to look beyond the pleadings and arrange the parties according to their real interest in the dispute, and not according to the arbitrary arrangement of the pleader; and if, after such rearrangement, it clearly appears that some of the plaintiffs and defendants are citizens of the same state it is the duty of the court to dismiss the cause for want of jurisdiction. Removal Cases, 100 U. S. 457, 25 L. Ed. 593; Pacific R. R. Co. v. Ketchum, 101 U. S. 289, 25 L.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Ed. 932; Hawes v. Oakland, 104 U. S. 450, 26 L. Ed. 827; Detroit v. Dean, 106 U. S. 537, 1 Sup. Ct. 560, 27 L. Ed. 300; Doctor v. Harrington, 196 U. S. 579, 25 Sup. Ct. 357, 49 L. Ed. 606; Dawson v. Columbia Trust Co., 197 U. S. 178, 25 Sup. Ct. 420, 49 L. Ed. 713; Joseph Dry Goods Co. v. Hecht, 120 Fed. 760, 57 C. C. A. 64; Mann v. Gaddie, 158 Fed. 42, 88 C. C. A. 1; Gage v. Riverside Trust Co. (C. C.) 156 Fed. 1002.

In the Ketchum Case the court said:

"For the purpose of jurisdiction, the court had power to ascertain the real matter in dispute, and arrange the parties on one side or the other of that dispute. If in such arrangement it appeared that those on one side were all citizens of different states from those on the other, jurisdiction might be entertained, and the cause proceeded with."

Of course, the converse of that proposition, that, if upon such re-arrangement there is no diversity of citizenship between all the plaintiffs and all the defendants, the jurisdiction fails, is manifestly the law. Upon an examination of the bill and the trust deed sought to be foreclosed, which is made a part thereof, it appears that, while the complainant, the cestui que trust of the mortgage, is a corporation created under the laws of the state of Missouri, both the trustees, all the mortgagors, and the subsequent mortgagees are citizens of the state of Arkansas.

The contention that the trustees are merely nominal parties and could be dismissed entirely cannot be sustained, for it has been uniformly held by the national courts that trustees in a mortgage deed are not only indispensable parties, but the only necessary parties plaintiffs in a foreclosure proceeding, and for this reason it is their citizenship which controls; and not that of the beneficiaries, and the latter need not be made parties at all, although the pleader may make them parties as they are proper parties. Knapp v. Railroad Company, 20 Wall. 117, 22 L. Ed. 328; Gardner v. Brown, 21 Wall. 36, 22 L. Ed. 527; New Orleans v. Gaines, 138 U. S. 595, 606, 11 Sup. Ct. 428, 34 L. Ed. 1102; Dodge v. Tulleys, 144 U. S. 451, 12 Sup. Ct. 728, 36 L. Ed. 501; Mexican, etc., R. R. Co. v. Eckman, 187 U. S. 429, 23 Sup. Ct. 211, 47 L. Ed. 245; Morris v. Lindauer, 54 Fed. 23, 4 C. C. A. 162; Rust v. Brittle Silver Co., 58 Fed. 611, 7 C. C. A. 389; Griswold v. Batcheller (C. C.) 75 Fed. 470.

Nor is this rule confined to trust deeds in which there are a large number of bonds sought to be secured which are held by numerous parties, many of them unknown. In Dodge v. Tulleys the indebtedness sought to be secured was held by one person only, and it was held that the beneficiary was not a necessary party, and for this reason the fact that he was a citizen of the same state as the mortgagor did not defeat the jurisdiction of a national court if there was a diversity of citizenship between the trustee of the mortgage and the mortgagor.

In Rust v. Brittle Silver Co. it was also urged, as has been in this case, that the trustee is only a nominal party, and for that reason his citizenship immaterial, but Judge Caldwell, speaking for the court in response to this contention, said:

"This position is not tenable. The deed of trust invests Frost (the trustee) with the legal title to the premises, and imposes on him the duty of selling the property, and applying the proceeds to the payment of certain debts of the grantor. * * * To a bill seeking such relief the trustee is not merely a nominal, but an indispensable, party."

What are the interests of a trustee in such a conveyance? Clearly antagonistic to those of the mortgagors who were the grantors and he the grantee. He holds the legal title for the benefit of the beneficiary, and the pleader cannot by making him a codefendant of the mortgagors, instead of a co-complainant, invoke the jurisdiction of a national court if he is a citizen of the same state as the mortgagors. That cannot be done arbitrarily, nor even by reason of a refusal on the part of the trustees to act. It is true in the latter event the trustees may be made parties defendants, but for jurisdictional purposes they will be treated as complainants. *Coal Company v. Blatchford*, 11 Wall. 172, 20 L. Ed. 179; *Pacific Railroad Co. v. Ketchum*, supra; *Thayer v. Life Association*, 112 U. S. 717, 5 Sup. Ct. 355, 28 L. Ed. 864; *Peper v. Fordyce*, 119 U. S. 469, 7 Sup. Ct. 287, 30 L. Ed. 435; *Barth v. Coler*, 60 Fed. 466, 9 C. C. A. 81; *Shipp v. Williams*, 62 Fed. 4, 10 C. C. A. 247; *First National Bank v. Radford Trust Co.*, 80 Fed. 569, 26 C. C. A. 1; *Turner v. Building & Loan Ass'n*, 101 Fed. 308, 41 C. C. A. 379; *Board of Trustees v. Blair* (C. C.) 70 Fed. 414.

In *Shipp v. Williams* the trustees were, as in this case, made parties defendants; the beneficiary being the sole complainant, the bill alleging that "the trustees had refused and declined to further exercise their duties as trustees in the said deed of trust and announced their determination to decline the use of their names and services in the matter of foreclosing said deeds of trust," while in the case at bar no reason whatever is alleged why the trustees cannot act in these foreclosure proceedings. Judge, now Mr. Justice Lurton, who delivered the opinion of the court in that case, held that, while it was proper under the circumstances to make the trustees parties defendants, the court for jurisdictional purposes must arrange them according to their interests, and when so arranged, the trustees being citizens of the same state as the mortgagors, the court was without jurisdiction. It was further held in that case that:

"The duty of the court to arrange the parties according to their interests applies as well in cases of original jurisdiction as it does under the removal section of the act."

Whether these principles would apply in a case in which the trustees claim some interest adverse to the beneficiary or when the beneficiary seeks an accounting from the trustees for their misconduct it is unnecessary to determine in this cause, as no such allegations are made in the bill.

Arranging the parties in accordance with these rules, we must treat the defendants Phillips and Irvin, the trustees in the trust deed sought to be foreclosed, as coplaintiffs of the commission company, the beneficiary, and, as the bill alleges that these trustees and the other defendants are all citizens of the state of Arkansas, this court is without jurisdiction, and the bill must therefore be dismissed for want of juris-

THE NANUET.

(District Court, S. D. New York. January 25, 1910.)

(Syllabus by the Judge.)

COLLISION (§ 45*)—SIGNAL AND TOW.

Collision between the tug Nanuet and a carfloat in tow alongside and the schooner Honora Butler in the East River near Corlear's Hook. The schooner was duly lighted and sailing up the river. The tug was bound down with two carfloats on her starboard side. *Held*, that the schooner kept her course and the collision was due to the tug's fault in not seeing the lights of the schooner and in failing to avoid her.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 51; Dec. Dig. § 45.*]

In Admiralty. Action by Thyge J. Mikkelson against the steam-tug Nanuet. Decree for libellant.

William C. Foster and Howard S. Harrington, for libellant.
Wilcox & Green, for claimant.

ADAMS, District Judge. On the night of April 13, 1909, about 1:30 a. m., the schooner Honora Butler, about 76 feet long, laden with a cargo of manure, and bound for Naubuc, Connecticut, collided with the tug Nanuet and a carfloat in tow on the starboard side of the tug. They were proceeding down the river. The collision occurred about off Corlear's Hook. The weather was clear, the tide strong flood. The schooner was sunk causing a loss, said to have been \$3,000 and upwards.

The libel alleges that the schooner set sail from Gowanus Bay about 11:30 p. m. on the 12th, properly manned, her master being at the wheel and a good lookout forward; that she carried the regulation lights properly set and burning brightly; that all went well until the schooner reached a position in the river about half way between the Brooklyn and Williamsburg Bridges, when those in charge saw the green light of a tug boat, which later proved to be the Nanuet, with a carfloat on her starboard side, a little below the Williamsburg Bridge; that at this time the schooner was about in the middle of the river and was heading on a course which would have carried her past Corlear's Hook about one-third of the way from the New York shore; that after sighting the green light the schooner held her course; that shortly thereafter and while the schooner and tug were still between a quarter and a half a mile apart, the tug blew two whistles to the schooner, which thereafter continued to hold her course; that the tug continued to display its green light for some time but when the vessels were only a short distance apart and each was showing her green light to the other, the tug suddenly ported her helm and swung across the bow of the schooner; that this manœuvre was made too late for the tug and tow to cross the schooner's bow in safety with the result that the tug and carfloat both came in collision with the schooner, catching her bow between the two, and inflicting such serious injuries that she sank in a few minutes; that the collision occurred

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

about one-third of the way over from the New York side. It is further alleged that the tug was in fault in that: (1) she maintained no sufficient lookout, (2) she did not pass the schooner starboard to starboard, (3) being the burdened vessel, she did not give the schooner a wider berth, (4) after blowing two whistles, she ported her helm and tried to cross the bow of the schooner and (5) she did not avoid the schooner.

The answer, after some admissions and denials, alleges:

"On the 12th day of April, 1909, at about 11:40 p. m., the tug Nanuet left Long Island City with two carfloats in tow on her starboard side, bound for Jersey City. The tide was flood, the wind strong from the southeast, and the atmosphere clear. The tug's lights were all properly set and burning, there were two competent lookouts forward on the floats, and the master and mate were in the pilot house, the latter having the wheel and the former keeping a lookout. After the tug had proceeded down the East River, favoring the Manhattan shore, and had arrived about abreast of Corlear's Hook, two tugs, one with a tow, were observed on the starboard bow of the tug, bound up the river. The Nanuet blew two whistles to the tugs, and received an answer of two whistles from the outside tug. Both tugs subsequently passed her starboard to starboard. After signalling the tugs, the Nanuet hauled more towards the Brooklyn shore, and when she was about mid-river, a sail vessel, which subsequently proved to be the Honora Butler, was observed about four points on her port bow, bound up with a free wind, heading clear of the Nanuet, but displaying no port light. Then the schooner's green light was suddenly opened and she headed for the tug. Danger of collision becoming imminent, the master of the tug at once took the wheel, put it hard aport, rang for full speed astern, and blew alarm whistles. The order to the engine was at once obeyed, but the schooner kept on towards the tug, and her bow came into collision with the bow of the tug and the port side of the inner of the two floats. It was then observed that the schooner was carrying a very high deck load.

Ninth: Claimant further alleges, upon information and belief, that said collision was wholly due to fault and negligence on the part of the schooner, in the following among other respects which will be pointed out upon the trial of this action: 1. She did not keep her course, but swung to port and attempted to cross the course of the tug. 2. Her port light was not burning. 3. She had no lookout. 4. She did not observe the tug until just prior to the collision. 5. She was carrying a deck load so high as to shut off or embarrass the view of her wheelsman. 6. She did not have a competent man at her wheel."

The testimony showed that the Butler was going up through the East River with a south south-east wind, close hauled, keeping well to the Brooklyn side. When opposite Arbuckle's Refinery, about Jay Street, the master, at the wheel, eased off his sheets and headed on a north-east course about for Corlear's Hook. She was then making, aided by the tide, about 6 knots per hour. The master then saw a green light, which, as it subsequently turned out, was on the Nanuet, about one-half a mile away. The schooner was then showing its green light to that vessel. The schooner kept on and if there had been no change on the part of the tug, there would have been no collision, but the tug, when the vessels were not far apart, suddenly changed to the starboard and brought the vessels together.

There was no dispute about the schooner showing her green light but it was strongly urged that her red light was not burning. It does not seem that this would have made any difference as the green light was always in view of the tug but if the red light had any bearing

whatsoever, upon the collision, there could be no reasonable doubt that it was properly displayed. The testimony on the schooner makes it clear that it, as well as the green, was duly lighted and shown. This was, as to its being displayed, confirmed by an outside witness, from the passing tug, who saw the light.

The schooner's navigation seems to have been without fault and is in substance correctly described in the libel. Her master was mistaken in supposing that the two whistle signal of the tug was intended for him, but that is immaterial. His navigation was not dependent upon signals. All that she was required to do was to keep her course and it was the duty of the tug to avoid her. In this the tug failed, making some notable mistakes in her navigation. The lookout on her part was deficient. She did not see the schooner when she should have, doubtless because the attention of those on her who should have performed this duty, was given to the tug bound up the river, following the schooner, which passed the schooner and also the Nanuet, the latter in conformity with an exchange of a two whistle signal. Having passed the tug, the Nanuet turned to the starboard and was suddenly confronted with the schooner, when she stopped and backed, doing what she could to avoid collision, but it was too late.

The tug's account of the lights and navigation of the schooner is incredible. Those on her apparently did not see the schooner when they should and then to explain the situation, they made some remarkable statements, for example, that the schooner with the south-east or south south-east wind and sailing up the river to the north-east, had her sails on her starboard side, a contention which has been abandoned by her counsel since the trial.

There will be a decree for the libellant, with an order of reference.

SEATTLE BREWING & MALTING CO. v. UNITED STATES.

(Circuit Court, W. D. Washington, N. D. January 28, 1910.)

No. 1,469 (1,967).

1. CUSTOMS DUTIES (§ 73*)—CUSTOMS REGULATIONS—BROKEN RICE—AUTHORITY OF SECRETARY OF THE TREASURY.

Under Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 232, 30 Stat. 169 (U. S. Comp. St. 1901, p. 1649), relating to broken rice that will pass through what is "known commercially as No. 12 wire sieve," it appearing that there are several sieves so known commercially, the Secretary of the Treasury was authorized, in order to secure uniformity, to specify which of them should be used by customs officers.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 73.*]

2. CUSTOMS DUTIES (§ 73*)—EVIDENCE—DETERIORATION.

The fact that age and repeated handling of broken rice may have caused an infinitesimal increase in the percentage of the material that will pass through the standard sieve is not a sufficient reason for rejecting a test based on samples of such rice, especially where the failure to make a proper test at the time of importation was due to no fault of the importer.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 73.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

On Application for Review of a Decision by the Board of United States General Appraisers.

The Board of General Appraisers overruled the protest of the importers against the assessment of duty by the collector of customs at the port of Port Townsend. The Board's opinion reads as follows:

WAITE, General Appraiser. The merchandise consists of 2,328 bags of broken rice, which was assessed for duty as cleaned rice at 2 cents per pound, under tariff act July 24, 1897, c. 11, § 1, Schedule G, par. 232, 30 Stat. 169 (U. S. Comp. St. 1901, p. 1649), and is claimed to be dutiable at one-fourth of one cent per pound, at least as to so much as is small enough, under the provision in the same paragraph for "rice, broken, which will pass through a sieve known commercially as No. 12 wire sieve."

The collector states the reasons for his assessment as follows: "The deputy collector of customs at Seattle reports that, upon the first examination of the samples and testing, but 76 per cent. of the rice passed through the No. 12 sieve, United States standard, and that upon a subsequent test, by prolonged shaking and persistent rubbing, this was increased to 87 per cent. The entire importation was assessed for duty at the highest rate applicable to any part of the importation, following an unpublished decision of the Board of United States General Appraisers, dated January 27, 1902, concerning slack coal."

The decision referred to is an unpublished one, in which the Board held that an importation of coal slack or culm mixed with pea coal was properly assessed at the highest rate applicable to any of the merchandise, for the reason that there was no separation of the various grades. That decision was undoubtedly correct in its statement of the law, but if the Board had before it only the statement of the collector as quoted above it would feel obliged to sustain the protest in this case. That officer states that the test made by the customs officers itself established the proportion of broken rice in the importation which would pass through a No. 12 sieve, and we should say that the case was thus brought squarely within the principle adopted by the Supreme Court in *United States v. Hanlett*, 172 U. S. 133, 19 Sup. Ct. 114, 43 L. Ed. 393, in any event as to 76 per cent. of the rice, which presumably passed through the screen without "prolonged shaking and persistent rubbing."

There are other facts before us, however, which compel a different conclusion. It has been shown by the testimony taken before the Board that the sieve used by the customs officers in making the tests referred to by the collector was not the standard sieve prescribed by the regulations of the Treasury Department for use in classifying broken rice. In the Board's decision in *Re Wakem & McLaughlin*, G. A. 5,350 (T. D. 24,492), it was held that in view of the existence of different styles of No. 12 commercial sieves, it was proper for the Treasury Department to adopt the sieve mentioned in its order of December 19, 1900 (T. D. 22,680), namely, a sieve made of No. 24 brass wire, either Stubbs or Birmingham gauge. This decision was affirmed on appeal by the Circuit Court for the Northern District of Illinois in *Wakem v. United States* (C. C.) 147 Fed. 874, T. D. 27,395. The only legal method, therefore, for determining whether broken rice is within the provision therefor in paragraph 232, is by the use of such sieve. It is shown by the testimony that the sieve used by the customs officers at Seattle was a No. 12 sieve made of No. 27 wire, Birmingham gauge. The No. 12 signifies the number of meshes to the inch, and it is apparent that a sieve having 12 meshes to the inch, made of No. 27 wire, which is a smaller size than No. 24, will have larger meshes than the authorized sieve, and will pass more of a given quantity of broken rice than the latter. It is obvious, then, that in both tests made at Seattle an improper method was pursued, and the collector's report can furnish no basis for a finding as to the proportion of broken rice in the importation.

A later test of a small sample from the importation, weighing something less than a pound, was made by the examiner of rice at the port of New York, who testified that but 33½ per cent. of it passed through the standard sieve in use at that port. Importers' counsel maintains in his brief, and the Board agrees with him, that this test was of too small a sample to properly determine the quantity of such rice in 2,328 bags. The Board is therefore confronted with a record in which the only evidence of the quantity of broken rice dutia-

ble at one-fourth of one cent per pound which is contained in the importation consists of proof of certain tests, all of which were improper or inadequate, and which vary so widely as to furnish an insufficient basis for a finding as to such quantity. The burden rests upon the importers to show, by a fair preponderance of evidence, the quantity of rice which they contend is dutiable at the lower rate; and as they have failed to do this the Board, with some regret, is compelled to overrule their protest.

Counsel for the protestants objected to the introduction in evidence of the sieve used at Seattle, and of all the testimony which tended to impeach the report of the collector accompanying the protest, and which is quoted above. The Board is clearly of the opinion, however, that the government is not estopped from proving the actual facts connected with the original tests, even though the effect of such proof is to impeach the collector's return.

The protest is overruled, and the collector's decision affirmed.

Comstock & Washburn (Albert H. Washburn, of counsel), for importers.

Elmer E. Todd, U. S. Atty.

HANFORD, District Judge. There is manifest injustice in the assessment of duty on the importation which is the subject of litigation in this case, so much so that the decision of the Board of General Appraisers, overruling the importers' protest, expresses regret. The merchandise on which the duty was assessed consists of 2,328 bags of broken rice, dutiable under paragraph 232 of the Dingley tariff law of 1897 (30 Stat. 169) at the rate of two cents per pound on the portion thereof which will not pass through a sieve known commercially as a No. 12 wire sieve, and at the rate of one-fourth of a cent per pound on the portion which will pass through such a sieve. At the time of entry the collector tested samples of the rice, using a No. 12 sieve made of No. 27 wire, 12 meshes to the inch, and by that test it was found that 76 per cent. passed freely, and that with persistent shaking and rubbing 87 per cent. passed through the sieve. The collector then erroneously exacted duty on the entire importation at the higher rate. The importer protested, and appealed to the Board of General Appraisers. The collector transmitted a report of the test he had made and a sample of the rice which was tested at New York, using a No. 12 sieve made of No. 24 wire, which is the sieve prescribed by an order promulgated by the Secretary of the Treasury for use in appraisements under the paragraph of the tariff law referred to. On that test 33 $\frac{1}{3}$ per cent. of the sample passed through the sieve. By its decision the Board rejected the test made by the collector on the ground that the sieve used was not the sieve which the Secretary of the Treasury prescribed, and rejected the test made in New York on the ground that the sample was insufficient in quantity for an adequate test, and overruled the protest on the ground that the appellant had failed to prove affirmatively that the rate of two cents per pound was not applicable to the entire importation, and from that decision the importer has appealed to this court.

The evidence submitted for consideration of this court includes samples of the rice selected by a revenue officer of the United States, and the uncontradicted evidence proves that on a fair test of the samples, using a regulation sieve made of No. 24 wire, 47 $\frac{11}{17}$ per cent. of the rice passed through it. The United States Attorney contends that age

and repeated handling has affected the samples, so that they do not indicate with precision the different grades of the rice at the time of entry; but he has not suggested better means for a fair adjustment. No fault of the importer can be assigned as the cause of any loss to the government by reason of an infinitesimal increase in percentage of fine particles caused by abrasion in handling the samples.

The appellant has attempted to prove by the testimony of hardware merchants that the sieve known commercially as a No. 12 wire sieve is made of No. 27 wire. The evidence, however, proves that No. 12 sieves have 12 meshes to the inch and are made of wire gauged as Nos. 24, 25, 26, 27, and 32. In the case of *Wakem v. United States* (C. C.) 147 Fed. 874, an attempt was made to obtain a decision recognizing a wire sieve made of No. 32 wire as the lawful sieve prescribed in the tariff law. It is my conclusion that, in order to maintain uniformity in the appraisement of broken rice in the different customs districts, it was necessary to specify the size of wire of which sieves should be made, and that the Secretary of the Treasury was authorized to make the order designating No. 24 wire.

It is conceded that the importation consisted of broken rice, a portion of which will pass through the regulation sieve. Therefore the collector of customs assessed the duty by an improper method, and the importers' protest is valid. *United States v. Ranlett*, 172 U. S. 133, 19 Sup. Ct. 114, 43 L. Ed. 393; *United States v. Bond* (C. C.) 161 Fed. 165. The Collector of Customs had the opportunity to determine with accuracy the percentage of the rice dutiable at the different rates, and it is the opinion of the court that the government must be concluded by the tests made of the samples produced, and that duty should be collected at the rate of one-fourth of a cent per pound on 47¹¹/₃₇ per cent. of the importation, and at the rate of two cents per pound on the remainder.

The court directs that a judgment be entered in proper form as indicated by this opinion.

SEATTLE BREWING & MALTING CO. v. UNITED STATES.

(Circuit Court, W. D. Washington, N. D. January 26, 1910.)

No. 1,490 (1,968).

On Application for Review of a Decision of the Board of United States General Appraisers.

The opinion filed by the Board of General Appraisers reads as follows:

WAITE, General Appraiser. This protest claims that certain rice, assessed for duty by the collector as cleaned rice, at 2 cents per pound, under Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 232, 30 Stat. 169 (U. S. Comp. St. 1901, p. 1649), should be assessed at one-fourth of one cent per pound under the same paragraph as broken rice. The rate contended for applies only to such broken rice as "will pass through a sieve commercially known as No. 12 wire sieve."

It appears from the record that the importation consists of 1,680 bags of rice, 18³/₄ per cent. of which was assessed by the collector as broken rice under

said paragraph, while the remaining 81.25 per cent. was assessed as cleaned rice. The various allegations and contentions made by the protestants are not supported by any evidence introduced by them; but a careful test made by the Board of the official sample forwarded by the collector, which he concedes to be correctly representative of the merchandise, shows that 24 per cent. of it will pass through the standard No. 12 sieve in use in the appraiser's office at the port of New York. This sample, however, weighs something less than one pound, and is, in our judgment, inadequate to determine the proportion of broken rice in an importation of between 300,000 and 400,000 pounds, as this is. Furthermore, the importers have repudiated the official sample, contending in their protest that it was not taken from the importation in question. For the latter reason, and because of the inadequacy of the sample, the Board would hardly be justified in finding in favor of the importers that an additional $5\frac{1}{4}$ per cent. of the entire importation should be classified as broken rice. As the case stands, the findings of the customs officers as to the quantity of rice dutiable at the higher rate have not been successfully assailed.

In submitting their case importers' counsel asks consideration of testimony introduced in a previous case of the same protestants. Abstract 13,152 (T. D. 27,674). We have examined that record, and are unable to see that any conclusions to protestants' advantage can be drawn from it.

The protest is overruled, and the collector's decision affirmed.

Elmer E. Todd, U. S. Atty.

Comstock & Washburn (Albert H. Washburn, of counsel), for importers.

HANFORD, District Judge. The controversy in this case relates to an importation of 1,689 bags of broken rice, on which duty was assessed and paid at the time of entry at the rate of one-fourth of a cent per pound. The lawful duty under paragraph 232 of the Dingley tariff law of 1897 on broken rice is one-fourth of a cent per pound on the portion thereof which will pass through a sieve known commercially as a No. 12 wire sieve, and 2 cents per pound on the portion thereof which will not pass through such a sieve. The collector of customs reliquidated the assessment of duty, and exacted payment at the rate of 2 cents per pound on $81\frac{1}{4}$ per cent. of the quantity of rice. The importer protested, and appealed to the Board of General Appraisers. By its decision the Board overruled the protest, holding that the appellant had failed to prove affirmatively that there was any error in the reliquidation.

Samples of the rice have been produced in evidence, and the uncontradicted evidence proves that upon a fair test of the sample $43\frac{3}{11}$ per cent. passed through a No. 12 wire sieve made of No. 24 wire, which is the sieve recognized by the Treasury Department as the lawful sieve for testing the broken rice. On this evidence the court finds that the appellant is entitled to reclaim the excess above lawful duty paid on the excess above $43\frac{3}{11}$ per cent. of the importation, and a judgment will be entered accordingly.

WHITTAKER v. ILLINOIS CENT. R. CO.

(Circuit Court, E. D. Louisiana. January 24, 1910.)

No. 13,755.

1. MASTER AND SERVANT (§ 250*)—FEDERAL EMPLOYER'S LIABILITY ACT—SCOPE AND EFFECT.

Where the petition of an employé in an action against a railroad company to recover for a personal injury alleges facts which bring the case within the federal employer's liability act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1909, p. 1171]), it is governed by such act, whether specifically declared on or not, at least in the federal courts.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 250.*]

2. COURTS (§ 270*)—FEDERAL COURTS—DISTRICT OF SUIT.

Where an action is within the general jurisdiction of the federal courts, both on the ground of diversity of citizenship and because founded on a law of the United States, such action can be brought only in the district of which defendant is an inhabitant, under the judiciary act (Act March 3, 1887, c. 373, § 1, 24 Stat. 552, as amended by Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508]), which authorizes the bringing of a suit in the district of the residence of either the plaintiff or defendant when jurisdiction is founded "only" on diversity of citizenship.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 810; Dec. Dig. § 270.*]

Action by Walter W. Whittaker against the Illinois Central Railroad Company. On motion to dismiss. Motion sustained.

Armand Romain, for plaintiff.

Gustave Lemle, for defendant.

FOSTER, District Judge. This is an action for damages for personal injury, and a motion is made to dismiss for want of jurisdiction—or, more properly speaking, venue—in this court. Plaintiff is a citizen of Louisiana and defendant is a corporation organized under the laws of Illinois, having its principal office at Chicago.

Defendant contends that plaintiff's right to enter the federal court is twofold: First, because of diversity of citizenship; second, because his right of action is founded on a law of the United States, to wit, Act Cong. April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1909, p. 1171), known as the federal "Employer's Liability Act," and therefore suit can be brought only at the domicile of the defendant.

The identical question, based on analogous facts, was recently decided by Judge Maxey in the case of *Cound v. Atchison, Topeka & Santa Fé Ry.*, 173 Fed. 527, in the Circuit Court for the Western District of Texas. In the logical and convincing opinion of Judge Maxey the question is argued at length, and little is left to be said on the subject. Jurisdiction seems to depend on the construction to be given the word "only" in the clause of Act March 3, 1887, c. 373, § 1, 24 Stat. 552, as amended by Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 433 (U. S. Comp. St. 1901, p. 508), which is as follows:

"But no person shall be arrested in one district for trial in another in any civil action before a Circuit or District Court; and no civil suit shall be brought before either of said courts against any person by any original pro-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

cess or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

It is urged by counsel for plaintiff, in his painstaking and forceful brief, that Judge Maxey's construction of the word "only" is too narrow; but, without reference to the lexicographers, the word has a plain, ordinary, common-sense meaning equivalent to "solely," and so interpreted there can be no doubt, if plaintiff's cause of action is based on Act April 22, 1908, there is no jurisdiction, or rather venue, in this court. Furthermore, the question cannot be considered open. See *McCormick v. Walthers*, 134 U. S. 41, 10 Sup. Ct. 485, 33 L. Ed. 833.

Plaintiff's petition alleges, substantially, that defendant is engaged in the railroad business as a common carrier in interstate commerce; that plaintiff was employed by defendant, and while in the actual discharge of his duties and employed in such commerce he was injured through the negligence of defendant. He specifies that his injury was caused by the incompetence and negligent acts of a certain track crew also employed by defendant, and by the defective condition of defendant's engine, because certain brake beams and shoes were missing.

Plaintiff contends and ingeniously argues that the only allegation of his petition under which his cause of action might be construed to be based on the federal statutes is the one showing defendant to be engaged in interstate commerce; that for the purpose of passing on the exception this allegation should be treated as surplusage, and not considered; that if this is done he still has his action under the state law, and, jurisdiction being then based on diversity of citizenship only, the venue would lie in this district.

I cannot agree with this theory. Conceding the act of Congress to be constitutional, in the courts of the United States, at least, it is superior to and supersedes any state law or jurisprudence on the same subject. It is well settled that plaintiff need not base his cause of action on the federal statute specifically. If his petition alleges facts which bring the case within the purview of that law it is enough. That it does so is, to my mind, clear. Undoubtedly there is also jurisdiction by diversity of citizenship, and the defendant's domicile is not in this district.

These views, if correct, demonstrate that the suit is cognizable in the Circuit Court on two distinct grounds of jurisdiction, therefore not "only" because of diversity of citizenship, and must be brought in the district of which the defendant is a resident.

It may be that the most convenient place of trial, for defendant as well as plaintiff, is in this district, where the accident occurred. However, defendant has not seen fit to waive its rights, as it might have done, and, on the contrary, insists on trial at its domicile.

No doubt it will be a hardship on plaintiff to be required to transport his witnesses to the domicile of defendant, or submit to the alternative of taking their testimony out of the hearing of the jury; but I can only enforce the law as I understand it.

The exception of defendant will be maintained, and the suit dismissed.

BANCEL v. UNITED STATES.

(Circuit Court, S. D. New York. November 10, 1909.)

No. 5,512.

CUSTOMS DUTIES (§ 43*)—CLASSIFICATION—MODELING CLAY—PLASTILINA—SIMILITUDE—"CLAY."

Plastilina, or modeling clay, an article not containing clay, is not dutiable as "clay," either directly or by similitude, under Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 93, 30 Stat. 156 (U. S. Comp. St. 1901, p. 1632), but as an "unenumerated manufacture," under section 6, 30 Stat. 205 (U. S. Comp. St. 1901, p. 1693).

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 43.*]

On Application for Review of a Decision by the Board of United States General Appraisers.

In this case the importer sought to reverse a decision by the Board of Appraisers that had affirmed the assessment of duty by the collector of customs at the port of New York on merchandise imported under the tariff act of 1897. The Board's opinion, by Waite, General Appraiser, reads in part as follows:

"The commodity is known as modeling clay. It is used by artists and others engaged in plastic work, for making busts and models. The chemist reports that it contains 60.36 per cent of sulphur and 31.12 per cent of fatty anhydrides, with a small amount of each of the following ingredients: Unsaponifiable oil, zinc oxide combined, zinc oxide free, insoluble siliceous matter, and color. The report further states that the presence of clay cannot be demonstrated. * * * The fact that the substance is very high in price would indicate that it is not properly classifiable as 'clay.' * * * The testimony and invoices show that the cost in the country from which it is exported is over \$150 per ton."

Kammerlohr & Duffy (Joseph G. Kammerlohr, of counsel), for importer.

D. Frank Lloyd, Deputy Asst. Atty. Gen. (William A. Robertson, of counsel), for the United States.

MARTIN, District Judge. The merchandise in question is invoiced as modeling clay, and is also sometimes called plastilina. It was assessed for duty at 20 per cent. ad valorem under Tariff Act July 24, 1897, c. 11, § 6, 30 Stat. 205 (U. S. Comp. St. 1901, p. 1693), as a manufactured article, unenumerated. The particular claim of the importer relied upon on the argument was that said merchandise should be assessed as "clay" under section 1, Schedule B, par. 93, 30 Stat. 156 (U. S. Comp. St. 1901, p. 1632), either directly or by application of the similitude clause of section 7, 30 Stat. 205 (U. S. Comp. St. 1901, p. 1693). The Board of General Appraisers affirmed the assessment of the collector.

The question presented here seems to be solely one of fact. The Board properly classified the importation upon the facts as it found them. I see nothing in the record to justify the court in changing the Board's findings.

Decision affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

AMERICAN TELEPHONE & TELEGRAPH CO. OF ALABAMA v. TOWN OF NEW DECATUR.

(Circuit Court, N. D. Alabama, N. D. January 27, 1910.)

No. 263.

1. COURTS (§ 282*)—JURISDICTION OF FEDERAL COURTS—FEDERAL QUESTION.

Where jurisdiction of a federal court is predicated on the ground that the obligation of a contract has been impaired by a state, the questions to be considered are (1) the existence or not of the contract, (2) the obligation arising under it, and (3) whether there has been state legislation impairing the contract obligation.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 821; Dec. Dig. § 282.*]

2. CONSTITUTIONAL LAW (§ 115*)—OBLIGATION OF CONTRACTS—IMPAIRMENT BY STATE.

Impairment by a state of the obligation of a contract must be by legislation subsequent to the making of the contract enacted either directly by the Legislature of the state or, through delegation, by one of its municipalities.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 274-278; Dec. Dig. § 115.*]

3. CONSTITUTIONAL LAW (§ 115*)—OBLIGATION OF CONTRACTS—IMPAIRMENT BY STATE—MUNICIPAL ACTION.

If an ordinance of a municipality is relied on as constituting an impairment of the obligation of a contract, it must be shown to have been enacted pursuant to, or under color of, legislative authority from the state, granted either subsequent to the contract or, if prior, of continuing effect.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 115.*]

4. CONSTITUTIONAL LAW (§ 115*)—OBLIGATION OF CONTRACTS—IMPAIRMENT BY STATE—MUNICIPAL ACTION—"ACT OF THE STATE."

General and implied powers arising out of the charter of a municipal corporation do not constitute such legislative authority for an ordinance passed by the municipality repealing or repudiating a prior ordinance by which it entered into a contract as to render it an "act of the state" within the contract clause of the federal Constitution.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 115.*]

5. CONSTITUTIONAL LAW (§ 115*)—OBLIGATION OF CONTRACTS—IMPAIRMENT BY STATE—MUNICIPAL ACTION—"IMPAIRMENT OF OBLIGATION."

A mere repudiation of a contract by a municipal corporation or a denial of liability thereon, whether by ordinance or otherwise, is not an "impairment of the obligation" of the contract within the contract clause of the federal Constitution.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 115.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3412-3417.]

6. COURTS (§ 282*)—JURISDICTION OF FEDERAL COURTS—FEDERAL QUESTION.

The passage by a municipal council of an ordinance and resolutions repealing a prior ordinance granting a franchise to a telephone company, ordering it to remove its poles and wires from the streets as a nuisance, and in the event of its failure to do so directing suit against it to compel such removal, does not constitute laws impairing the obligation of the contract made by the franchise ordinance so as to confer upon a federal court jurisdiction of a suit to enjoin their enforcement.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 821; Dec. Dig. § 282.*]

Jurisdiction in cases involving federal question, see notes to Bailey v. Mosher, 11 C. C. A. 308; Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co., 35 C. C. A. 7.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Equity. Suit by the American Telephone & Telegraph Company against the Town of New Decatur. On motion for preliminary injunction. Motion denied for want of jurisdiction.

Callahan & Harris, John C. Eyster, and Knox, Acker & Blackmon (Charles D. M. Cole, of counsel), for plaintiff.

W. T. Lowe, A. F. Fite, and Tyson, Wilson & Martin, for defendant.

GRUBB, District Judge. This was a bill in equity, the purpose of which was to enjoin the defendant from interfering with the plaintiff's telephone system, consisting of lines of poles and wires, as constructed in the town of New Decatur, Ala., and from instituting legal proceedings in the state courts to enjoin the plaintiff from operating, maintaining, and managing its telephone system in that town. Jurisdiction in the federal court is claimed solely because the controversy is claimed to be one arising under the Constitution of the United States. Diversity of citizenship does not exist between the parties. The action of the defendant, complained of in and sought to be restrained by the bill of complaint, is contended to be in violation of article 1, § 10, of the Constitution, and of the due process clause of the fourteenth amendment thereto, and the jurisdiction of this court depends upon whether the bill of complaint shows that such claim is made out by the facts alleged in it.

The bill avers a grant to plaintiff by defendant on June 7, 1898, by ordinance, of a franchise to occupy with its poles and wires the highways of the town, subject to supervision and regulation under the police power of the municipality; the acceptance of the grant by plaintiff; and the construction of its poles and wires in the highways, pursuant to said grant, and the use of said highways thereunder for a period of about six years. It further avers that on March 14, 1904, the town of New Decatur adopted an ordinance, the legal effect of which was to repeal the former ordinance granting the franchise; that on May 3, 1904, the defendant adopted another ordinance, providing (1) for the removal from the highways of plaintiff's poles and wires by plaintiff; (2) in the event of plaintiff's failure to effect such removal in 30 days, for the removal thereof by the town officers; and (3) declaring the maintenance of said poles and wires thereafter by plaintiff a nuisance, for which plaintiff's employes and officers were made responsible. It further avers the passage of two resolutions by defendant, the first on May 3, 1904, and the second on May 11, 1904, directing the attorneys of the defendant to institute legal proceedings in the state courts for the purpose of (1) restraining the plaintiff from engaging in and carrying on the telephone business in the town of New Decatur, after the expiration of its existing license, and forbidding the town clerk to reissue a license to it for that purpose, and (2) compelling it to remove its poles and wires from the highways of the town and to cease using them in its telephone business. It further avers that, in pursuance of the said ordinances and resolutions, the authorities intend to take steps to force plaintiff to remove its poles and wires from the highways and cease using and operating them.

Where jurisdiction is predicated upon the ground that the obligation

of a contract has been impaired by a state, the questions to be considered are (1) the existence or not of the contract, (2) the obligation arising under it, and (3) whether there has been state legislation impairing the contract obligations. If the conclusion is reached by the court in this case that the bill of complaint fails to show state legislation impairing contract obligations, then the bill should be dismissed for want of jurisdiction, though the ordinance of June 7, 1898, created a valid contract between plaintiff and defendant to permit the use of its highways for plaintiff's poles and wires without limit as to time. Impairment by a state of the obligations of a contract must be by legislation subsequent to the making of the contract, enacted either directly by the Legislature of the state, or, through delegation, by one of its municipalities. *McCullough v. Virginia*, 172 U. S. 102-116, 19 Sup. Ct. 134, 43 L. Ed. 382; *Oshkosh Water Co. v. Oshkosh*, 187 U. S. 437-446, 23 Sup. Ct. 234, 47 L. Ed. 349. If the ordinance of a municipality is relied upon as constituting such impairment, it must be shown to have been enacted pursuant to or under color of legislative authority from the state. In the case of *Hamilton Gas Light Co. v. Hamilton City*, 146 U. S. 258, 266, 13 Sup. Ct. 90, 92, 36 L. Ed. 963, the court said:

"The jurisdiction of that court (Circuit Court of the United States) can be sustained only upon the theory that the suit is one arising under the Constitution of the United States. But the suit would not be of that character, if regarded as one in which the plaintiff merely sought protection against the violation of an alleged contract by an ordinance to which the state has not in any form given or attempted to give the force of law. A municipal ordinance, not passed under supposed legislative authority, cannot be regarded as a law of the state within the meaning of the constitutional prohibition against state laws impairing the obligations of contracts. *Murray v. Charleston*, 96 U. S. 432-440 [24 L. Ed. 760]; *Williams v. Bruffy*, 96 U. S. 176-183 [24 L. Ed. 716]; *Lehigh v. Easton*, 121 U. S. 388-392 [7 Sup. Ct. 916, 30 L. Ed. 1059]; *N. O. Waterworks v. Louisiana Sugar Co.*, 125 U. S. 18, 31, 38 [8 Sup. Ct. 741, 31 L. Ed. 607]. A suit to prevent the enforcement of such an ordinance would not, therefore, be one arising under the Constitution of the United States."

In the case of *Dawson v. Columbia Trust Co.*, 197 U. S. 178, 182, 25 Sup. Ct. 420, 422, 49 L. Ed. 713, the court said:

"In the case before us, there was no legislation subsequent to the contract and it is not even shown that there was a color of previous legislation for the city's acts. These acts are alleged to be unlawful, and the allegation would be maintained by showing that they were not warranted by the laws of the state."

The rule to be derived from these cases is that a municipal ordinance to constitute a basis of legislation impairing the obligation of a contract must be enacted under color of an act of the Legislature, either of subsequent enactment, or, if prior, then of continuing effect in the sense that it operates as a subsequent delegation to the municipality of authority to enact the ordinance complained of. The cases relied on by plaintiff's counsel do not conflict with this rule. In each the ordinance was authorized by express specific legislation, generally enacted after the accrual of the contract rights alleged to have been impaired, or, as in the case of *Cleveland v. Cleveland City Ry. Co.*, 194 U. S. 517, 24 Sup. Ct. 756, 48 L. Ed. 1102, by legislation, enacted before the making of the contract, but which was construed as being of continuing force

thereafter and until the enactment of the impairing ordinance. In every case in which the question has been considered, the necessity for municipal action under express specific legislative authority has been recognized. *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341; *Vicksburg Waterworks Co. v. Vicksburg*, 185 U. S. 65, 22 Sup. Ct. 585, 46 L. Ed. 808; *Vicksburg v. Vicksburg Waterworks Co.*, 202 U. S. 453, 26 Sup. Ct. 660, 50 L. Ed. 1102; *Cleveland v. Cleveland City Ry. Co.*, 194 U. S. 517, 24 Sup. Ct. 756; 48 L. Ed. 1102; *Mercantile Trust Co. v. Columbus*, 203 U. S. 311, 27 Sup. Ct. 83, 51 L. Ed. 198.

The plaintiff in this case relies upon municipal ordinances and resolutions of the town of New Decatur and threatened action by the town authorities thereunder, as showing legislative action impairing the obligation of the contract. The bill of complaint should show that such ordinances and resolutions were adopted in pursuance or under color of express and specific legislative authority, and that they amounted to more than a mere repudiation of its contract and a denial of liability upon it. The ordinance of March 14, 1904, merely repealed the ordinance of June 7, 1898, which created the contract rights, alleged to have been impaired. The bill does not allege under color of what, if any, legislative authority, this repealing ordinance was enacted. No express power to repeal ordinances is to be found in the legislative charter of the town of New Decatur. All municipal corporations have the inherent power to repeal ordinances, implied from their authority to adopt them. The incorporation of the town of New Decatur as a municipality, with such implied powers, is the only legislative authority that can be claimed for the repealing ordinance. Such authority is not only prior in date to the contract ordinance, but is general and implied, as distinguished from the specific and express legislative authority, which alone has been held by the Supreme Court sufficient to constitute municipal legislation impairing contract obligation within the meaning of this article of the Constitution of the United States.

The ordinances and resolutions directing the plaintiff to remove its poles and wires from the streets, and, in the event of its failure so to do within a stated period, directing the town marshal to effect such removal, and declaring them to be nuisances thereafter, are contended by plaintiff to have been adopted by the defendant pursuant to the general power in its original legislative charter of 1888-89, re-enacted in 1898-99, to remove obstructions in the streets of the town, and so to constitute legislation impairing the obligation of the contract ordinance. This legislative power was granted to defendant years before the contract rights accrued, and was the general power, inherent in all municipalities, in which is vested the control of highways, and is to be distinguished from the character of legislation in the cases cited, which consisted of express and specific grants of power by the state to the municipality to build the gas or waterworks, or to issue bonds for such purpose, or call elections therefor, and to compel the construction or repair of viaducts, the doing of which in each case constituted the alleged impairment.

The plaintiff also contends that the ordinances and resolutions com-

plained of were passed by defendant under authority of section 23, art. 1, of the Constitution of Alabama of 1875, which provides that no law, making any irrevocable grants of special privileges or immunities, shall be passed by the General Assembly. Neither the bill nor briefs of defendant's counsel show any such reliance. The position of defendant, on the contrary, with reference to the constitutional provision, is that it nullified the original contract ordinance and so made a repealing ordinance unnecessary. The Supreme Court of Alabama, in the case of *Weller v. City of Gadsden*, 141 Ala. 642, 37 South. 682, held that the constitutional provision did not have reference to "revocations, alterations and amendments" by municipalities, but only to those of the state through its Legislature. As the constitutional provision has no reference to repeals by ordinances of municipal corporations, the defendant cannot be presumed to have relied on it in enacting the repealing ordinances in question. There is, therefore, no presumed reliance by defendant upon this constitutional provision; and no actual reliance is alleged in the bill. The provision is not the character of legislation by the state that would make an ordinance enacted under color of it state legislation impairing the obligation of contract rights. Its enactment, not only antedated the accrual of the contract rights alleged to have been impaired, but it is even more general in its nature than the provisions of the charter relied on by plaintiff, being a part of the fundamental law of the state. The bill of complaint fails to show any legislative authority for the ordinances and resolutions complained of, of such a character as would, within the decisions of the Supreme Court, constitute state legislation impairing contractual obligations. Its averments do not show that the town of New Decatur, in passing the resolutions and ordinances, acted under color of any constitutional or statutory provision. The attempt is to bring the municipal action within the sphere of state legislation by showing authority in the defendant under the general principles of law relative to the powers of municipal corporations, and under constitutional provisions, to enact the repealing ordinances and resolutions. There is no attempt to show that the state by legislation, either express or reasonably to be implied, has sanctioned in any way the action of the defendant. The acts of the defendant complained of are merely alleged "to be unlawful, and the allegation would be maintained by showing that they were not warranted by the laws of the state."

There is a stronger reason why the conduct of the defendant, as set out in the bill, does not constitute legislation impairing the obligation of contract rights. The rule is well settled that an ordinance or resolution of a municipality, the effect of which is merely to deny liability upon or repudiate a contract, and which creates no antagonistic rights or duties, is not impairing legislation, though the contract repudiated is valid and binding. In the case of *St. Paul Gas Light Co. v. St. Paul*, 181 U. S. 142, 149, 21 Sup. Ct. 575, 577, 45 L. Ed. 788, the court expressed the principle in this language:

"The other provision (of the ordinance) in question created no new right or imposed no new duty substantially antagonistic to the obligations of the contract, but simply expressed the purpose of the city not in future to pay the interest on the cost of the construction of the lamp posts, which were ordered to

be removed; that is to say, it was but a denial by the city of its obligation to pay, and a notice of its purpose to challenge in the future the existence of the duty to make such payment. This denial, whilst embodied in an ordinance, was no more efficacious than if it had been expressed in any other form; such as by way of answer filed on behalf of the city in a suit brought by the company to enforce what it conceived to be its rights under the contract. When the substantial scope of this provision of the ordinance is clearly understood, it is seen that the contention here advanced of impairment of the obligations of the contract arising from this provision of the ordinance, reduces itself at once to the proposition that wherever it is asserted on the one hand that a municipality is bound by a contract to perform a particular act and the municipality denies that it is liable under the contract to do so, thereby an impairment of the obligations of the contract arises in violation of the Constitution of the United States. But this amounts only to the contention that every case involving a controversy covering a municipal contract is one of federal cognizance determinable ultimately in this court. Thus to reduce the proposition to its ultimate conception is to demonstrate its error."

In the case of *Mercantile Trust Co. v. Columbus*, 203 U. S. 311, 321, 27 Sup. Ct. 83, 86, 51 L. Ed. 198, the court said:

"The ordinance and act were not mere statements of an intention on the part of one of the parties to a contract not to be bound by its obligations. Such a denial on the part, even of a municipal corporation, contained in an ordinance to that effect, is not legislation impairing the obligation of a contract. *St. Paul Gas Light Co. v. St. Paul*, 181 U. S. 142 [21 Sup. Ct. 575, 45 L. Ed. 788]."

And after quoting from the case there cited, the portion incorporated in this opinion, the court said further:

"In the case at bar the conditions are entirely different. There was not merely a denial by the city of its obligation under the contract, but the question is whether there were not new and substantial duties in positive opposition to those contained in the contract, created and their performance provided for by the ordinance and act. The act of the Legislature aided the city by granting it power to itself to erect waterworks and to issue bonds in payment thereof, and the city was proceeding to avail itself of the power thus granted, when its progress was arrested by the filing of the bill in this case, and the issuing of a temporary injunction. It would seem as if the case were really within the principle decided in *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1 [19 Sup. Ct. 77, 43 L. Ed. 341]; *Vicksburg Water Co. v. Vicksburg*, 185 U. S. 65 [22 Sup. Ct. 585, 46 L. Ed. 808], again reported [*Vicksburg v. Water Co.*] 202 U. S. 453 [26 Sup. Ct. 660, 50 L. Ed. 1102]; *Davis v. Los Angeles*, 189 U. S. 207 [23 Sup. Ct. 498, 47 L. Ed. 778]; *Knoxville Water Co. v. Knoxville*, 200 U. S. 22 [26 Sup. Ct. 224, 50 L. Ed. 353]."

The case of *Dawson v. Columbia Trust Co.*, 197 U. S. 178, 181, 25 Sup. Ct. 420, 422, 49 L. Ed. 713, clearly differentiates the class of cases in which the ordinance merely denies liability and repudiates the contract obligation, from the other class in which the ordinance creates rights or duties antagonistic to the contract rights, charged to have been impaired. In that case, the court said:

"The mere fact that the city was a municipal corporation does not give to its refusal the character of a law impairing the obligation of the contract or deprive a citizen of property without due process of law. That point was decided in *St. Paul Gas Light Co. v. St. Paul*, 181 U. S. 142-150 [21 Sup. Ct. 575, 45 L. Ed. 788]. Undoubtedly the decisions on the two sides of the lines are very near to each other. But the case at bar is governed by the one which we have cited and not by *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1 [19 Sup. Ct. 77, 43 L. Ed. 341], which is cited and distinguished in *St. Paul Gas Light Co. v. St. Paul*. In *Vicksburg Waterworks Co. v. Vicksburg*, 185 U. S. 60 [22 Sup. Ct. 585, 46 L. Ed. 808], the city had made a contract with the waterworks com-

pany, and afterwards a law was passed authorizing the city to build new works. The city acting under this law denied liability and took steps to build the works, whereupon the waterworks company filed its bill, alleging the law to be unconstitutional. This bill was held to present a case under the Constitution. In the case before us, there was no legislation subsequent to the contract, and it is not even shown that there was a color of previous legislation for the city's acts. These acts are alleged to be unlawful and the allegation would be maintained by showing that they were not warranted by the laws of the state. See *Hamilton Gas Co. v. Hamilton City*, 146 U. S. 258-266 [13 Sup. Ct. 90, 36 L. Ed. 963]; *Lehigh Water Co. v. Easton*, 121 U. S. 388-392 [7 Sup. Ct. 916, 30 L. Ed. 1059]. We repeat that something more than a mere refusal of a municipal corporation to perform its contract is necessary to make a law impairing the obligation of contract or otherwise give rise to a suit under the Constitution of the United States."

On one side of the line of cases are *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 19 Sup. Ct. 774, 3 L. Ed. 341, *Vicksburg v. Vicksburg Waterworks Co.*, 185 U. S. 60, 22 Sup. Ct. 585, 46 L. Ed. 808, *Cleveland v. Cleveland City Ry. Co.*, 194 U. S. 517, 24 Sup. Ct. 756, 48 L. Ed. 1102, *Mercantile Trust Co. v. Columbus*, 203 U. S. 311, 27 Sup. Ct. 83, 51 L. Ed. 198, and *Northern Pacific R. R. Co. v. Duluth*, 208 U. S. 583, 28 Sup. Ct. 341, 52 L. Ed. 630. In each of these cases the municipal legislation amounted to more than a naked breach or repudiation of contract, in that it created powers and rights in antagonism to the contract rights, such as the power to construct competing water or gas works, when an exclusive right was given by the contract or ordinance, or an authority to issue bonds or call an election to that end, or the authority to compel a railroad company to construct or maintain at its expense a viaduct over a highway. On the other side of the line are the cases of *St. Paul Gas Light Co. v. St. Paul*, 181 U. S. 142, 21 Sup. Ct. 575, 45 L. Ed. 788, *Dawson v. Columbia Trust Co.*, 187 U. S. 178, 25 Sup. Ct. 420, 49 L. Ed. 713, and *Des Moines v. City Ry. Co.*, 214 U. S. 179, 29 Sup. Ct. 553, 53 L. Ed. 958, in each of which the ordinances were construed to amount to no more than a breach or repudiation of a municipal contract, and, for that reason, not to constitute legislation impairing the obligation of contract within the meaning of the Constitution. Upon the proper classification of the case at bar in this respect depends its correct decision. In the case at bar no antagonistic rights or powers to those of the original contract or ordinance were created by the subsequent ordinances and resolutions, and the case resembles in that respect the line of cases last cited. There was (1) a mere repealing ordinance; (2) an ordinance directing the plaintiff to remove its poles and wires from the streets within 30 days, and in the event of its failure to do so a direction to the town authorities to remove them and a declaration that their continued maintenance thereafter would constitute a nuisance; and (3) subsequent resolutions directing the city attorney to file proceedings in the state court to compel the removal of the plaintiff's poles and wires from the streets, to compel it to cease doing business after the expiration of its existing license, and forbidding its reissue to plaintiff. So far as the ordinances and resolutions concern the right of plaintiff to do business, other than its right to maintain poles and wires on the highways, no federal question is involved, for there is no showing in the bill of any vested right to a license to do business in any other sense in the

town limits. Eliminating the license feature, the case at bar is identical in legal effect with that of *Des Moines v. City Ry. Co.*, 214 U. S. 179, 29 Sup. Ct. 553, 53 L. Ed. 958, and is controlled by it. The opinion of the court is brief, and is set out in full as follows:

"This is a bill brought in the Circuit Court by an Iowa corporation against a city of Iowa. The ground of jurisdiction is that a resolution of the city council of that city is a law impairing the obligation of contracts within the meaning of the Constitution of the United States, and if carried out will take the property of the corporation without due process of law, contrary to the fourteenth amendment. The Circuit Court granted an injunction against the enforcement of the resolution, and the defendant appealed to this court. The plaintiff, the appellee, sets up, under a certain ordinance, a right unlimited as to time to construct, maintain, and operate an electric street railway in and over the streets, alleys, and bridges of Des Moines.

"The resolution alleged to impair these rights is as follows: 'Whereas questions have been raised as to the rights of the Des Moines City Railway Company and the Interurban Railway Company to maintain their tracks and operate their lines upon and along and over the streets and bridges and public places of the city of Des Moines; and whereas, it is essential to the preservation of the rights of the city of Des Moines that such questions be determined as speedily as possible: Be it resolved by the city council of the city of Des Moines that said companies be and they are hereby ordered to remove all of their tracks, poles and wires from the streets, bridges and public places of the city of Des Moines, and to restore and repair the surface and pavement where paved of all of the streets along which they are now operating their lines, and said companies are hereby ordered to commence said removal within twenty-five days after the passage of this resolution; be it further resolved, that should the said railway companies fail to commence such removal within the time above specified, the city solicitor be and he is hereby instructed to take such action as he shall deem advisable and necessary to secure the enforcement of the above resolution; be it further resolved, that the city clerk be and he is hereby instructed to serve a certified copy of this resolution upon the Des Moines City Railway Company and the Interurban Railway Company forthwith.'

"We are of opinion that this is not a law impairing the rights alleged by the appellee, and therefore that the jurisdiction of the Circuit Court cannot be maintained. Leaving on one side all questions as to what can be done by resolution as distinguished from ordinance under Iowa laws, we read this resolution as simply a denial of the appellee's claim and a direction to the city solicitor to resort to the courts if the appellee shall not accept the city's views. The resolution begins with a recital that questions as to the railway company's rights have been raised, and ends with a direction to the city solicitor to take action to enforce the city's position. The only action to be expected from a city solicitor is a suit in court. We cannot take it to have been within the meaning of the direction to him that he should take a posse and begin to pull up the tracks. The order addressed to the companies to remove their tracks was simply to put them in a position of disobedience, as a ground for a suit, if the city was right."

In the case at bar, it is true that the ordinance of May 3, 1904, directs the town marshal to remove the poles, if the plaintiff failed to do so in the stipulated time. This might differentiate the case from the case cited, except for the fact that on May 11th thereafter the city council adopted a later resolution, directing the city attorneys to institute and prosecute in the name of the defendant such a suit or proceeding as might be deemed proper by them to compel the plaintiff to remove its poles and wires from the streets and to prevent their use in its telephone business. This resolution, passed subsequently, clearly indicates the abandonment by defendant of any intention on its part to remove the poles and wires by violence, and an intention to compel

their removal by legal proceedings only. The passage of a resolution authorizing the institution of a suit to compel removal is inconsistent with a purpose to proceed under an earlier resolution to remove by force and without suit. The bill also avers "that, in pursuance of the ordinances and resolutions passed by the board of aldermen of the city of New Decatur, as hereinabove set forth, the said city authorities of the said city intend forthwith and without delay to take steps to force orator to remove its poles and wires from the public streets of said city." The averment is that the removal was to be forced pursuant to the ordinances and resolutions set out in the bill; that is, by filing legal proceedings to compel their removal. No acts or threats of defendant are averred or relied on other than the ordinances and resolutions set out in the bill, as indicating a purpose on its part to resort to violence. Construing the resolutions and ordinances as an entirety, the only action reasonably to be expected to be taken by the town authorities was a suit in court. This case is, therefore, identical with the case of Des Moines City Railway Co., *supra*; and controlled by it. For the reasons stated, the court is without jurisdiction.

The restraining order heretofore granted is dissolved, and the motion for a temporary injunction is denied; and the bill will be dismissed for want of jurisdiction at the costs of plaintiff, unless amended by the plaintiff within 15 days from the date of this decision, so as to confer jurisdiction within the views expressed herein.

In re PENNY & ANDERSON.

(District Court, S. D. New York. December 14, 1909.)

BANKRUPTCY (§ 140*)—PROPERTY VESTING IN TRUSTEE—ATTEMPTED CONSIGNMENT OF GOODS.

Bankrupts conducted a restaurant, and claimants delivered to them a stock of wines and liquors for use therein under an agreement called a "memorandum of consignment," which contained an invoice of the liquors and the prices and provided that they should be considered as delivered on consignment and should remain the property of claimants until the "full indebtedness" of the bankrupts should be paid. There was no restriction on the sale of the liquors by the bankrupts as to price or otherwise and no provision respecting the disposition of the proceeds. *Held*, that the transaction was not a consignment but a sale, and the attempted retention of title in the seller void, as against creditors; and that claimants could not reclaim the property from the trustee in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 140.*]

In Bankruptcy. In the matter of Penny & Anderson, bankrupts. On motion to confirm report of special master dismissing the petition of James M. McCunn & Co. to reclaim goods. Motion granted.

The following is the report of Dexter, Special Master:

On August 19, 1909, a petition in bankruptcy was filed against Penny & Anderson, doing business as restaurant keepers at 152 Columbus avenue, and Mr. Charles P. Sanford was appointed receiver and took possession on the same day. The receiver made an inventory of the stock in the premises (petitioner's Exhibit G), which included a quantity of wines and liquors found in the cellar,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and claimed in this proceeding as the property of McCunn & Co. These goods were not in any way separated from the other wines and liquors stored in the wine cellar, but were used as required in the restaurant upstairs. After the receiver's appointment an arrangement appears to have been made by him with the Lincoln Square Restaurant Company, which in some unexplained way succeeded to the business of the bankrupts, by which wines and liquors as required were withdrawn from the receiver's stock for consumption on the premises, and goods to the value of \$94.97 were so withdrawn and paid for (Exhibit D). This arrangement was apparently acquiesced in by the claimant, McCunn; a separate record being kept by the receiver of such withdrawals (page 19). The goods so withdrawn and claimed by McCunn & Co. as their property are enumerated at page 23 as follows:

"Bottle brandy came from McCunn; quart of Medoc on the 5th also from McCunn; on October 5th there were 3 gallons of bar whisky taken out of McCunn's stock; there was also a gallon of dry gin taken out. I cannot state the date. It was after the 8th; I should judge 9th or 10th. Also under the same date is a gallon of sherry, gallon of dry gin, gallon of Tom gin; on the same date 2 gallons Private Stock whisky; also gallon brandy, gallon of sherry, one gallon of port wine, gallon of Scotch whisky."

There remains in the possession of the receiver, identified by McCunn & Co. as goods delivered by them to the bankrupts under the agreement hereinafter referred to, the following stock:

"11 bottles old Orkney Scotch whisky, 11 bottles Coleraine Irish whisky, 5 quarts Graves Sauterne, 13 pints Graves Sauterne, 22 quarts Barton Freres claret, 57 pints of same, 36 quarts Barton & Guestier Medoc claret wine, 87 pints of same, 7 quarts Feist Neuersteiner, which is Rhine wine; 25 pints of same; 8 quarts of Pommard Burgundy, 18 pints of same, barrel Quality Club whisky, barrel Private Stock whisky, one-eighth cask, which is a small cask, Octave dry gin; $\frac{1}{8}$ cask Tom gin, $\frac{1}{8}$ cask Holland gin, $\frac{1}{8}$ cask Gromme Rogee & Co. brandy, $\frac{1}{8}$ cask pale Imperial sherry, $\frac{1}{8}$ cask Crouzard port, $\frac{1}{8}$ cask Strommers Scotch whisky, one 5-gallon demijohn Jamaica rum, 1-5 gallon Santa Croix rum, 1-5 gallon blackberry brandy, 1-5 gallon demijohn Crummack Irish whisky."

On October 15, 1909, James M. McCunn & Co., on petition and affidavits alleging that they claimed title to certain wines and liquors in the receiver's possession, obtained an order from Judge Hough directing the receiver to show cause why the goods in question should not be returned to the petitioner and staying the receiver from selling the same pending decision. Attached to the moving papers are two exhibits, which were produced and offered at the hearing. As they contain the gist of the petitioner's case, they are inserted in full:

"Memorandum of Consignment.

"This agreement, made the 10th day of June, 1909, by and between James M. McCunn & Co., of No. 98 Pine St., N. Y., party of the first part, and Penny & Anderson of No. 152 Columbus avenue, N. Y. C., party of the second part, witnesseth: Whereas the parties of the second part are about to open a restaurant with a bar at No. 152 Columbus avenue, and whereas the parties of the second part are unable to pay for said goods hereinafter described: 2 bbls. whisky, $\frac{1}{8}$ cask sherry, $\frac{1}{8}$ cask port, $\frac{1}{8}$ cask Holland gin, $\frac{1}{8}$ cask Tom gin, $\frac{1}{8}$ cask Gordon dry gin, $\frac{1}{8}$ cask Scotch whisky, 1 demijohn Irish whisky, 1 demijohn blackberry cordial, $\frac{1}{8}$ cask brandy, 1 demijohn St. Croix rum, 1 demijohn Jamaica rum, 1 case special liquer Scotch, 1 case 10 year old Coleraine, 50 bottles St. Julien qts. claret, 100 bottles St. Julien pts. claret, 50 bottles Medoc qts. claret, 100 bottles Medoc pts. claret, 13 bottles Neistien qts. Rhine wine, 25 bottles Neistien pts. Rhine wine, 25 bottles Lubenheimer pts. Rhine wine, 1 case Graaves pts. Sauternes, 1 case Graaves pts. Sauternes, 1 case Pommard qts., 1 case Pommard pts., 3 bar bottles, 4 decanters. The party of the first part agrees to stock the wine cellar of the parties of the second part with following (sic) wines and liquors and in consideration of the foregoing it is agreed by and between the parties that the said wines and liquors shall be considered as placed at the premises of No. 152 Columbus avenue on consignment, and the title in and to said wines and liquors shall always be in the party of the first part until the full indebtedness to the party of the first part

is paid and receipt in full thereof is given. It is further agreed that the value of the said wines and liquors hereby to be delivered under this agreement is \$945.55. Signed and witnessed the day of the year above written.

"James M. McCunn & Co.

"Penny & Anderson, Per Anderson."

Exhibit E.

James M. McCunn & Co., Distillers and Importers. 98 Pine Street, New York, June 11, 1909. Sold to Messrs. Penny & Anderson, 152 Columbus Ave., City. Terms: (on consignment). Shipped via ———: "1 bbl. Franklin Club rye, E4234451, 47.50 galls. at \$2.30, \$109.25; 1 bbl. Private Stock rye, E4234450, 48.50 galls. at \$3, \$145.50; ½ cask pale Imperial sherry, 22 galls. at \$2, \$44; ½ cask Cruzado port, 23.50 galls. at \$2, \$47; ½ cask Holland gin, R32505353, 26 galls. at \$2.25, \$58.50; ½ cask Old Tom gin, R32505352, 26.50 galls. at \$2.25, \$59.63; ½ cask Gordon gin, 101335, 17.50 galls. at \$3.25, \$56.88; ½ cask Stromness Scotch, 76748, 26 galls. at \$3.60, \$93.60; 5 galls. Cromac Irish, 62413, 5 galls. at \$3.60, \$18; 5 galls. extra sup. blackberry brandy, 204913, 5 galls. at \$1.50, \$7.50; ½ cask Fromy, Rogee & Co. brandy, 76747, 24.50 galls. at \$4.95, \$121.27; 5 galls. St. Croix rum, R2699068, 5 galls. at \$3.50, \$17.50; 5 galls. Jamaica rum, R2699068, 5 galls. at \$3.50, \$17.50; 4 five-gall. box demjs. at \$1.25, \$5; 1 case special liquor Scotch, \$14; 1 case (10 year old) Coleraïne, \$14; 50 qts. St. Julien (Dom) at \$2.30, \$9.60; 100 pts. St. Julien (Dom) at \$3.30, \$13.75; 50 qts. B & G Medoc at \$4.50, \$18.75; 100 pts. B & G Medoc at \$5.50, \$22.90; 13 qts. Feist Neirsteiner at \$5, \$5.42; 50 qts. Feist Neirsteiner at \$6, \$12.60; 1 case (qts.) Graves at \$4.75, \$4.75; 1 case (pts.) Graves at \$5.75; 1 case (qts.) Pommard at \$11; 1 case (pts.) Pommard at \$12—\$945.65. Three bar bottles, 2 private decanters; 2 cabinet decanters."

No payments were ever made for these goods, and the petitioner asks that they be returned to him as consigned goods, or, if their return cannot be had, then that he recover the value thereof, \$945.55, together with damages for unlawful detention and costs. This is the petition referred to the special master for examination, testimony, and report.

I am of the opinion, and so report, that the petition should be dismissed, for the reason that the inherent character of the attempted consignment was a sale of goods for consumption, with a secret restriction that title should not pass until the goods were paid for, which is inconsistent with the continued ownership of the vendor, and is fraudulent and void as against creditors of the bankrupt. In re Garcewich (C. C. A. N. Y.) 115 Fed. 87, 53 C. C. A. 510, 8 Am. Bankr. Rep. 149; In re Wells (D. C. Pa.) 140 Fed. 752, 15 Am. Bankr. Rep. 419; In re Hassam (D. C. Vt.) 153 Fed. 932, 18 Am. Bankr. Rep. 745; Pontiac Buggy Co. v. Skinner (D. C. N. Y.) 158 Fed. 858, 20 Am. Bankr. Rep. 206.

The only distinction between this and the Garcewich Case appears in the form of the agreement for the delivery of the goods. In the case at bar it is termed "memorandum of consignment," and provides that the goods "shall be considered as placed at the premises of No. 152 Columbus avenue on consignment," and the title shall always be in McCunn until the full indebtedness of Penny & Anderson is paid; the value of the goods delivered being stated at \$945.55. The invoice accompanying the goods contained the words "sold to Messrs. Penny & Anderson, terms, on consignment," and gives the price of each article of the consignment going to make up the aggregate of \$945.55.

The debtors were permitted to sell and dispose of the goods as they saw fit and at any price and terms, for consumption on the premises as required in their business. The agreement is silent as to the disposition of the proceeds of sale, but recognizes an indebtedness on the part of Penny & Anderson to be paid before the title vests in them. The petitioner, recognizing this inconsistency, by an amendment to his original petition alleged a further oral agreement that the proceeds of sale were to be kept in a separate fund and that said fund was to be applied upon the purchase price until fully paid. But there is no competent proof of any such agreement. Against the objection of the trustee Mr. McCunn testified (page 43): "We drew up the agreement which has been marked in evidence—a consignment agreement whereby those goods were to be sold and paid for in amounts as Mr. Anderson derived from the sale of the goods."

In other words, the witness merely stated his construction of the agreement. But even if the alleged oral agreement was made it cannot help the petitioner, for the vice in the whole transaction lies in the fact that the goods were delivered for consumption or sale in a way inconsistent with continued ownership of the vendor, and therefore constituted a fraud upon the vendees' creditors.

As is well stated by Judge Archbald (In re Wells, supra): "There is no particular magic in the terms 'consigned' or 'consigned account.' In a sense, all goods shipped to another are consigned to him. The question is: What was the inherent character of the transaction which depends upon the purpose of it? Were the goods put in the hands of the one party by the other to be sold for him and on his account, creating a relation of principal and factor, or were they turned over to such purchaser to be treated and disposed of as his own, being responsible to the other for the price? In the one case we have a trust or bailment, the goods throughout being those of the consignor or principal, as well as the moneys received for them; in the other there is a sale, the super-added condition sometimes appearing that the title shall not pass until the goods are paid for amounting to nothing as a restriction upon it." In the above case the petition for the return of the goods was dismissed.

The transaction in question did not create the relations of principal and factor, for a factor cannot make a profit of his agency nor a valid purchase for himself and receives a commission for his services. A. & E. Ency. Law, vol. 12, at pages 628, 644. If it were claimed to be a warehousing contract, it would be void against creditors because there was no change of possession continuous or otherwise, nor any real separation from other goods belonging to the bankrupts. Security Warehousing Co. v. Hand, 206 U. S. 415, 27 Sup. Ct. 720, 51 L. Ed. 1117. If it were claimed to be a chattel mortgage, it would be void for nonfiling as against the trustee under the rule laid down in Skilton v. Codington, 185 N. Y. 80, 77 N. E. 790, 113 Am. St. Rep. 885, disapproving the earlier case (In re Economical Printing Co., 110 Fed. 514, 49 C. C. A. 133, 6 Am. Bankr. Rep. 615), which can no longer be cited as authority for the contrary proposition. And if it were claimed to be a conditional sale it would be void as against creditors under the rule laid down in Re Garcewich, 115 Fed. 87, 53 C. C. A. 510, 8 Am. Bankr. Rep. 149.

The authorities in other districts are not uniform on this question, depending to a great degree on the varying state statutes. The case of In re Fabian (D. C.) 151 Fed. 949, 18 Am. Bankr. Rep. 488, in the Eastern district of Pennsylvania, is relied upon as controverting the proposition above stated. In that case the vendors agreed to ship to the bankrupt "from time to time certain goods to be sold for their account as per schedules to be delivered at time of shipments, and all such goods to remain the property of (the vendors) until sold for their account." The nature of the goods is not disclosed. Provision was made for guaranteed weekly averages and a regular accounting and adjustment between sales and remittances. The court considered the case within the decision of the United States Supreme Court (York Mfg. Co. v. Cassell, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782) and sustained the contract in favor of the vendors.

As to the York Manufacturing Company Case and others depending on it, the conflict with the Garcewich Case and the cases depending on it is only apparent. Machinery, fixtures, and merchandise may be the subjects of conditional sale, and the court will protect the claim of the conditional vendor as against the trustee who takes the property in cases unaffected by fraud subject to all equities impressed upon it in the hands of the bankrupt. Thompson v. Fairbanks, 196 U. S. 516, 25 Sup. Ct. 308, 49 L. Ed. 577. But where there is fraud, actual or constructive, the cases rest upon a different reasoning. Thus, in the Security Warehousing Case, supra, the Supreme Court, after reviewing the York Manufacturing Company Case and others, held: "The case at bar bears no resemblance in its facts to the case just cited. There was no valid disposition of the property in the case before us or any valid lien. The so-called warehouse receipts, issued by the warehousing company, upon the facts of this case give no lien under the law in Wisconsin, in which state they were issued. In such case this court follows the state court."

In the Garcewich Case the Circuit Court of Appeals of the Second circuit rests its decision flatly on the fraudulent nature of the conditional sale. "We think that the court below erred in viewing the case as one in which there had

been a valid conditional sale good as against creditors. If the sale had been of that character, we think the decision would have been correct, but, being a fraudulent one, it was void as to the trustee." So in *Re Hassam*, supra, Judge Martin, of Vermont, says: "It has been repeatedly held that when personal property is delivered to a vendee for sale or to be dealt with in a way inconsistent with the ownership of the seller, or so as to destroy his lien or right of property, the transaction cannot be upheld as a conditional sale and is a fraud upon the creditors of the vendee. [Citing cases.] In no case decided by the Supreme Court to which my attention has been called has the court upheld secret liens or mortgages upon goods designed for sale or so tainted by fraud as to creditors as this case appears to be."

Unless there be "some particular magic in the term consigned" which is not made to appear in the discussion of the cases, I must conclude that the form of the transaction is immaterial. The court will look at the substance of the transaction, and if tainted with constructive fraud, as in this case, will construe it according to its real purpose.

I therefore find and report that the petitioner is not entitled to recover of the trustee the goods in question nor the proceeds thereof so far as sold, and that his petition should be dismissed, with costs.

Lesser Bros. (William Lesser, of counsel), for the motion.
Wait & Foster (Charles C. Bunker, of counsel), opposed.

HOUGH, District Judge. Motion granted. Report confirmed.

LUDVIGH v. AMERICAN WOOLEN CO. et al.

(District Court, S. D. New York. January, 1910.)

1. BANKRUPTCY (§ 140*)—SUIT BY TRUSTEE TO RECOVER PROPERTY—TITLE OF BANKRUPT—SALE OR BAILMENT.

Bankrupts were dealers in silk and woolen goods, buying the latter largely from the American Woolen Company. Some two years prior to the bankruptcy, at the instance of the Woolen Company, the Niagara Woolen Company was organized, and two shares of stock were taken by the Woolen Company to qualify two of its employes for directors; practically all the remaining stock being issued to one of the bankrupts, who executed a mortgage on real estate to secure payment therefor. The Niagara Company was controlled by the Woolen Company, and its charter authorized it only to contract and deal with the Woolen Company and deal in fabrics received therefrom. It at once made a contract with the Woolen Company which bound it to receive whatever goods the latter should see fit to furnish, sell the same, and collect and pay the proceeds to the Woolen Company, less the difference between the selling and invoice prices; the goods to remain until sold the property of the Woolen Company. Such goods as it did not sell or collect pay for it was bound to account and pay for to the Woolen Company at invoice price, and to secure performance of such contract in all its parts one of the bankrupts pledged all of his stock to pay for which he had given the mortgage. The Niagara Company had no working capital. A small office was railed off for it in the bankrupt's store where it kept a bookkeeper, furnished by the Woolen Company, an additional sign with its name thereon was placed on the store front, and its goods were received in such store, mingled with the goods of the bankrupts, and sold by their salesmen with their own goods under an arrangement that bankrupts were to receive a certain sum per month for the service from the "earnings" of the Niagara Company. Shortly before the bankruptcy, the bankrupts being insolvent, the Woolen Company removed from their store all the remaining goods furnished by it under the contract. *Held*, that the organization of such paper corpora-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 176 F.—10

tion was merely a device on the part of the Woolen Company to secure itself against loss in respect to goods which it in fact sold to the bankrupts; that since under the arrangement the bankrupts were ultimately liable for the price of the goods, whether they sold the same or not, and without right to return them, the transaction was not a bailment or consignment, but a sale by which title to the goods passed to the bankrupts and from them to their trustee in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 140.*]

2. SALES (§ 4*)—DISTINGUISHED FROM BAILMENT.

One to whom goods are delivered, which he not only may sell, but must pay for whether he sells them or not, and which he cannot return, is not a bailee, but a purchaser.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 7-11; Dec. Dig. § 4.*]

In Equity. Suit by Clifford G. Ludvigh, trustee in bankruptcy of P. Horowitz & Son, against American Woolen Company and Niagara Woolen Company. On final hearing. Decree for complainant.

See, also, 159 Fed. 796.

Abram I. Elkus, Garrard Glenn, and James N. Rosenberg, for complainant.

Daniel P. Hays and Ralph Wolf, for defendants.

HOUGH, District Judge. Prior to 1901, and thereafter until the fall of 1904, Philip and Joseph Horowitz (father and son) constituted the firm of P. Horowitz & Son, which firm (and its members) became bankrupt on January 26, 1905. Complainant, as trustee for the firm of its members, brings this suit to recover the value of certain merchandise physically removed from the bankrupts' place of business by the defendants shortly before the filing of the involuntary petition herein. The bill of complaint also demands an accounting for certain moneys alleged to have been transferred shortly before petition by the bankrupt partnership to the defendant Niagara Woolen Company (hereinafter called "Niagara Company"). This claim was not pressed at the hearing, for reasons sufficiently apparent from the facts to be stated. The Horowitz firm had been engaged in the purchase and sale of silk and woolen goods for some time before the organization of the American Woolen Company (hereinafter called "Woolen Company") in 1901. The partners had been accustomed to buy (probably) much more than half their woolen goods from firms and corporations which became merged in the Woolen Company on the formation thereof.

From his appearance on the witness stand Joseph Horowitz must have been a very young man in 1901, and it is quite evident that as long as the firm lasted the controlling spirit thereof was (naturally) the father, Philip. Before organization of the Woolen Company, Horowitz & Son had at times, if not steadily, carried a line of woollens averaging \$40,000. After the formation (but how long after does not appear) of the Woolen Company, and on November 15, 1901, an agreement was entered into between Horowitz & Son and the Woolen Company by which: (1) Horowitz agreed to accept goods "on consignment" from the Woolen Company, and in consideration of such con-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

signment further agreed to "consider any and all shipments of merchandise as consigned, whether billed to that effect" or not. (2) The title to such consigned merchandise "or its proceeds" was always to be vested in the Woolen Company "until said merchandise is fully accounted for." (3) Horowitz agreed "to make all bills of such consigned goods payable to" the Woolen Company and to render "an account of sales" to the Woolen Company at least once a month. (4) Horowitz was also to give real estate security to protect the Woolen Company from any failure to "observe this consignment contract in its entirety." (5) Horowitz's profits were stipulated to be "the difference between the invoice prices and the selling prices" of the consigned goods. (6) The "basis of terms" to Horowitz was to be 7 per cent. discount for four months, and any increase in profits by varying these terms to the trade was to go to Horowitz. (7) The Horowitzs were to have a drawing account of \$1,200 a month, the same to be charged to profit account "provided the sales of goods made by P. Horowitz & Son shall warrant such payment."

This agreement was to extend until December 1, 1902, and during its continuance Horowitz was to "buy wools" from no one except the Woolen Company. How closely this agreement was adhered to does not appear from the evidence, except that under it sales were made in the name of Horowitz & Son and bills for such sales sent to customers bearing a prominently printed legend in red ink to the effect that the amount was payable direct to the Woolen Company. The goods thus obtained by Horowitz continued to represent a stock of about \$40,000.

It is obvious that this business arrangement was an endeavor on the part of the Woolen Company to retain title to all goods delivered to Horowitz, and to make all persons buying such goods through Horowitz debtors of the Woolen Company; but there is nothing in the agreement requiring Horowitz at any time to take and pay for such of the goods as were not sold. The requirement was to "account" for goods in January and July, but for all that appears from the agreement produced or the evidence herein goods were sufficiently accounted for by showing them on hand. As the term of the agreement of 1901 approached its end, the Woolen Company, for reasons not shown in the evidence, decided upon a different method of doing business with Horowitz, which method is expressed in divers agreements dated November 25, 1902, and in evidence. As to what occurred at this time, the actors in such occurrences and their relation to each other, there is no conflict of evidence, and it is sufficient for the purposes of this cause to state only my ultimate conclusions thereon. Both the elder and younger Horowitz were entirely under the control of the Woolen Company, so far as obtaining and marketing the product of that company was concerned. What they did was done on the order of the Woolen Company. For all that appears they were entirely willing to obey orders, but they either had to obey orders or forego much if not most of their business. Therefore, under orders from the Woolen Company, they contributed \$300 and the Woolen Company \$200 toward the capital stock of the then incorporated Niagara Company. The \$500 thus obtained allowed the issue of five full paid shares of the capital stock of the newly formed corporation, and with said \$500 the cor-

poration itself paid the fees and expenses of the Woolen Company's counsel in and about the incorporation of the Niagara Company. The balance of the authorized capital stock (\$20,000) of the Niagara Company was issued in consideration of the assignment or execution to the Niagara Company of a mortgage for the proper amount made by Philip Horowitz on certain real estate owned by him. (This was the same real estate which had been used to secure the performance of the "consignment agreement" of 1901.)

The Niagara Company then had on paper a fully paid in capital stock, of which Philip Horowitz owned 197 shares, and the remaining 3 shares were distributed between his son and the two employes of the Woolen Company, who immediately became the directors of the Niagara Company. The sole business of that company, as revealed by its articles of association, was "to contract and deal with the American Woolen Company of New York and to deal in fabrics received therefrom." There was also charter power to acquire real estate, or mortgages thereon, not exceeding \$20,000 at any one time; but this right was, under the evidence, plainly to be used only in validating the issuance of capital stock in the manner above set forth. The Niagara Company, having been thus formed with the limited powers above indicated and officered in such a manner as to insure its control by the Woolen Company, executed a contract with the Woolen Company dated November 25, 1902, whereby the Woolen Company agreed: (1) To deliver to the Niagara Company such goods "as it in its judgment sees fit." (2) The Niagara Company agreed to accept such goods, to hold them as the property of the Woolen Company and in such wise that "the title to the said (goods) shall pass directly from the (Woolen Company) to persons to whom the same shall be sold * * * in the manner and upon the terms herein contained." (3) To keep the goods aforesaid insured in the name of the Woolen Company (whether this was ever done does not appear—it was not done regularly). (4) To "sell the goods" to persons selected by it (Niagara Company) and to collect all bills for such sales and "immediately to pay over to (Woolen Company) any amount (so) collected immediately upon its collection," minus the difference between the invoice price to the Niagara Company and the sale price fixed and collected by said company (clause 4). (5) To guarantee payment of all bills for merchandise so sold, and "in case any merchandise delivered under the provisions of this agreement by (Woolen Company to Niagara Company) is not accounted for to (Woolen Company) under the provisions of clause 4 of this agreement to pay (Woolen Company) the invoice price of said merchandise."

It is to be observed that this document requires the Niagara Company to pay the invoice price of the merchandise delivered to it unless it accounts for the same "under the provisions of clause 4"; but clause 4 contains, as above set forth, a specific agreement on the part of the Niagara Company to sell the merchandise and pay over to the Woolen Company the sale price thereof, less the difference between such price and the invoice value. It follows that if the Niagara Company could not account to the Woolen Company for money by selling the goods it was nevertheless bound to pay the invoice price and (continues the written agreement) "thereupon title to said merchandise * * * so

paid for shall pass to" the Woolen Company. It was further provided (6) that the invoices given by the Woolen Company to Niagara Company "are to be subject to the usual trade discounts" of the Woolen Company. Contemporaneously with the execution and delivery of this agreement between the two corporations the members of the bankrupt firm executed an agreement of suretyship to the Woolen Company "for the full and faithful performance" of the contract just mentioned on the part of the Niagara Company. By this agreement the partners guaranteed to the Woolen Company "the full and faithful performance of any and all conditions imposed on the Niagara Company" by said contract, and as further security for faithful performance the elder Horowitz transferred his 197 shares of the Niagara Company to an officer or agent of the Woolen Company. These two agreements of November 25, 1902, were to endure for a year, but on November 17, 1903, were continued in force (with some modifications) to December 1, 1904. The modifications related only to the discounts to be allowed the Niagara Company, provided it turn over to the Woolen Company the invoice value of goods delivered to it "within sixty days (of the sale thereof) by the Niagara Company."

The Niagara Company, having thus a legal existence, full-paid capital stock and a means of getting goods from the Woolen Company, made the younger Horowitz (Joseph) its president, but in by-laws at once adopted limited the president's powers so that he was not authorized "to make contracts for the purchase of merchandise from any other person, individual, firm or corporation than the American Woolen Company of New York." Thus far Niagara Company had no quick assets and no working capital. Regarded as a separate corporation, it had no machinery at all for carrying on a mercantile business. Obviously there must be some means provided for doing this, and it was accomplished by acting upon a communication from Philip Horowitz received at an adjourned meeting of the Niagara's incorporators held at the offices of the Woolen Company on November 25, 1902. Mr. Horowitz offered in writing "to pay all the expenses of doing business for the Niagara Woolen Company in consideration of the sum of \$1,200 monthly, to be paid out of the earnings of the corporation." This offer was accepted, and thereafter and until the early summer of 1904 Philip Horowitz was paid this monthly amount usually if not with regularity.

If the documents submitted in evidence and the scheme thereby unfolded have been understood, it is manifest that the result thereof, if adhered to and recognized as lawful, was to enable the Woolen Company to send to the Niagara Company as great or as small a quantity of goods as it desired. Such is the express language of the agreement. There was no limit to the Niagara Company's obligation to receive goods from the Woolen Company, but the latter corporation was not bound to deliver any goods at all. Merchandise once delivered on consignment to the Niagara Company could be sold by the latter, and any advance over invoice price or value retained, and it is evidently by such sales at advanced prices only that the Niagara Company could make any earnings whatever. If the goods were not sold, or were sold at a loss or to persons who did not pay, it was nevertheless plainly in-

cumbent upon the Niagara to pay to the Woolen Company the invoice price. The expenses of this business were to be paid by Philip Horowitz, and his obligation in form was to pay all the Niagara's expenses, no matter what they were, in consideration of \$1,200 a month out of the "earnings" of that concern. If there were no earnings, he had no claim to this monthly payment; but his obligation to pay the expenses of the business remained in force. It was further incumbent upon the Horowitz firm to make good every obligation of the Niagara Company to the Woolen Company, i. e., not only were all sales guaranteed, but ultimate settlement with the Woolen Company on the basis of invoice price for all goods delivered was likewise covered, and to the performance of these onerous obligations the elder Horowitz had pledged substantially all the capital stock of the Niagara Company, which in turn represented a foreclosable interest in his personal real estate.

The mere statement of this paper scheme seems to me to show its unworkable nature. Perpetual business sunshine was essential for its continuance even from day to day. It therefore becomes interesting and material to consider the evidence of what was actually done under agreements stated, between November, 1902, and October, 1904. On this subject the testimony of Joseph Horowitz seems to me frank and honest, though given under circumstances very painful to any son of Philip Horowitz. It was Joseph to whom was given the first intimation that the Woolen Company desired to put into effect any such scheme as this just outlined, and the way it was put to him (by an agent of the Woolen Company) was that his firm must incorporate. Doubtless the details of the plan were not present in the mind of the agent who spoke, but as arranged by that company's counsel it was the apparatus of the Niagara Woolen Company of which Joseph was given notice by the language above substantially quoted.

In response to inquiry he was at the same time told that business would go on as before, and it did go on as follows: Joseph, as president of the Niagara Company, went from time to time to salesmen of the Woolen Company. He advised them of what he wanted, and in due time received a memorandum of order specifying the quantity, quality, and price of the goods to be sent to the Niagara Company "in accordance with agreement had between us as of November 25, 1902." In due time also a manifest or "copy of order" was sent to the Niagara Company, in which the time of delivery was stated, and the terms (of so much per cent. off for payment within specified periods) were given, as in ordinary bills rendered. The copy of order also stated that:

"These goods are delivered on consignment by (Woolen Company) and accepted by (Niagara Company) upon the express condition that the title thereto remains vested in (Woolen Company) until paid for."

The goods thus ordered and billed were usually sent to the Horowitz place of business, but in some instances they remained in the Woolen Company's store or warehouse until wanted.

Obviously, as to goods delivered at Horowitz's place, some means of connecting them with the Niagara were desirable, and, accordingly, a sign reading "Niagara Woolen Company" was appended to the sign of Horowitz & Son displayed outside the door of the latter's establish-

ment. This sign seems to have been reasonably conspicuous. In the back part of the store a stall or partition about 10 feet square was boarded off, and there a set of books was kept in which were entered all goods received from the Woolen Company and all sales of such goods as reported by the Horowitz salesman, for the Niagara Company never at any time had a sales department of its own.

The goods thus delivered by the Woolen Company bore tags which (if not removed) would serve to indicate their origin; but they were so mingled with other goods, both woolens and silks, obtained by Horowitz from divers sources, that there was nothing in the arrangement of goods in Horowitz's store to indicate that any particular goods were the property either of the Woolen Company or of the Niagara Company, or not the property of Horowitz. The books last referred to were at first kept by employes of Horowitz, but were so badly kept that in July, 1903, the Woolen Company, at its own expense, installed in the room or stall above described a bookkeeper, who thereafter kept accurate record of such goods as were billed and of such sales and payments as were reported to him through Horowitz. The volume of business thus done in Woolen Company goods remained at least up to normal standards (an average line of \$40,000), and at times evidently exceeded that figure. In selling goods Horowitz and his clerks made no discrimination between Woolen Company goods and other goods. All were offered alike, and all customers were solicited through Horowitz; but when bills were rendered (at least as long as Joseph Horowitz was president of the Niagara Company) such bills for Woolen Company goods were in the name of the Niagara Company only. It sometimes occurred that, when merchandise was sold in mixed lots (some from "consigned" goods and some from Horowitz's own stock) to the same customer, a check came in payable to Horowitz & Son only. This check was deposited and a cross-check drawn in favor of the Niagara Company. All checks drawn to the Niagara's order were (under Joseph Horowitz's presidency) deposited in a separate bank account in the name of the Niagara Company. The business thus conducted was visited almost daily by the secretary and treasurer of the Niagara Company (a clerk of the Woolen Company), whose duties consisted in examining the sales book, and with the co-signature of Joseph Horowitz taking out of the Niagara Company's bank account as much money as the account would stand without undue depletion.

After the payment of attorney's fees for the formation of the Niagara Company, the only checks ever drawn out of its bank account were either in favor of the Woolen Company or in favor of Philip Horowitz for the \$1,200 a month above alluded to. No dividends were paid on the Niagara's stock nor are any earnings of that company shown in excess of said \$1,200 per month, while in the early summer of 1904 these payments were stopped because, in the opinion of the secretary and treasurer, the "earnings did not warrant" them.

In 1903 Joseph Horowitz objected that the terms of discount permitted by the Woolen Company were not sufficiently generous. He laid his claim before the proper agents of the Woolen Company and finally received a memorandum (in evidence), from which it would ap-

pear that substantially what Joseph had requested was to be granted to the "credit P. H. & Son." In December, 1903, Joseph Horowitz desired to have certain of the consigned goods taken back by the Woolen Company, but was informed that that company could not consent "to have thrown back into our stock fall goods which were made expressly for you and delivered in accordance with the terms of the agreement"—"you" meaning Niagara Woolen Company. Specific agreements were made to the effect that "off-price" goods which had been ordered by Joseph Horowitz, as president, would be taken back by the Woolen Company, provided that that company was saved harmless from all loss by such sending back of goods.

There is nothing in the oral evidence to persuade me that down to about May, 1904, there was any departure from either the letter or the spirit of the written agreements first above set forth. The result was that, if the Horowitz firm could not sell and collect for enough goods in a month to show \$1,200 of "earnings" by the Niagara Company, they got no contribution from the major portion of their business toward the payment of their rent, their clerk hire, and their personal expenses. Yet they had nothing upon which they could honestly borrow. Joseph Horowitz deposes that he, accordingly, found the burden more than he could bear, resigned the presidency of the Niagara Woolen Company, and entered into a business of his own, not formally retiring from his father's firm, but after about May 1, 1904, having nothing to do therewith and rarely visiting the place of business. Philip Horowitz succeeded his son as president of the Niagara Woolen Company, and shortly entered upon the series of dishonest transactions which have ultimately produced this litigation. Instead of indorsing checks drawn to the order of the Niagara Woolen Company for deposit and thereafter putting them in the bank account of that corporation, he (as president) indorsed them in blank and thereafter deposited them in his own bank account and appropriated the proceeds to his own use—of course keeping these transactions concealed from the Woolen Company's bookkeeper in his own place of business and from the visiting secretary and treasurer. This lasted for several months, until a fire occurred in his place of business under circumstances so suspicious that an investigation was entered upon, pending which the petition in bankruptcy herein was filed, whereupon Philip Horowitz fled the jurisdiction, and has not since been seen nor heard of by any party to this litigation (so far as appears) nor by his own son.

Upon the discovery of Philip Horowitz's dishonesty and probable insolvency, the defendants herein removed from Horowitz's store all consigned goods then on hand (said to amount to over \$33,000), and for an accounting as to the same this action is brought. The bill of complaint correctly alleges the main features of the plan above set forth, but it also asserts (in substance) that with the knowledge and connivance of the defendants, and especially of the officers and agents of the Woolen Company, Horowitz & Son sold the "consigned goods in their own name and rendered bills in their own name and made collections accordingly," and that in most instances the proceeds of such sales were placed by the bankrupts "in their own bank account," so that in effect the bill charges that, however legally good inter partes

the paper scheme was, it was also from the beginning, or nearly so, practically disregarded, and is now used, and was always intended to be used, only as a protection in time of need; while ordinarily the Horowitz firm with the knowledge and consent of the Woolen Company transacted their business, sold goods, and made collections therefor exactly as if they had bought all the goods in their store for cash or credit in the ordinary way. This, as above sufficiently indicated, I do not believe to be true. There is no evidence of any actual fraud on the part of the Woolen Company; on the contrary, the evidence is clear that that corporation, acting under advice of counsel, perfected this plan in order to avoid suspected dangers in doing business with Philip Horowitz. The plan was believed to be lawful, and was honestly adhered to until within a short time of failure, when Philip Horowitz more than justified suspicion by flagrantly violating his own agreements and becoming a fugitive from his creditors. This makes the case presented for decision on the evidence quite different from that before the court on demurrer, but the bill is broad enough to fairly cover the claim now put forward by the trustee.

Decision.

Complainant's present position may be thus stated from the bill, which avers that by reason of the premises the "stock of goods delivered by said American Woolen Company and maintained at the said place of business of the bankrupts became and remained the property of the latter in so far as the rights of all the latter's creditors * * * are affected or in any way concerned." This is an assertion that the removed goods belonged in the eye of the law to the bankrupts, and therefore belong to their trustee, and that this case is brought to remove from said goods or their value the incumbrance created by the creation of the Niagara Company and the apparatus of contracts above recited. It may be admitted, and is found, that there was no actual fraud on the part of any one, in the sense either of suppression of truth or suggestion of falsehood practiced upon creditors. The existence and powers of the Niagara Company were matters of record, its presence at Horowitz's store was advertised by a sign, and any one might examine the form of bill rendered for many (if not most) of the sales made by Horowitz. Yet if the entire scheme as revealed by the agreements entered into or the conduct of the parties thereunder or both constitute a transaction fraudulent as matter of law," the good faith of all parties cannot avail as against creditors, and a trustee in bankruptcy is a proper party complainant to assert the creditors' rights. *Skilton v. Codington*, 185 N. Y. 80, 77 N. E. 790, 113 Am. St. Rep. 885.

Nor does it advance the matter to point out that the arrangements complained of were valid and lawful inter partes. That is admitted; but so are most conveyances actively fraudulent as against creditors. Neither is it important to dwell much upon the method of doing business under the contracts and agreements made. It often happens that what contracting parties do, how they deal with each other, after contract made, more clearly shows what they really intended to do than the written instruments by which they concealed rather than revealed their purposes. In this case about the only light cast on the parties' writing

by their acts makes the court certain that it was never intended by the Woolen Company to ship or deliver to Niagara Company more merchandise than Horowitz ordered, and he ordered only what he hoped to dispose of in what all parties regarded as his business. The presidency of the Niagara Company was thought of only as a part of the plan ordained by the Woolen Company, which was the only method by which Horowitz & Son could provide themselves with goods, and the plan itself was deemed but a legal substitute for the consignment agreement of 1901, as to which the Woolen Company's counsel had grown doubtful, while Horowitz thought of nothing but getting the goods and selling them at a profit which he could keep.

Let this matter, therefore, be tested by the written contracts. From them alone it is apparent that in substance and effect Horowitz & Son were obliged to pay the invoice price for every yard of goods delivered to the Niagara Company sooner or later, whether the merchandise was sold or not, and even if it were burned or stolen the Woolen Company was entitled to sue both father and son for such invoice price or any deficiency thereof, and if such suit was not desired the obedient directors of the Niagara Company could foreclose on the Horowitz real estate and so put the Niagara Company in funds to pay pro tanto. In short, the Woolen Company so arranged matters that while carefully avoiding all such words as sale or conveyance, and procuring Horowitz to agree to such avoidance, it was from the moment of delivering goods contractually entitled to recover from Horowitz the sale price of those goods, and could not be compelled to resume possession of any of them; yet it always claimed and now claims to own outright what it would not take back and could sue for the price of. If this method of openly doing business is legal, the defendants must prevail; but legality is not to be determined by words. A formal conveyance in fee may be but a mortgage and will not be saved by the strongest habendum clause ever penned; and where fraud, whether by active deceit or legal misnomer, is averred and proved, the rights of parties are to be judged by their substantial position towards each other and not by the label they put on their transactions.

After patient consideration of this confessedly novel business device, I am convinced that the vice of defendants' position is that they have wrongfully labeled what they did. They urge that the transaction was (1) a consignment and nothing else, and (2) the bankrupts were not the consignees, but were at all times strangers to the goods, whence it follows that the Woolen Company owned the goods taken; but, if not, then, whoever owned them, Horowitz & Son certainly did not.

The first of these propositions will not bear investigation. A consignment is but a species of bailment, and if the so-called "consignment" does not respond to the legal tests for bailment, it cannot be what the label calls for. Whether a delivery of goods does or does not constitute a bailment is primarily determined by the question whether the identical article delivered is to be returned. But where there is no obligation on the part of the bailee to restore the specific article, even though he be at liberty to return another thing of equal value (instead of paying money), he becomes a debtor, and the title to the property is changed; the contract in such a case is one of sale. *Foster v. Petti-*

bone, 7 N. Y. 433, 57 Am. Dec. 530. And the same fundamental essential to any contract of bailment has been recognized and expounded time and again. See Cyc. p. 169, and cases cited, Benjamin on Sales (7th Ed.) p. 5; Powder Co. v. Burkhardt, 97 U. S. 116, 24 L. Ed. 973. The ingenuity of man has devised many variants of bailment, and undoubtedly the mere fact that the bailee may sell the goods is not enough to render the original transaction a sale (*Ex parte White*, L. R. 6 Ch. App. 397, affirmed 21 W. R. 465), while deliveries to "sell or return" are well recognized forms of bailment (*Sturm v. Boker*, 150 U. S. 312, 14 Sup. Ct. 99, 37 L. Ed. 1093). A bailee also may have the right to account for goods lost or consumed at a fixed price (*Westcott v. Thompson*, 18 N. Y. 363) without thereby becoming a vendee, and it is even possible (in some jurisdictions) that, under an agreement made in good faith and clearly intended by both parties to be one of agency, a consignee of goods may sell at any price, while accounting to his consignor at a price fixed beforehand (*Harris v. Coe*, 71 Conn. at 163, 41 Atl. 552).

It remains, however, always true that what the contract means is a question of fact, sometimes to be submitted to a jury (*Crosby v. D. & H. Canal Co.*, 119 N. Y. 333, 23 N. E. 736), but finally, when the facts are ascertained, presenting a question of law for the court (*Westcott v. Thompson*, supra). The contract between the Woolen Company and Niagara Company does not respond favorably for defendants to even the most generous test. It has never been held that one to whom goods were delivered, which he not only might sell, but must pay for whether he sell them or not, and who also cannot return any of the merchandise, is a bailee, and if he be not a bailee he cannot be a consignee.

In my opinion the contracts in question plainly show an endeavor to obtain for the Woolen Company all the rights of both vendor and bailor, while denying to the Niagara Company the privileges of either a vendee or bailee. This cannot be done as against creditors who are entitled to have the test of law applied to the transaction, however valid as between the parties themselves. The authorities on this subject (after the inherent nature of the contract is ascertained) have been so recently collected in Referee Dexter's able report (*In re Penny & Anderson*, 176 Fed. 141) that further citation seems superfluous. See, however, under Bankruptcy Act of 1867, *In re Linforth*, 4 Sawy. 370, Fed. Cas. No. 8,369; *Nutter v. Wheeler*, 2 Lowell, 336, Fed. Cas. No. 10,384.

Holding then, as I now do, that in legal effect the delivery of the goods in question to the Niagara Company constituted a sale to that company, it remains to consider whether this finding can benefit the creditors of Horowitz. In this branch of the case I find no difficulty, although no similar litigation has been instanced. The analysis above made of the contract between the Woolen Company and the Niagara Company has assumed (for argument's sake) that the latter was an independent concern actually making contracts on its own behalf and maintaining a real existence separate and apart from the Woolen Company and from Horowitz. It is, however, too plain for argument that such was not the case; if it had not been for the agreement of Horowitz & Son guaranteeing the performance of every covenant and obli-

gation entered into by the Niagara Company and for the real estate security furnished (in effect) by Philip Horowitz as collateral to the promise of his firm, the written engagements made between the Niagara Company and the Woolen Company would have been absurdities. There was no real person for the Woolen Company to contract with, except the bankrupts, and the whole and avowed meaning and intent of the arrangement was not to consign goods to the Niagara Company, but to enable Horowitz & Son to sell goods at their own prices without owning them. If the Woolen Company could not have dealt with an independent Niagara Company in the manner it did without having its dealing result in a sale, then that situation is not bettered by the intervention between the Woolen Company and Horowitz of a paper corporation which was merely another name for the Woolen Company itself. If the Niagara Company had really been an independent concern, had itself become bankrupt with numerous creditors, and the Woolen Company had removed from its premises goods in like manner as it removed them from Horowitz's store, then, for the reasons above given, such creditors through their trustee could have recovered against the Woolen Company. If, however, Niagara Company had carried on its own real and independent business through Horowitz's clerks and mingled its goods with Horowitz's goods, then it is true that Horowitz's creditors could have had no recourse against Woolen Company, whatever might have been their rights against Niagara Company, and Horowitz would then have been a stranger to the Woolen Company, however intimate might have been his relations with the Niagara Company. But when the Woolen Company in the very beginning creates the Niagara Company, not for the purpose of doing business with it, but for the purpose of doing business with Horowitz, then the real substantive agreement made is not the idle form of the consignment contract with the Niagara Company, but that which was intended as between the Woolen Company and Horowitz and expressed with perfect plainness in the latter's indemnity agreement. From what source was the Woolen Company to receive payment for its goods? From the goods themselves, if possible. But who was to sell those goods? Plainly Horowitz, and, if he could not sell them, to whose property did the Woolen Company have recourse? Nominally to the capital stock of the Niagara Company, which, however, meant no more than the foreclosure of a mortgage upon Philip Horowitz's house.

The legal effect of this arrangement was exactly the same as that even more plainly expressed in the consignment agreement between the Woolen Company and Horowitz of 1901, with this difference only: That so far as the paper writings are concerned Horowitz could return in 1901 goods he did not want; whereas, when in 1902 the transparent window of the Niagara Company was erected between himself and the Woolen Company he was forbidden that privilege. It is highly improbable that in practice there was any such difference between 1901 and 1902, but the difference between the written documents is clear. It results, therefore, that in my opinion the legal effect of the transactions shown in evidence is that at the time defendants removed the goods which are the subject of this suit such goods had been delivered to Horowitz & Son and were in their possession in pursuance of the

contracts of November 25, 1902, whereof the legal result was to render the persons to whom the goods were delivered and intended to be delivered (i. e., Horowitz & Son) the vendees of the same.

The complainant will therefore have an interlocutory decree requiring the defendants to account for the goods admittedly taken, or the value of the same, together with costs to be taxed.

THE SUSQUEHANNA.

(District Court, E. D. New York. January 15, 1910.)

SHIPPING (§ 84*)—INJURY TO STEVEDORE—CONTRIBUTORY NEGLIGENCE.

Libelant was foreman of a gang of stevedores, who were coaling a vessel, and on returning to the vessel after dark after an absence he jumped from a temporary gangway, which they had constructed for their work, into an open hatchway, and was injured. The ship had furnished lights which had been placed by the stevedores, who had full charge of that portion of the deck, but the hatchway was in the shadow. The hatch was not in use at the time, and whether the cover had been removed by one of the stevedores or by a seaman was left in doubt by the evidence; but neither libelant nor any officer of the ship had ordered it removed. *Held*, that in either event libelant did not exercise reasonable care in jumping onto a dark part of the deck, where he knew there were hatches, without examination, and that he was not entitled to recover from the vessel for his injury.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 189, 190; Dec. Dig. § 84;* Master and Servant, Cent. Dig. § 734.]

Suit in admiralty by Eugenio Fortuna against the steamship *Susquehanna*. Decree dismissing libel.

Convers & Kirlin (J. Parker Kirlin and John M. Woolsey, of counsel), for the *Susquehanna*.

Jackson, Hollander & Frank (Eugene L. Parodi and Samuel F. Frank, of counsel), for libelant.

CHATFIELD, District Judge. The libelant was the foreman of a gang of stevedores, who at the time of the accident were engaged in loading the steamer *Susquehanna* with a supply of coal, upon the 15th day of February, 1904. This steamer had what is known as a "cross-bunker hatch" in its bridge deck leading down to the space in which the coal for consumption was carried, and along each side of the house upon the bridge deck were three side hatches, which, according to the testimony, were usually made use of, or at least the one in question was made use of, to trim and completely load the coal in the appropriate bunkers, after the space into which the cross-bunker hatch led had been filled. In order to dump the coal into this cross-bunker hatch, a gangway or elevated platform had to be built from the side of the vessel to a spot over the hatch, upon which wheelbarrows could be run; the coal having been raised from the lighter by buckets, which were emptied into the wheelbarrows at the side of the vessel. This gangway was about four feet above the deck so as to clear the rail and other obstructions, and the building of this temporary structure compelled

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the removal of a pinnacle or boat which was ordinarily suspended from davits and rested upon supports near the rail of the vessel, outside of the particular side hatch through which the libelant fell upon the day in question.

The libelant's testimony is that he was compelled to leave the ship about half past 4 o'clock in the afternoon of that day to get a gangwayman in place of one who had gone home; that when he returned it was dusk or nearly dark; that the lights had been arranged for the continuation of the coaling which was to go on through the night; but that the lighter in which the supply of coal had been brought alongside of the vessel was empty at the point where the buckets were being lowered; and that he took the hawser or line of the lighter and proceeded forward along the bridge deck of the *Susquehanna*, in order to pull the lighter forward, so as to bring another portion of her cargo within the range of the buckets for loading. As he did this, he climbed up on the elevated gangway or path for the wheelbarrows and jumped down upon the other side, immediately into and through the side hatch, which proved to be uncovered at that time. He sustained some injury by this fall.

His testimony and that of all the other witnesses satisfactorily shows that the exact location of this small hatchway was at that time within the dark radius caused by the shadows of the gangway and other structures in the neighborhood. Plenty of lights had been supplied by the ship, and the arrangement of these lights was entirely under the direction of the stevedores, of whom the injured man was foreman. The gangway itself had been built by the stevedores, out of materials which they procured on the ship or dock, and the conditions of this gangway were entirely within the control of the libelant.

In the same way the use of the hatches and of the different portions of the vessel and its machinery necessary for the loading of coal were under the direction of the stevedores, although it is apparent from the testimony of both sides that some officer of the ship, usually one of its engineering force, was on duty the greater part of the time, so as to see that the machinery of the vessel was available.

The testimony of the ship's officers is to the effect that the accident occurred somewhat later in the evening than the libelant fixes as the time when he fell, and the testimony of these various officers of the ship shows some confusion on their part as to whether the vessel had been coaling earlier in the day or upon the previous night. A considerable portion of their testimony about the matters as to which they were questioned is either hearsay or generalizations from customs and situations usually prevailing. If, however, the testimony of the claimant's witnesses who had any knowledge of the actual transactions be believed, no officer of the ship or no person connected with the ship for any explicit or authorized work had been near the hatch cover in question, and it may be assumed to be established from the testimony as a proposition of law that the control of the decks and hatches, so far as their use by the stevedoring gang was concerned, belonged to the foreman of the stevedores, and that the ship was not responsible for any carelessness or negligence on the part of the stevedores themselves with respect to one another. Further, according to the testi-

mony of all the witnesses, the hatchway in question was not required to be open at the time of the accident, inasmuch as the cross-bunker hatch was still being used for the loading of the coal, and no necessities of the vessel or her crew called for anything in connection with the small hatch through which the libellant fell. It is argued from this that the presumption is that it had been opened by some of the stevedores themselves.

Upon such a state of facts, no negligence against the vessel or on the part of any one for whose acts the vessel was responsible could be predicated. But the libellant presents certain testimony showing that the small hatch cover in question, which was substantially made and sufficient in every way for the purpose for which it was used, had been taken off by a sailor, or a man doing some painting, clothed as a sailor, on the afternoon in question, while the foreman of the stevedoring gang was ashore looking for his new gangwayman. Two witnesses were produced by the libellant who testify about the actions of this sailor. The first one, a coal passer, says that the sailor removed the hatch in order to protect some fresh paint, at about 5 o'clock in the afternoon, and that the witness said in Italian, "Don't touch the hatch; don't touch the hatch," and also said, "Don't take it away, because some one might fall down." This stevedore could not talk English to any extent, and, when making these remarks, called to the son of the libellant, whom he designated as "Frank," and Frank talked to the seaman. This witness, Schiano, also testifies that the libellant fell down the hatch soon after he got back and before there was any opportunity to warn him. The libellant's son, Frank, is shown by this testimony to have also known that the hatch cover in question was off the hatch, and was himself called as a witness. He testified that he himself was working in the forward bunker hatch, bossing the men who were shoveling the coal which was lowered through the cross-bunker hatch, and that he knew one of the side hatches was off because some light came through. He testified that the conversation of which Schiano spoke, with reference to interpreting to the seaman about taking the hatch cover off, occurred in the daytime early, when he (Frank) was on deck. His testimony is as follows:

"Q. Tell what took place at that time? A. The crew of the steamship shifted the boat, the lifeboat, the big lifeboat, and after a while this other fellow came along, and he thought there was not enough support for the lifeboat on the deck, and he said that much.

"By the Court: Q. What did he say? A. He said that the boat was liable to fall over, and that is all I knew about it.

"Q. What orders did he give? A. He wasn't in a position to give orders; he was a sailor; he went to take this hatch cover, and took it up there.

"By Mr. Kirlin: Q. Did he take it? A. I concluded he took it off after I went down because I know more light came in through that part of the hatch.

"Q. You didn't see anybody take the hatch off yourself? A. No.

"Q. You didn't have any talk with anybody about taking it off? A. No."

Assuming that the testimony of these witnesses is correct—and their manner of testifying as well as the substance of their statement would seem to be worthy of belief—it would seem that the cover of the hatch in question was removed without any orders or participation on the part of the officers of the steamship, and solely at the instance of the

individual who was called by these witnesses "a sailor," whether his motive was that of protecting the fresh paint, or of steadying the pinnace which, to make room for the gangway, had been moved from its supports and was resting near the deck house alongside of the hatch in question.

It may be assumed that it was the duty of the vessel to furnish a safe place for the stevedores to perform their work, in so far as the equipment and parts of the steamer were concerned. It was also the duty of the steamer to avoid creating any danger or being guilty on the part of its officers or crew of any negligence which would create a trap or situation from which the stevedores might be injured, without being able to avoid the risk by due care on their part. It may also be assumed that negligence cannot be imputed to the vessel simply because certain hatch covers were or were not removed at the time the vessel was turned over to the stevedores for their work. The stevedores themselves had the right and were expected to remove such hatches as they might think necessary, or to put covers back in place as their work might require, and each one of the gang of stevedores was called upon to exercise reasonable care in using the different portions of the vessel where his work might take him. The stevedores also were workmen who assumed the obvious risks of their work, and who must be held to have considerable knowledge and experience in the use of the hatches and equipment of such a steamer. Especially would this be true of the foreman of the stevedoring gang, who himself was in charge and had the right to control the work of the stevedores and the places and means of doing their work. If the hatchway had been opened by one of the stevedores, the ship would not be liable. If the hatchway had been opened by a sailor, in broad daylight, and the stevedores with their foreman had proceeded to work around the open hatchway, they could not have held the ship responsible for any lack of reasonable care on their part when so doing.

Hence we come down to a consideration of the only point of view from which any liability might be placed upon the ship. If some sailor or some officer of the vessel, in the absence of the person injured, opened a part of the vessel, where reasonable care by themselves as to apparent risks would not be sufficient to protect the stevedores, and no care was taken to give warning or to call the danger to the attention of any one who could take proper precautions with respect thereto, then the ship would be liable, if contributory negligence were not present. In the case at bar, the most difficult question to determine is whether *Fortuna* was guilty of contributory negligence or lack of care upon his own part, in jumping over or from the gangway into a dark portion of the deck, where he was bound to know that hatchway openings would be unprotected if the covers had been removed, even though these hatchway covers were within the control of himself and his own men. Had he a right to rely upon the fact that he himself had given no orders, or that the work of which he was in charge had not progressed to the point where the use of these particular hatches might be necessary or convenient?

If he were bound only to use reasonable care with respect to the

dangers which he himself had created, then some liability might be predicated upon the act of a sailor in creating a condition of danger.

But it is considered that this is too extreme a doctrine under such circumstances. This court is unwilling to hold that the libellant exercised reasonable care in attempting to jump into and to traverse a dark space such as this was, with hatchways immediately in his path, when he was in charge of the lights, and was not compelled to proceed without investigation or without procuring sufficient light. His sole reliance was based upon the fact that the ship had been turned over to him, and that he had not ordered the hatches in question removed, and he did not use proper care for his own safety.

The libel will be dismissed.

UNITED STATES v. LIBERMAN.

(Circuit Court, E. D. New York. January 20, 1910.)

PERJURY (§ 6*) — PROCEEDING IN WHICH OATH WAS ADMINISTERED — SPECIAL COMMISSIONER APPOINTED IN BANKRUPTCY PROCEEDING.

Under Bankr. Act July 1, 1898, c. 541, § 21a, 30 Stat. 552 (U. S. Comp. St. 1901, p. 3430), which authorizes a court of bankruptcy by order to require any designated person to be examined in court, it may, as a court of equity, appoint a special commissioner to conduct such examination, and, where such an appointment was made prior to adjudication to examine a designated witness respecting transfers of property by the bankrupt, his powers were not suspended by an order referring the case generally to a referee after adjudication, and an indictment for perjury against the witness may be predicated of false testimony given by him before such special commissioner.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 7-17; Dec. Dig. § 6.*]

Criminal prosecution by the United States against Peter Liberman. On motion to quash indictment. Overruled.

William J. Youngs, U. S. Atty. (William P. Allen, Asst. U. S. Atty., of counsel).

Abram J. Rose, for defendant.

CHATFIELD, District Judge. The defendant has been indicted by the grand jury of this district for perjury alleged to have been committed by the giving of false testimony with respect to material matters when under authorized examination, upon the 26th day of June, 1908, before Richard P. Morle, Esq., as special commissioner, in a bankruptcy proceeding brought against one Samuel Greenberg, in the District Court for this district, by the filing of an involuntary petition upon the 5th day of May, 1908. A receiver was appointed upon the 19th day of May, and the special commissioner designated upon the 20th day of May, by order.

The indictment also alleges that the special commissioner was authorized at the time to administer an oath, that the oath was admin-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

istered, and that the examination then being conducted on the 26th day of May before the said commissioner was one in effect authorized by law at the time.

The language of the indictment did not admit of the filing of a demurrer, so upon being arraigned the defendant has made a motion to quash upon the proceedings in the bankruptcy case, as set forth by the indictment, and upon matters of record in the District Court, of which this court can take judicial notice.

The question involved has been argued upon the merits, and the United States has not attempted to oppose the hearing of this motion in anticipation of the trial, inasmuch as no dispute of facts can be made, and as these facts are shown by the records available to the court without taking testimony.

An adjudication in the Matter of Greenberg was had upon the 21st day of May, 1908, and on that day a general order of reference of the proceedings subsequent to adjudication was made to a duly appointed referee in bankruptcy in this district. This order of reference was delivered to the referee by the 23d day of May, and the first meeting of creditors and the examination of the bankrupt was set down, there being some delay over the filing of schedules, for the 5th day of August, 1908. The order entered upon the 20th day of May, appointing a special commissioner and directing the examination of Liberman, was made under the provisions of section 21a of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 552 [U. S. Comp. St. 1901, p. 3430]), which is as follows:

"A court of bankruptcy may, upon application of any officer, bankrupt, or creditor, by order require any designated person, including the bankrupt and his wife, to appear in court or before a referee or the judge of any state court, to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under this act."

Liberman was designated in this order as one of the petitioning creditors, who was alleged in the affidavit upon which the order was obtained to have been a party to the transfer and disposition by the bankrupt of his property immediately preceding the filing of their petition. It also appears in this affidavit that up to that time no receiver had been appointed and no one was in charge or protecting the property of the bankrupt, and it seemed to be necessary to take some action to protect the estate prior to the first meeting of the creditors, which could not be held for some time, and which in fact could not be noticed until after schedules or a list of creditors had been filed. In this particular case the list of creditors was finally filed by intervening creditors, and no schedules by the bankrupt were ever presented.

It has been sufficiently well settled that, under the powers of a court of bankruptcy as a court of equity, testimony of witnesses can be taken before an officer of the court, usually called in this circuit a "special commissioner," to distinguish him from a special master in the ordinary equity case, and the rules for the taking of testimony in equity (No. 67, etc.) are applicable thereto. In *re Isaacson* (decided in this district on November 9, 1909, and cases there cited) 175 Fed. 292.

This equity practice is especially authorized by General Order No. 22 (89 Fed. x, 32 C. C. A. xxv), adopted by the Supreme Court of the United States with reference to bankruptcy proceedings, and there would seem to be no doubt that under the provisions of section 21a, if any designated person, including the bankrupt, who is a competent witness under the laws of the state, is ordered to appear in court for examination, his examination may be taken by a special commissioner for the court, and that the special commissioner shall have the power to administer an oath. It is also evident that by the provisions of section 21a "a court of bankruptcy" may at any time order such examination with respect to the "acts, conduct, or property of a bankrupt whose estate is in process of administration."

By section 1(7) of the bankruptcy statute, the word "court" is defined as meaning "the court of bankruptcy in which the proceedings are pending, and may include the referee," while section 1(8) of the bankruptcy act provides that "courts of bankruptcy" shall include the District Courts of the United States, etc. Referees have jurisdiction, by section 38(4), to "perform such part of the duties, * * * as are by this act conferred on courts of bankruptcy and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts, except as herein otherwise provided."

The Supreme Court of the United States has provided a form for referring a bankruptcy matter to a referee after adjudication, under the provisions of section 22 of the bankruptcy act, and by General Order No. 12 (89 Fed. vii, 32 C. C. A. xvi) has directed that:

"A copy of the order shall forthwith be sent by mail to the referee or be delivered to him personally by the clerk or other officer of the court, and thereafter all the proceedings, except such as are required by the act or by these general orders to be had before the judge, shall be had before the referee."

Inasmuch as section 38 of the act makes the orders of the "courts of bankruptcy," as well as the rules of this court, conclusive upon the referee, and inasmuch as section 38(4) excepts the other provisions of the bankruptcy statute, it does not seem that in a district where application to the court is required, under the provisions of section 21a, for the examination of parties other than the bankrupt himself at the first meeting of creditors, or where application to the court is required for orders relating to the disposition of the property of the bankrupt, there could be any question that the general order of reference to the referee did not oust the court of bankruptcy, as distinguished from the court (the latter being for the ordinary purposes of the estate the referee) of jurisdiction to have at any time a witness examined before it; that is, the testimony of the witnesses taken before a special commissioner, as the representative of the court of bankruptcy, in distinction from the matters before the referee at the first meeting and subsequent thereto.

The very purpose of an examination under section 21a is to discover property of the bankrupt, or to learn as to its whereabouts and as to the acts of the bankrupt with respect thereto; and if the bankrupt could delay such investigation, either by interposing an answer and thus preventing adjudication, or by delaying the filing of schedules

and the calling of a first meeting, the property in many cases, at least in those in which fraud might be present, would be lost and beyond the reach of process or even discovery, and in such cases the services of a receiver would be substantially useless, for no knowledge would ordinarily be obtained until time for the election of a trustee, when what knowledge might be acquired would undoubtedly be too late to be of any service.

The reason for allowing examination under section 21a prior to adjudication is therefore the same as the reason for allowing an examination subsequent to adjudication and prior to the first meeting of creditors, and there seems to be no reason to hold that the court has lost all jurisdiction merely by the reference of the case for the general purposes of administration to the referee.

It must be held, therefore, that in the present case the order of May 21st was within the jurisdiction of the court, and that the examination of Liberman thereunder was not only authorized by statute, but necessary and advisable from the standpoint of the case itself.

The defendant's attorney has cited two cases in support of his position, of which some discussion is necessary. The first case cited, viz., *Matter of Abbey Press*, 134 Fed. 51, 67 C. C. A. 161, decided merely that a referee could order an examination of a creditor if the referee acted as the court in so doing. The court there said:

"No question is made but that this case has been referred generally to the referee as provided in section 22 of the act. The referee, therefore, constituted a court with all the powers of the court for the purposes of this examination. The contention that the proceeding was not pending at the time when the order was made is not well founded. Section 88a of the act invests the referees with jurisdiction to consider all petitions referred to them and to make the adjudication, etc. And thereafter, under General Order No. 12, all the proceedings, except those enumerated above, are to be had before the referee."

This does not control the present case as to an examination ordered by the District Court before reference nor (under the rules and practice of this district) at any time during the proceedings.

In the *Matter of Ruos* (D. C.) 164 Fed. 749, in the Eastern district of Pennsylvania, a great part of the opinion is devoted to the discussion of using testimony taken in a bankruptcy case, before a special referee appointed before adjudication under clause 9 of section 7 of the statute, which requires the bankrupt, at the first meeting of creditors and at such other times as the court may order, to submit to an examination; and it appears from the statement of facts in the case that this particular examination before the special referee was continued long after the general order of reference and the first meeting of creditors.

Such a proceeding could not be approved, but the court held only that it should not use such testimony as if taken upon a formal motion to compel the turning over of property. The case does not determine when perjury could or could not be committed.

In this district, as in every other, it would seem that the reference of the matter to the referee for a first meeting, at which the bankrupt is required by law to appear and submit to examination, should neces-

sarily prevent the holding of another examination of the same sort throughout a similar period, at a double expense to the bankrupt estate. But it is another thing to say that, if the bankrupt were ordered to appear for such examination (at least prior to the day when he was subjected to a double examination by the coming on of the first meeting of creditors), he could plead that the court of bankruptcy had no jurisdiction to order his examination for a special purpose, under section 21a of the statute. And much more would it seem that if the bankrupt or a creditor appeared prior to the first meeting of creditors and at an examination before a special referee, special commissioner, or special master, consented to be sworn and did not refuse to testify, that he could then object to the authority of the court in requiring his examination, because he had testified falsely on such examination. But still less is there any reason for third parties to claim that the appointment of the referee and provision for the examination of the bankrupt at the first meeting of creditors is a ground for their claiming that the false testimony is not perjury, upon the theory that the court of bankruptcy did not have jurisdiction to order their testimony before itself—that is, its officer—under the equity rules.

The indictment will be sustained, and the motion to quash denied.

UNITED STATES v. BROD.

(Circuit Court, N. D. Georgia. January 27, 1910.)

1. BANKRUPTCY (§ 242*)—PROSECUTION OF BANKRUPT FOR PERJURY—TESTIMONY GIVEN ON EXAMINATION.

The immunity given by Bankr. Act July 1, 1898, c. 541, § 7a (9), 30 Stat. 548 (U. S. Comp. St. 1901, p. 3425), which provides that no testimony given by a bankrupt on his examination concerning the conduct of his business, etc., "shall be offered in evidence against him in any criminal proceeding" extends only to criminal proceedings based on matters relating to which he testified, and does not protect him from the use of his testimony in support of a charge of perjury committed in the bankruptcy proceedings.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 242.*]

2. BANKRUPTCY (§ 242*)—PROSECUTION OF BANKRUPT FOR PERJURY—PLEADINGS.

Rev. St. § 660 (U. S. Comp. St. 1901, p. 661), providing that "no pleading of a party * * * shall be given in evidence or in any manner used against him * * * in any criminal proceeding; provided that this immunity shall not exempt any party or witness from prosecution for perjury committed in * * * testifying," does not render it unlawful to use the pleadings in a bankruptcy proceeding, such as the petition, schedules, etc., before a grand jury in an investigation of the charge that he committed perjury in his testimony before a special master on an application for his discharge, for the purpose of showing the pendency of the proceeding, and that the matter in which he testified was properly before the master.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 242.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Prosecution by the United States against A. E. Brod. On plea in abatement and motion to quash indictment. Overruled.

F. C. Tate, U. S. Atty., and Jno. W. Henley, Asst. U. S. Atty.
Dodd & Dodd and Reuben R. Arnold, for defendant.

NEWMAN, District Judge. The defendant in this case was indicted by the grand jury at the March term, 1909. The indictment charges that the defendant Brod "did on the 27th day of November, in the year 1908, in the said district and within the jurisdiction of said court, then and there unlawfully, willfully, knowingly and fraudulently, while a bankrupt, make a false oath in and in relation to a proceeding in bankruptcy." The false oath charged is that Brod made application for discharge, and, objections being filed thereto, the issue made by the application for discharge and the objections was referred to a special master, and that Brod, while testifying on oath before the master in the investigation of said matter, did falsely testify to the following, to wit:

"I did not, in the months of November and December, 1907, send by Lindsey Maxey four trunks full of my goods, tied up with ropes bought from A. W. Stubbs, to be shipped over the Central of Georgia Railway. I did not send to the Atlanta & West Point Railroad by Lindsey Maxey two trunks full of my goods. I did not have Elbert Walker carry from the rear door of my place to the Central depot four trunks loaded with my goods, during the month of January, 1908. I did not conceal any goods at all from my trustee in bankruptcy. After I went into bankruptcy, I did not have in my possession or control any merchandise, shoes, boots, hats, coats, cloaks, ribbons, or goods which I concealed from my trustee in bankruptcy. I turned over everything I had—all my goods and possessions—to the trustee, except what was set aside as a homestead. I never hauled any trunks from the store at all, that I didn't sell to parties. I don't know anything about goods going out unless I was not there, and somebody stole it. I don't know anything about it."

Then follows the charge in the indictment falsifying, according to the usual practice, the statements so made by Brod.

The plea in abatement and motion to quash is as follows, signed by counsel and sworn to by A. E. Brod:

"And now comes the defendant, A. E. Brod, and before arraignment and plea in said case, files this his plea in abatement and motion to quash the indictment, and for ground thereof says: First. The said indictment was found upon alleged testimony given by this defendant in relation to a proceeding in bankruptcy on the 27th day of November, 1908, and the same was in violation of section 7, subsection 9, of the Bankruptcy Act of 1898, which provides as follows: 'The bankrupt shall, when present at the first meeting of his creditors and at such other times as the court shall order, submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind and whereabouts of his property, and in addition, all matters which may affect the administration and settlement of his estate; but no testimony given by him shall be offered in evidence against him in any criminal proceeding.' This defendant shows that, had not the government offered the testimony given by this defendant in the above proceeding against him before the grand jury, no indictment would or could have been found; and the indictment being based upon this illegal evidence, is itself illegal; and this defendant says that the same should be quashed. Second. That the testimony used before the grand jury upon which said indictment was found, contains a verbatim report of the testimony of the bankrupt given in his bankruptcy proceeding on a former occasion some six months previously, to wit, on March 20, 1908. That this use of

the testimony before the grand jury was in contravention of law, and expressly prohibited by section 7, subsection 9, of the Bankruptcy Act, and by section 860, Revised Statutes; and therefore said indictment should be quashed. Third. That said indictment was found by using before the grand jury, as evidence, the petition in bankruptcy filed by said defendant, the schedule thereto attached, and the oaths of the defendant made to such petition in bankruptcy and schedules; also, the application for discharge. That the oaths made to such petition and schedules are required and demanded by the terms of the bankrupt law (section 7, subsection 8, of the Act of Congress of 1898, relating to bankruptcy). And by the terms of section 7, subsection 9, of said act, the bankrupt is guaranteed immunity from the use in evidence of such testimony or oaths in any criminal proceeding. That the use in evidence before the grand jury of such petition and schedules was contrary to law, and expressly prohibited by said section of the bankruptcy act. That it appears in the face of said indictment that there was used in evidence before the grand jury the pleadings obtained from this defendant in a judicial proceeding, to wit, the petition in bankruptcy and the schedules thereto attached and the bankrupt's application for a discharge. That the use of such pleadings is unauthorized, illegal, and prohibited by law. That the bankrupt is protected from the use in evidence of any and all such pleadings, under section 860 of the Revised Statutes, which reads as follows: 'No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture: Provided, that this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid.' Wherefore defendant prays that this his plea and motion be sustained, and that said indictment be dismissed."

The plea in abatement was traversed by the United States, and thereupon the United States Attorney and counsel for defendant entered into the following stipulation and agreement as to the facts to be considered in passing upon the plea in abatement and motion to quash:

"It is stipulated and agreed by and between counsel for the defendant, A. E. Brod, and counsel for the United States that the issues and questions raised by the plea in abatement and motion to quash and the traverse thereto in this case be submitted to the court for determination without the intervention of a jury upon the indictment and the following agreed statement of facts, to wit: It is agreed that in addition to the parol evidence submitted to and considered by the grand jury in this case, the following documentary evidence was also introduced and used before that body, to wit: (1) The voluntary petition and schedules of personal property, B (2) and B (3) of A. E. Brod, the bankrupt, attached to the petition, together with the verification and entry of filing thereof. (2) The order of adjudication of bankruptcy of A. E. Brod on his voluntary petition together with the entries of filing thereof. (3) The petition of A. E. Brod, the bankrupt, for discharge and the entry of filing thereof. (4) The original and amended objections of J. K. Orr Shoe Company et al. to the discharge of A. E. Brod, the bankrupt, together with the entry of filing thereof. (5) The order of court referring to R. O. Jones, a referee in bankruptcy, as special master, the issue made by the objections to the discharge of the bankrupt, A. E. Brod."

The first question, it will be apparent, is whether or not the testimony of the bankrupt, given before the special master, could be used in evidence against him. Section 7, par. 9, of the Bankruptcy Act of 1898 (Act July 1, 1898, c. 541, 30 Stat. 548 [U. S. Comp. St. 1901, p. 3425]), provides that the bankrupt shall, "when present at the first meeting of his creditors and at such other times as the court shall order, submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons,

the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate; but no testimony given by him shall be offered in evidence against him in any criminal proceeding."

The contention here is that the putting in evidence before the grand jury of what he testified to before the special master was violative of this last provision of the bankruptcy act; that is, giving in evidence before the grand jury what he stated before the special master, as set out in the bill of indictment. Section 29 of the bankruptcy act provides:

"A person shall be punishable by imprisonment for a period of not exceeding two years, upon conviction of the offense of having knowingly and fraudulently * * * (2) made a false oath or account in relation to any proceeding in bankruptcy."

While the act provides, therefore, for the punishment of a bankrupt who has made a false oath in relation to any proceeding in bankruptcy, at the same time it provides that no testimony given by him shall be offered in evidence against him in any criminal proceeding. The question thus made has been before the courts. The first case important to notice is *Edelstein v. United States*, 149 Fed. 636, 79 C. C. A. 328, 9 L. R. A. (N. S.) 236. This decision was by the Circuit Court of Appeals for the Eighth Circuit. The majority of the court, Circuit Judges Van Devanter and Adams, decided the testimony was admissible; Judge Philips dissenting. The fourth, fifth, and sixth headnotes of the opinion give, I think, substantially what was decided in the case by a majority of the court. They are as follows:

"4. Bankruptcy—Defenses—"False Oath"—Statutes—Construction.

"Bankr. Act July 1, 1898, c. 541, § 29, 30 Stat. 554 (U. S. Comp. St. 1901, p. 3433), provides that a person shall be punished by imprisonment on conviction of having knowingly and fraudulently made a false oath or account in or in relation to any proceeding in bankruptcy, and Act July 1, 1898, c. 541, § 2, subd. 12, 30 Stat. 548 (U. S. Comp. St. 1901, p. 3421), imposes the duty to discharge or refuse to discharge bankrupts on courts of bankruptcy as one of the 'bankruptcy proceedings.' Act July 1, 1898, c. 541, § 30, 30 Stat. 554 (U. S. Comp. St. 1901, p. 3434), authorizes the Supreme Court of the United States to prescribe all necessary rules, forms, and orders for carrying the act into effect, pursuant to which General Order No. 12 [89 Fed. vii, 32 C. C. A. xvi] was adopted, declaring that applications for a discharge shall be heard and decided by the judge, with authority to refer the application or any specified issue to a referee to ascertain and report the facts. Held, that the term 'false oath' was not limited to the examination of the bankrupt, authorized by Act July 1, 1898, c. 541, § 7, subd. 9, 30 Stat. 548 (U. S. Comp. St. 1901, p. 3425), nor to false swearing in connection with the bankrupt's schedules, but related to any proceeding in bankruptcy, including the examination of the bankrupt before a referee on an investigation of specifications filed against his discharge.

"5. Witnesses—Bankruptcy Proceedings—Immunity—Extent of.

"Bankr. Act July 1, 1898, c. 541, § 7, subd. 9, 30 Stat. 548 (U. S. Comp. St. 1901, p. 3425), provides for the examination of a bankrupt at the instance of his creditors, and declares that no testimony given by him shall be offered in evidence against him in any criminal proceeding. Held, that the examination contemplated by such section relates to past transactions; that the words 'in any criminal proceeding' are limited to proceedings arising out of the conduct of the bankrupt's business, the disposition of his property, etc.; that the immunity provided for is limited to protecting the bankrupt from the use of his evidence in such criminal proceedings as arise out of the conduct of his business or the disposition of his property, etc., and does not protect him from prosecution for false swearing in giving his evidence.

"6. Same.

"Section 7, subd. 9, supra, does not grant immunity to the bankrupt from prosecution for testifying falsely in a proceeding to investigate the truth of specifications filed against his discharge."

The judgment of conviction in the court below against Edelstein was affirmed. There was an application for certiorari in the case and the same was denied by the Supreme Court (205 U. S. 543, 27 Sup. Ct. 791, 51 L. Ed. 922). The same question came subsequently before the Circuit Court of Appeals for the Second Circuit, in *Wechsler v. United States*, 158 Fed. 579, 86 C. C. A. 37. So much of the opinion, by Circuit Judge Lacombe, in that case as would be material here is as follows:

"The bankruptcy act of July 1, 1898 (30 Stat. 543, c. 541, § 7 [U. S. Comp. St. 1901, p. 3424]), requires the bankrupt to submit to an examination under oath as to various matters specified therein, with the proviso that 'no testimony given by him shall be offered in evidence against him in any criminal proceeding.' It is contended that the immunity thus accorded in broad, unqualified language should apply to prosecution for falsely testifying upon such examination; and it is suggested that the section quoted from does not contain the qualification found in section 860, Rev. St. U. S. (U. S. Comp. St. 1901, p. 661) (and in other federal statutes), that the immunity provision 'shall not exempt any * * * witness from prosecution and punishment for perjury committed in * * * testifying as aforesaid.' Plaintiff in error cites in support of his contention the opinion of Judge Hanford in *U. S. v. Simon* (D. C.) 146 Fed. 89, and the dissenting opinion of Judge Phillips in *Edelstein v. U. S.*, 149 Fed. 636, 79 C. C. A. 328, 9 L. R. A. (N. S.) 236, which are directly in point and fully sustain his contention. He also cites dicta in *Re Marx* (D. C.) 102 Fed. 676, and in *Re Logan* (D. C.) 102 Fed. 876, in *Re Leslie* (D. C.) 119 Fed. 406, in *Re Dow's Estate* (D. C.) 105 Fed. 889, and in *Re Gaylord*, 112 Fed. 668, 50 C. C. A. 415. On the other hand, the provision quoted was held not to give immunity from prosecution for giving false testimony upon an examination under the bankrupt act in a well-considered opinion concurred in by a majority of the court in *Edelstein v. U. S.*, 149 Fed. 636, 79 C. C. A. 328, 9 L. R. A. (N. S.) 236 (G. C. A., Eighth Circuit); and an application for certiorari in that case was refused by the Supreme Court (205 U. S. 543, 27 Sup. Ct. 791, 51 L. Ed. 922). Whatever might be our conclusions were the question presented as a novel one, we are clearly of the opinion that we should follow the construction adopted in the Eighth Circuit and left undisturbed by the Supreme Court, so that in a matter of so much importance the decisions of the federal courts in the different circuits may be uniform."

These two decisions of the Circuit Court of Appeals, in the first of which an application for certiorari was denied by the Supreme Court, must be taken as conclusive of the case made here and controlling against the defendant.

The next question made is the use in evidence before the grand jury of the pleadings in the bankruptcy proceedings as set out in the stipulation given above. The immunity claimed against the use of the petition, schedules, etc., in the bankruptcy proceeding is under section 860 of the Revised Statutes, set out in the plea in abatement above. The pleadings (and they have been determined to be such—*Johnson v. U. S.*, 163 Fed. 30, 89 C. C. A. 508) did not and could not contain anything to sustain the special charge made against Brod in the indictment. The charge was that he swore falsely before the special master in reference to his property and the disposition of his property just before the bankruptcy proceeding was begun. The only purpose of

offering the bankruptcy proceedings, petition, and schedules, application for discharge, objections to the same and order of the court, must have been to show that there was a bankruptcy proceeding and that the matter in which the false testimony was alleged to have been given was properly before the special master at the time Brod testified. In *Johnson v. U. S.*, supra, which is relied upon by the defendant here, the plaintiff in error was indicted for concealing from the trustee of his estate in bankruptcy, property belonging to the estate. It is manifest from an examination of the opinion of Mr. Justice Holmes, who presided and delivered the opinion in the Circuit Court of Appeals in that case, that the main reason why the schedules of the bankrupt were deemed improper evidence there was that they themselves contained evidence against the defendant; that is, they showed certain property, which it was claimed the bankrupt had withheld and concealed from the trustee, was not embraced in his schedules, and tended thereby to convict him of the specific offense with which he was charged. This would make the schedules distinct and positive evidence against him as to the very matter on which he was being tried. Here the defendant is indicted for false swearing or perjury in testimony given before the master, on a reference as to his right to a discharge; and the only possible use of the papers put in evidence was to show that such a case was pending and that the issue in it, as to the right to a discharge, was referred, as charged in the indictment.

By section 860 "No pleading of a party * * * shall be given in evidence or in any manner used against him * * * in any court of the United States in any criminal proceeding: Provided that this immunity shall not exempt any party or witness from prosecution for perjury committed in * * * testifying." The reverse of the proposition is, construing this section, that pleadings may be used against a party when he is indicted for perjury. In other words, where a party or witness is indicted for perjury, the immunity granted by this section of the statutes is not operative. Unless this construction be given, it would be rare indeed that any one could be convicted of perjury, however false their testimony might have been. It is necessary, of course, to show that a case was pending and that an issue was made in the case, which made the testimony material.

The conclusion is that there was nothing improper or illegal in putting these papers in evidence before the grand jury, and there being no merit, as stated, in the contention that the evidence of Brod before the master should not have been put before the grand jury, the result is that the plea in abatement and motion to quash must be overruled and denied. An order may be entered to that effect.

THE PROTECTOR.

(District Court, E. D. South Carolina. December 3, 1909.)

COLLISION (§ 122*)—MOORED AND MOVING VESSEL—PRESUMPTION OF FAULT.

Where a lighter, engaged in raising a tug which had sunk at a wharf, and to which one end of a line passed under the tug was made fast, was so placed as to be in the way of vessels brought to the wharf, and two tugs, employed to dock a schooner, shoved her against the lighter, causing the sunken tug, which had been partly raised, to drop back, the happening of the accident under such circumstances was not of itself evidence of fault on the part of the tugs; and, in the absence of evidence that they failed to exercise ordinary care and skill, they cannot be held liable therefor.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 257; Dec. Dig. § 122.*]

In Admiralty. Suit by C. H. Yaeger, as owner of the steam tug Buck, against the steam tug Protector. Decree for respondent.

Nathans & Sinkler and G. H. Momeier, for libellant.

Mitchell & Smith, for respondent.

BRAWLEY, District Judge. The libel is for damages inflicted upon the steam tug Buck by the steam tug Protector during the progress of operations for the raising of the Buck, which had been sunk at Johnson's Wharf in the port of Charleston. The Buck, a small steam tug, of which Messrs. Dingle and Webb were owners since the year 1902, was sunk at Johnson's Wharf in January, 1909. She had been bought for \$1,750 in the year first mentioned, and her life had not been a successful one; the testimony showing that she had been sunk six or seven times. The testimony shows that her owners, after inquiry as to the cost of raising her, concluded that her value when raised would not repay the expense incurred, and practically abandoned her, selling her as she lay, about the end of August, to C. H. Yaeger for the nominal sum of \$5. Men of large experience and reliable have testified that in her then condition she had no value whatever; but the libellant, who had had some experience as a diver and some as a prize fighter, evidently was of opinion that the raising of her would be a successful speculation. The weight of the testimony is that the speculation could not in any event have been a successful one. The Buck was about 12 years old, had been lightly built of wood, had been repeatedly sunk, and that bad luck which sometimes attends even things inanimate had pursued her.

C. H. Yaeger and his associates obtained a lighter, and about September 4th went down and made an examination of the condition of the boat, which was buried in the mud. He was unable to pass a chain under the keel or under the shaft, and a chain was passed underneath the counter forward of the rudder shoe, fastened at one end to the port bits of the lighter, and at the other end to the wharf. The testimony is that the counter had little strength, and was easily liable to be torn off, and obviously the safer method of raising her would have been to pass the chain under the keel. The Buck had been lifted a little by

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

September 8th, and was partially suspended between the wharf and lighter, when the owner of the wharf employed the tug Protector to dock the schooner Bayard Barns, laden with coal destined for his wharf. The position of the lighter, near the end of the wharf, was a serious obstruction to the docking of the schooner, and Capt. Igoe, the master of the Protector, was reluctant to undertake it, with prophetic ken foreseeing that, if any accident occurred to the lighter in the process of docking the schooner, he would be held responsible. The owner of the wharf thereupon agreed, as an extra precaution against such contingency, to employ another tug to assist in the operation, and the tug Waban was employed. In the process of docking the schooner, she was shoved against the lighter, moving her a few feet. The touch seemed to have been a slight one, causing no damage to the lighter or to the schooner; but the lines holding up the Buck were dislodged, and she fell back into the mud.

No testimony was offered by the libelant tending to show any specific negligence or want of skill on the part of the tugs engaged in the docking of the Bayard Barns, and the case for the libelant rests upon the doctrine that, when a vessel moored is struck by a moving vessel, this is *prima facie* evidence of negligence on the part of the moving vessel. As a general proposition this is sound; but I do not conceive it applicable in the peculiar circumstances of this case. The act of Congress of March 3, 1899 (30 Stat. 1152, c. 425, § 15 [U. S. Comp. St. 1901, p. 3543]), makes it unlawful to tie up or anchor craft in navigable channels so as to obstruct the passage of other craft; and while I do not hold that the lighter was unlawfully where she was, yet it is obvious that she was an obstruction to free navigation. The schooner Bayard Barns, consigned to Johnson's Wharf, had the right to go there; and if the tugs Protector and Waban were managed with ordinary skill and prudence, and in the operation of docking an accident occurred, the mere fact of the accident cannot of itself be imputed as a fault.

Some of the remarks of Judge Brown in the case of *The Alfred* (D. C.) 59 Fed. 795, seem applicable. In that case a derrick, anchored in the channel of the East River under a permit from the Secretary of the Treasury, and occupied in raising a sunken vessel, was damaged by steam tugs. It was held that the raising of sunken vessels was legitimate and lawful, and that her position in the channel way, though lawful, added greatly to the difficulties of navigation by other vessels, and the court says:

"Those vessels were doubtless required to use skill and diligence to avoid the derrick and each other; but they were not otherwise answerable for the results, and in determining whether skill and diligence have been exercised the mere fact of collision with the derrick in a place like this is not such *prima facie* evidence of negligence as in the ordinary case of a collision with a wharf or with a vessel moored at a wharf, or upon ground out of the channel way and set apart for anchorage. Considering all the circumstances * * * I am of opinion that neither of the tugs was lacking in reasonable diligence and skill from the time when the danger of collision became appreciable, and that no specific fault is established against either. * * * Since the event, no doubt, modes can now be pointed out by which the collisions might have been avoided."

The *Etruria* (D. C.) 88 Fed. 555, is to the same effect.

While it cannot be said that the collision was an "inevitable accident," in the sense that it was due to the uncontrollable fury of those forces of nature which no human foresight could have prevented, yet in the admiralty law this is considered as a relative term to be construed, not absolutely, but reasonably, with regard to the circumstances of each particular case. In *The Grace Girdler*, 7 Wall. 196, 19 L. Ed. 113, the court says:

"Inevitable accident is where a vessel is pursuing a lawful avocation in a lawful manner, using the proper precautions against danger, and an accident occurs. The highest degree of caution that can be used is not required. It is enough that it is reasonable under the circumstances."

In *The Jumna*, 149 Fed. 171, 79 C. C. A. 119, the Circuit Court of Appeals of the Second circuit, quoting the case just cited and others, says:

"The test is: Could the collision have been prevented by the exercise of ordinary care, caution, and maritime skill? In the case at bar we are unable upon the testimony before us to specify any particular fault, to put our finger upon any act or omission, and assert that to it the accident was attributable. Fault may exist, but we are unable to discover it. It is inscrutable. Where the evidence is so conflicting that it is impossible to determine to what direct and specific acts the collision is attributable, it is a case of damage arising from a cause that is inscrutable. Whether the case at bar be thus classified, or whether it be held to come within the admiralty definition of inevitable accident, is not material. In either event the loss must be borne by the party on whom it falls."

The testimony abundantly shows that the master of the *Protector*, a skillful officer of large experience, was fully advised of, and that he fully appreciated, the difficulty and danger attending the docking of the *Bayard Barns*, and for that reason he was unwilling to undertake the job without the assistance of another tug. Extra expense was incurred, and so far as the testimony shows all proper precautions against danger of collision were taken. There is no testimony whatever tending to establish any specific negligence or any lack of the ordinary care and caution which the circumstances demanded. The libellant brought this case into court, and the burden of proof rests primarily upon him. He has offered no proof, but rests his case upon the presumption that, as his lighter was moored, the moving vessel was at fault, losing sight of the fact that his lighter was moored in a position where she was an obstruction to navigation, and that the *Protector*, in the performance of her lawful calling, had the right to use those waters, provided she exercised ordinary skill and caution. I am not persuaded that there was any such lack of skill and caution that would demand condemnation. If I was, I should have great difficulty in fixing any just measure of damages; the weight of the testimony being that the only thing of value in the *Buck* was her engines and boiler, which were not injured by the collision. Any other value is purely speculative.

The libel is dismissed.

BIDWELL et al. v. HUFF et al.

(Circuit Court, S. D. Georgia, W. D. December 10, 1909.)

1. JUDICIAL SALES (§ 35*)—CONFIRMATION—DISCRETION.

Where a judicial sale has been conducted in good faith and in accordance with provisions made for notice, etc., and has brought a satisfactory price, it will not be set aside for trifling reasons, or on account of matters which ought to have been attended to by the complaining parties before the sale.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. §§ 72, 73; Dec. Dig. § 35.*]

2. JUDICIAL SALES (§ 35*)—VACATION—GROUNDS.

It was no reason for vacating a judicial sale that two of the defendants had an undivided two-sevenths interest in the property, and that they were not entitled to have their interests adjusted.

[Ed. Note.—For other cases, see Judicial Sales, Dec. Dig. § 35.*]

In Equity. Suit by William L. Bidwell and another against W. A. Huff and others. On objections to the report of commissioners praying for the confirmation of a judicial sale. Objections overruled, and confirmation granted.

Dupont Guerry and T. S. Felder, for objectors.

O. J. Wimberly and T. E. Ryals, for respondents.

SPEER, District Judge (orally). The law upon this subject, as announced by the Supreme Court of the United States, by Mr. Justice Brewer, in *Pewabic Min. Co. v. Mason*, 145 U. S. 356, 12 Sup. Ct. 888 (36 L. Ed. 732) is as follows:

"The question in this case is whether the master's sale shall stand. It may be stated generally that there is a measure of discretion in a court of equity, both as to the manner and conditions of such a sale, as well as to the ordering or refusing a resale. The chancellor will always make such provisions for notice and other conditions as will in his judgment best protect the rights of all interested and make the sale most profitable to all; and, after a sale has once been made, he will certainly, before confirmation, see that no wrong has been accomplished in and by the manner in which it was conducted. Yet the purpose of the law is that the sale shall be final; and to insure reliance upon such sales, and induce biddings, it is essential that no sale be set aside for trifling reasons, or on account of matters which ought to have been attended to by the complaining party prior thereto."

That being the law, what are the facts here? Every precaution was taken by the court to insure that this property should be placed on the market in a manner entirely just to all concerned, and the provisions in the decree indicate as much. The actions of the commissioners were in strict compliance with every essential provision of the decree. It is true that they were required in one clause not to sell the property as an entirety; it being the purpose of the court that they should not endanger the values by combinations to chill the bidding and secure the property at an inadequate price. It is true, however, that in another clause it was provided that they should divide the property up into lots (and how it should be divided was intrusted to their discretion), and, having thus divided it, that they should first offer those lots

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and hear the bids; then they were directed to sell the property as an entirety, and to accept the result if it was to the best interest of the parties, notwithstanding the previous sale of the independent lots. Both of these features must be construed together, to correctly understand the decree. This plan was followed. Ample advertisement was made, not only that required by law, but special and costly display advertisements in papers of wide circulation to attract the attention of possible purchasers; and unless the court is to declare that nearly every real estate dealer in this city is without sufficient intelligence to determine or pass upon the value of the commodity in which he deals, this property has brought a magnificent price—the sum of \$70,700. Indeed, several expressed their surprise at the high figure the property brought. Other evidence is convincing that at various times in the course of the proceeding, Mr. Huff, the principal defendant, was willing to sell particular lots and parcels, comprising the bulk of this property, at much less than the commissioners obtained by their public sale.

It is insisted that two of the defendants cannot now have their interests adjusted; that they have an undivided two-sevenths interest in some of this property. If that is true, and the court does not pass upon that now, it is ascribable to the fact that they have executed liens upon their undivided interest in the property, and the only possible way to have their equities determined was to have the property sold under the decree, long ago settled by all the courts, and their claim to a proportionate share of the proceeds finally settled. It is difficult for the court to perceive how their alleged rights to two-sevenths of the proceeds of the specified property can be jeopardized by the sale. If we were to set aside this sale on these grounds, we would be precisely where we were before the sale was made, with no better opportunity of adjusting those values then than we have now. Besides, we would run the risk of forfeiting a most advantageous sale.

I cannot regard these objections as meritorious in any sense. The case has been here for more than ten years. The defendant has utilized every possible expedient of the law to delay the righteous claims of his creditors. Whether these properties were bought with moneys which were raised by means of these various liens, which have now been enforced, I do not now recall. Certain it is that the validity of none of these debts thus secured has been successfully disputed. Besides, there are numerous liens for large amounts for taxes past due for many years, plastering the whole property. These could not have been adjusted and apportioned without a sale of the property.

This court, the Circuit Court of Appeals, and the United States Supreme Court have considered, weighed, passed upon, and determined every question in the case. I will not say that these objections are intended simply for delay, but certainly, if maintained, they would have no other effect than to delay the adjustment of this vast mass of proven indebtedness. The delay to the present time might have been cited by those who are accustomed to criticise the courts as an illustration of one of the greatest wrongs in our modern civilization; that is, the law's delay. The court has done all in its power, with an earnest regard for the rights of the creditors, to force the long drawn out

litigation to a prompt determination, but always with the kindest consideration proper toward the defendant. I know of no civil case in which there have been such unwarrantable, but unavoidable, delays. It is the right of the creditors, and the interest of the government and the people, that there should be an end to this litigation.

There is nothing in the objections which would make hesitation to approve this sale proper. It must be approved, and an order can be taken accordingly.

PARSONS NON-SKID CO., Limited, et al. v. E. J. WILLIS CO.

(Circuit Court, S. D. New York. December 31, 1909.)

PARTIES (§ 51*)—NEW PARTIES—RIGHT TO BRING IN ADDITIONAL DEFENDANT.

A foreign corporation, having no place of business within the district, and which could not have been made a defendant when the suit was brought, cannot be brought in merely because it has so contributed to the defense that it will be bound by the decree.

[Ed. Note.—For other cases, see Parties, Dec. Dig. § 51.*]

In Equity. Suit by the Parsons Non-Skid Company, Limited, and others against the E. J. Willis Company. On motions. Motions denied.

Howard P. Denison, for complainants.

Kiddle, Wendell & Varney, for defendant.

NOYES, Circuit Judge. The motion to compel a witness to answer questions is withdrawn and does not require consideration.

The motion to make Ernest J. Willis a party defendant cannot be granted upon the conditions stated in the complainants' memorandum. Therefore, in accordance with complainants' request, it is denied without prejudice to further proceedings.

The motion to make the Whittaker Chain Tread Company a party defendant must be denied. This is a Massachusetts corporation, without any place of business in the Southern district of New York. It could not originally have been joined as a defendant in this suit. The reason urged why it should now be brought in is that it has so contributed to the defense that it will be bound by the decree. This may be true. It may be established that this corporation is a privy to the suit and will be privy to the judgment. But I know of no principle upon which a court acquires jurisdiction over persons merely because by reason of their conduct they will be bound by its decrees. And if the court has not now jurisdiction over this foreign corporation it cannot order it to be made a party.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In re LEVIN.

(Circuit Court of Appeals, First Circuit. February 24, 1910.)

No. 848.

1. BANKRUPTCY (§ 413*)—DISCHARGE—TIME FOR ENTERING APPEARANCE IN OPPOSITION—POWER OF COURT TO EXTEND.

Under General Orders in Bankruptcy No. 32 (89 Fed. xlii, 32 C. C. A. xxxi), which provides that "a creditor opposing the application of a bankrupt for his discharge * * * shall enter his appearance in opposition thereto on the day when the creditors are required to show cause, and shall file a specification in writing of the grounds of his opposition within ten days thereafter, unless the time shall be enlarged by special order of the judge," the judge may, in his discretion, extend the time for entering an appearance as well as for filing the specification, and may do so after the time has expired, as well as before.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 712, 713; Dec. Dig. § 413.*]

2. BANKRUPTCY (§ 4*)—CONSTRUCTION OF ACT—FOLLOWING CONSTRUCTION OF PRIOR ACT.

Where provisions of the bankruptcy act of 1867 (Act March 2, 1867, c. 176, 14 Stat. 517) or of the general orders for carrying it into effect were construed by the courts, a court is justified in giving the same construction to similar provisions in the present act or orders.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 3, 4; Dec. Dig. § 4.*]

Petition to Revise Order of the District Court of the United States for the District of Massachusetts, in Bankruptcy.

In the matter of William I. Levin, bankrupt. The Crane Company obtained leave to file objections to discharge. On petition by bankrupt to revise. Dismissed.

David Stoneman, for petitioner.

William C. Rogers, for respondent.

Before COLT, PUTNAM, and LOWELL, Circuit Judges.

LOWELL, Circuit Judge. This petitioner filed his voluntary petition in bankruptcy April 7, 1908, and on that day he was adjudged a bankrupt. On August 28, 1908, he filed a petition for discharge, and an order of notice was issued thereon, returnable September 14th. On the last-mentioned day the referee filed a request, addressed to the District Judge in the form used for that purpose, as follows:

"Not having as yet sufficient information upon which to make report upon the bankrupt's application for discharge as requested, I hereby request that the hearing upon the same be continued."

On March 25, 1909, an attorney entered his appearance for a creditor of the bankrupt, apparently to object to the latter's discharge. On that day he moved for leave to file specifications of objection. This seems to have been treated as a motion for an extension of time based upon general order 32 (89 Fed. xlii, 32 C. C. A. xxxi). The motion was set down for hearing on March 29th, and on that day was denied by order of the court. On October 14, 1909, the same creditor moved

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

again for leave to file specifications of objection to discharge. This motion was set down for hearing on October 18th, when it was granted, and the time for filing specifications was extended to October 25th. On October 23d the objection to the discharge, with specifications, was filed by the creditor. Thereupon the bankrupt brought a petition under section 24b of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432]), to revise the action of the District Court in matter of law. The order and dates of the proceedings above mentioned are stated in a copy of the bankruptcy docket which is contained in the record. The precise forms employed in the various motions and orders have not been shown to us, and to some extent we are obliged to conjecture them.

The sole question here presented concerns the authority of the District Court to enlarge the time for entering a creditor's appearance in opposition to the bankrupt's discharge, and for filing specifications to the same end. The motion for an extension of time was here filed more than 10 days after the return day. General order 32 in bankruptcy reads as follows:

"A creditor opposing the application of a bankrupt for his discharge, or for the confirmation of a composition, shall enter his appearance in opposition thereto on the day when the creditors are required to show cause, and shall file a specification in writing of the grounds of his opposition within ten days thereafter, unless the time shall be enlarged by special order of the judge."

The petitioner contends that this order limits the entry of the creditor's appearance in opposition to the discharge to the return day itself, without authority in the court to extend the time for any cause whatsoever. The petitioner contends further, and in the alternative, that even if the time of entry may be extended somewhat, yet no extension can be granted unless the creditor's motion for an extension shall have been filed within 10 days after the return day. The respondent creditor, on the other hand, contends that to grant an extension of time, both for appearance and for filing specifications, is within the discretion of the court, and that this discretion may be exercised at any time before the discharge is granted. The petitioner contends that the phrase "unless the time shall be enlarged by special order of the judge" applies only to the clause immediately preceding it, "and shall file a specification in writing," etc., and that the judge has no discretion concerning the time of the creditor's "appearance in opposition thereto."

General order 32 under the bankruptcy act of 1898 is substantially the same as general order 24 under the bankruptcy act of 1867. Under the order last mentioned Judge John Lowell, sitting in the court of bankruptcy for the district of Massachusetts, admitted the appearance of a creditor after the time for filing specifications had expired, and said, in a carefully considered opinion:

"I have decided in one case that the discretion of the court to enlarge the time extends to the time for appearance, as well as to that for filing the specification, and may be exercised after the time has expired, as well as before. * * * But I do think that the rule intends that the court should have power to enlarge the time whenever there is good cause shown for it. The distinction is between an absolute power imposing a corresponding duty upon the court and a discretionary power to be exercised only upon cause shown." In *re Houghton*, 2 Low. 328, 330, Fed. Cas. No. 6,730.

In the United States Circuit Court, sitting in review of the action of the District Court for the Northern District of Illinois, Judge Drummond held to the same effect, and held expressly that the court of bankruptcy had authority to extend the time for entering objection and filing specifications, although the 10 days had already passed. In *re Levin*, Fed. Cas. No. 8,291, 14 N. B. R. 385. To the same effect is *In re Filley*, 2 Cent. Law J. 419, decided by Judge Dillon in the Circuit Court. These cases, long acquiesced in, though decided only by Circuit and District Courts, have a peculiar authority in the interpretation of a statute or of rules of court. *Logan v. United States*, 144 U. S. 263, 304, 12 Sup. Ct. 617, 36 L. Ed. 429; *Audubon v. Shufeldt*, 181 U. S. 575, 578, 21 Sup. Ct. 735, 45 L. Ed. 1009. By the weight of the judges who decided them, as well as by their conformity to reason and convenience, they are persuasive upon us. The practice thus laid down has been approved by text-books. *Bump on Bankruptcy* (10th Ed.) 276, 277; *Loveland* (3d Ed.) 794. That we are justified in interpreting the present bankruptcy act and general orders by reference to like language in the act of 1867 and in the general orders framed to carry it out appears plainly from opinions rendered by the Supreme Court. *Audubon v. Shufeldt*, *ubi supra*; *Hiscock v. Mertens*, 205 U. S. 202, 211, 27 Sup. Ct. 488, 51 L. Ed. 771; *York Mfg. Co. v. Cassell*, 201 U. S. 344, 352, 26 Sup. Ct. 481, 50 L. Ed. 782; *First National Bank v. Title & Trust Co.*, 198 U. S. 280, 289, 25 Sup. Ct. 693, 49 L. Ed. 1051. Of the cases decided under the present act which were cited by the petitioner none denies altogether to the court of bankruptcy a discretion to extend the time for entering an appearance and filing specifications in opposition to the bankrupt's discharge. Some of them expressly recognize it. Under the act of 1867 (Act March 2, 1867, c. 176, 14 Stat. 517) some cases held that the creditor's right to appear in opposition to the discharge was extended automatically by a continuance of the hearing upon the discharge. In *re Seabury*, Fed. Cas. No. 12,573; In *re Tallman*, Fed. Cas. No. 13,740. As we dismiss this petition for revision upon other grounds, we need not discuss the question thus suggested.

It is true that the bankruptcy act of 1898 seeks a speedy procedure in all matters, including discharge; so did the act of 1867. *Wiswall v. Campbell*, 93 U. S. 347, 350, 23 L. Ed. 923. Section 14 of the present act is careful to prescribe a hearing upon the application for discharge wherein all parties interested may have opportunity to be heard. "The judge shall hear the application for a discharge, and such proofs and pleas as may be made in opposition thereto by parties in interest, at such time as will give parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application, and discharge the applicant unless he has" done certain things. This is language somewhat unusual, in that it requires the judge to make investigation for himself, as well as to hear the parties in interest. To this end, the referee is required in the Massachusetts district to make investigation and to report to the judge concerning discharge, whether objections are entered by a creditor or not. The language above quoted does not precisely cover the point here raised, but it suggests that the independent investigation by the judge may be assisted in his discretion by the admission of creditors to state their objections.

Again, the act contemplates a speedy examination of the bankrupt, within 30 days at the longest; but experience has shown that this examination, whenever begun, may occupy months, and may continue after the application for discharge has been filed. Objection to the bankrupt's discharge by a creditor is commonly founded upon the bankrupt's examination, and upon that of accompanying witnesses. Until that examination is concluded, specifications of objection cannot ordinarily be framed, and until then the creditor is often unable to state whether he has cause or wish to oppose the bankrupt's discharge. If the petitioner's contention be adopted, every creditor who would preserve his rights must, on the return day, file his appearance in opposition to the bankrupt's discharge as a measure purely precautionary, not knowing at the time of filing whether he really has any objection or not, and what, if any, his objections may be. This requirement might well be prejudicial to an honest debtor. For months the records of the court of bankruptcy might thus contain objections to his discharge which were not based upon any real intention to oppose it, or upon knowledge of any ground for opposition, but were entered only as a necessary precaution to preserve the rights of a creditor. Suspicion would thus be excited which might seriously damage the bankrupt's prospects. Considering that the grammatical construction of general order 32 leans no more to the petitioner's contention than to that of the respondent, considering the general convenience of the parties which rules are made to guard and to serve, considering the construction put upon the language by eminent judges, a construction acquiesced in by suitors, and accepted by treatises on Bankruptcy, we are of opinion that the authority of the District Court was sufficient, and that the petition to revise should be dismissed, with costs.

Let there be a decree that the petition be dismissed, with costs for the respondent.

CLARK v. ROSARIO MINING & MILLING CO.†

(Circuit Court of Appeals, Ninth Circuit. February 21, 1910.)

No. 1,770.

1. SPECIFIC PERFORMANCE (§§ 58, 128*)—CONTRACTS ENFORCEABLE.

A court of equity is without jurisdiction of a suit for the specific performance of a contract which shows on its face that in case of its breach by defendant complainant is not entitled to a specific performance, but is limited to the recovery of a stipulated sum as liquidated damages; nor can the court in such case retain the suit for the purpose of awarding damages.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 180, 412-419; Dec. Dig. §§ 58, 128.*]

2. SPECIFIC PERFORMANCE (§ 95*) — CONTRACTS ENFORCEABLE — CONTRACT FOR SALE OF REALTY—MISTAKE AS TO TITLE.

A court of equity will not decree the specific performance of a contract for the sale of property against the purchaser, when it appears that the vendor's title is in fact defective and unmerchantable, notwithstanding a

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'y Indexes

† Rehearing denied May 9, 1910.

recital in the contract that the title has been examined by the purchaser and found satisfactory.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 257-277; Dec. Dig. § 95.*]

8. SPECIFIC PERFORMANCE (§ 51*) — CONTRACTS ENFORCEABLE — FAIRNESS AND REASONABLENESS.

By a contract between complainant, which was the owner of a mine, and defendant and his associates, who had been developing and operating the mine under prior contracts, defendant made an offer of \$400,000 for the mine, to remain open and subject to acceptance by complainant at any time during one year. Defendant was to operate the mine for one year, unless possession was sooner demanded by complainant, and was to make extensive improvements within 90 days, retaining 80 per cent. of the output during that time to apply on the cost, after which during the remainder of the year any profit above operating expenses was to be paid to complainant. Defendant was given an option to purchase the mine at the end of the year for \$600,000, provided complainant had not previously sold it, which it reserved the right to do, stipulating only that defendant should have a preferred right to purchase at the price offered, and that, if it was sold for more than \$600,000, defendant should receive the excess up to \$50,000, to reimburse him for improvements made. It was also provided that, in case complainant took possession at the end of the year or before, it should pay defendant for certain supplies on hand. At the end of the year complainant accepted defendant's offer, but he refused to complete the purchase. *Held*, that the contract was one-sided and unconscionable, and that a court of equity would not decree its specific performance against defendant.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 153-154; Dec. Dig. § 51.*]

Appeal from the Circuit Court of the United States for the Northern District of California:

Suit in equity by the Rosario Mining & Milling Company against C. W. Clark and others. Decree for complainant, and defendant Clark appeals. Reversed.

The appellee was the complainant in this suit, the defendants being the appellant, Clark, who was the principal defendant, Frank L. Sizer, the theretofore confidential mining expert of Clark, and William Falconer, as the administrator of the estate of Edward L. Whitmore, deceased, who, during the times in question, was Clark's private secretary and confidential agent. The suit was for the specific performance of a written contract made May 1, 1902, between the appellee, named therein as the party of the first part, and Clark, Whitmore, and Sizer, named therein as parties of the second part, concerning certain mining property known as the "Rosario Mine," situated in the state of Chihuahua, Mexico, specifically described in the bill. The respective parties had previously entered into two other contracts respecting the same property, which are referred to in the contract of May 1, 1902, as follows:

"Whereas, on December 12, 1900, the parties hereto entered into a contract whereby the second parties were given an option to purchase said properties for \$800,000, and bound themselves to do certain development work upon said property, and the treatment of the ores thereof, including stipulations binding the second parties to repair and improve said property and appurtenances, in the way of building and machinery thereof, and, in case of the failure of the second party to exercise their option and buy the property, then all such improvements and machinery and appliances as the second party should put upon the property should become the property of the first party without cost or expense; and, whereas, on the 12th day of August, 1901, said contract was extended so as to continue said option until May 1, 1902, and the second parties again bound themselves to continue the possession and development of said

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

mine, and a proper treatment of the ores thereof until May 1, 1902; and, whereas, in each of said contracts said second parties bound themselves to examine the titles to said mining property and other property above described; and, whereas, said second parties by said contracts bound themselves to make reports and maps of said property, to be furnished to the first party, and showing the extent of the working upon and value of the said property and its ores, treatment, and tests thereof; and, whereas, the said second parties have, after examination of said property and the titles thereto, notified the first party that the second party is satisfied that the titles to said property are in the first party; and, whereas, the second party has notified said first party that they will not exercise their said options to buy said property at the price of \$800,000 but have offered to the first party to buy the said property at the price of (\$400,000) four hundred thousand dollars cash (American gold); and, whereas, the first part(y) has refused to accept said offer; and, whereas, said option of the second parties to purchase said properties has expired, and the first party has become and is entitled to the possession of said property, together with all of the improvements, repairs, machinery, materials, tools, equipments, and betterments placed thereon by the second party, excepting current supplies of wood, groceries, chemicals, and unused hardware supplies, and entitled to the maps and complete report upon said property provided for in said contracts, which map and reports have not been furnished to the first party; and, whereas, it is the desire of each of the parties to further develop said property by the development work hereinafter stipulated, to the end of more certainly determining the value of said property, so that the first party may be able to sell the same to the best advantage to any purchaser which it may find, and, in the event of a sale at a figure above \$600,000 to other parties, that the first party will out of such proceeds compensate the second parties in part for the expenditures they have made in development of said property as herein provided; and, whereas, in order to carry out this arrangement and purpose, and to afford the second parties an opportunity to buy said property at the price of \$600,000 in the event of a failure of the first parties to make a sale of said property during the life of this contract at more than \$600,000, and to afford, the second parties a preference right to buy said property at the price of \$600,000 as herein stipulated; and, whereas, it is necessary to keep said property open and the operating plant in operation; and, whereas, the second parties, as a consideration in part for this option contract, are desirous of keeping open said offer to buy said property at the price of \$400,000, subject to the right of the first party to accept the offer at any time during the life of this contract:

"Now, therefore, it is hereby mutually agreed between the parties hereto as follows:

"(1) The second parties offer to the first party to buy from the first party said property, and to pay to the first party therefor the sum of (\$400,000) four hundred thousand dollars, American gold, at Ft. Worth, Tex., and to make said payment within thirty days after being notified of an acceptance by the first part(y) of said offer; provided, however, that if the said offer is accepted within the next four months the second party shall have until September 1, 1902, to make such payment, the first party concurrently or as near as may be with such payment to cause to be transferred to the second parties the titles which the first party through its directors or otherwise has in and to said property; and the second parties agree to leave said offer open for one year from this date, subject to the acceptance of the first party at any time during said year. Said titles having been examined by the second parties, it is agreed that the same are good and sufficient.

"(2) The first party, reserving the right to sell said property and contract with reference thereto to other parties, gives and grants to the second parties an option to buy said property at the end of the said year, to wit, on May 1, 1903 (said option to be then exercised or forfeited), at the price of \$600,000 cash or its equivalent, American gold, provided the first party shall not have sooner sold said property, or made a bona fide contract to do so; and provided, further, that before making any offer to sell said property at \$600,000 or less to other parties the first party shall give to the second parties a preference right to buy the same at said price so offered to others, and to that end shall

notify the second parties of such contemplated sale or offer, and the second party shall promptly exercise its performance (preference) right upon being so notified and afforded an opportunity to do so, and shall have 30 days after electing to take the property in which to make the payment for the property, whereupon concurrently or as near as may be the first party shall cause said property to be conveyed to the second parties. If the second parties, upon being so afforded an opportunity to exercise such performance right to purchase, shall fail to do so, then such right shall cease.

"(3) The first party, reserving full rights to make any sale it may choose of said property during the year, agrees that if during the year up to May 1, 1903, the first party shall sell said property or make a valid contract of sale thereof to other parties, resulting in a sale of the same at a price greater than \$600,000, it shall pay to the second parties \$50,000 out of the excess of the purchase price above \$600,000, except that if such excess does not amount to \$50,000, then such amount as the purchase price upon such sale shall exceed \$600,000; provided that, if the purchase price upon such sale shall not exceed \$650,000, the second parties shall have the preference right to take the property at the price of \$600,000; provided, also, that in the event of a sale to other parties, partly on a credit, the payment of the \$50,000, or the excess over \$600,000, if less than \$50,000, if under this contract the second parties shall become entitled to it, shall be apportioned among the time payments of the purchase money upon such sale, in proportion as it shall bear to the whole; provided, however, that not less than one-half of the amount to which the second parties shall be entitled shall be paid out of the first cash payment."

The contract in suit then provided for the right of free access to the mine by the first party thereto, and its appurtenances, including all books and records of its operation, and required the parties of the second part thereto to remain in possession of the property, and at their own expense to operate it until May 1, 1903, unless sooner sold, and, during the first 90 days from the date of the contract in suit, to perform certain specified work in and about the mine, and during that period of 90 days to pay to the first party 20 per cent. of the gross bullion output from the mine, mill and cyanide, or other reduction plant, and to operate the mill to its full capacity, and then provided that:

"After the end of the 90 days or the completion of said work, if sooner completed, the second parties shall, at the option of the first party, continue the operations of the mill and cyanide plant and to keep the mine unwatered and for the purpose of paying expenses shall have the bullion output of the said mill and cyanide plant, and if the output shall exceed such expenses then the excess shall be paid to the first party as royalty, but no other royalty shall be paid out of such output, but the ore so worked during that time shall not be sorted or picked, nor the rich streaks taken out; provided that after said work so specified shall have been completed, and in any event after 90 days, the first party shall have the right at any time to take possession of said property, and all of the improvements, betterments, machinery, and appliances, tools, apparatus, buildings, and supplies of every kind useful in the operation of the property, and as to all such supplies as under either of said preceding contracts the first party is to pay for, upon said property being turned over to it, an inventory shall be made and the same to be paid for at their reasonable value, it being understood that in determining what supplies and materials are to be turned over to the first party without being paid for, and what of such supplies are to be paid for, said original contracts are to be looked to and to govern."

The contract in suit next made certain provisions concerning the expenses of the work, and for certain settlements and proceedings. Its eighth, ninth, and tenth clauses are as follows:

"(8) In the event of an acceptance by the first party of the offer of the second parties to buy said property at the price of \$400,000, and a failure or refusal of the second parties to make good the offer to buy said property, then the second parties shall be liable to the first party in damages in the stipulated sum of \$100,000. The object of this clause of this contract is to make the measure of damages certain, whereas, without such stipulation, by reason of the peculiar character of the property and situation and surroundings of the

parties, it would be impossible to arrive at any just and correct measure of damages by proof in a court of law; and in the event the first party shall not sell said property to other parties or contract to do so according to the terms of this contract, and the second parties shall under the provisions of this contract become entitled to exercise their option to buy the said property at \$600,000, and shall elect to exercise said option and shall thereupon offer to purchase said property at said price, and the first party shall fail or refuse to comply with this contract to sell their said property at that price, then the first party shall be liable to the second parties in liquidated damages to the amount of \$100,000. This shall not deprive the second parties of the right to waive damages and have specific performance of this contract.

"(9) Upon the termination of this contract, or at any time at which the first party shall elect to take possession of said property, the same shall be turned over to the first party, together with (1) all of the betterments, machinery, repairs, apparatus, supplies for all appliances and machinery and all parts thereof, tools, assay appliances, and all other appliances upon the property, free of any cost to the first party, and (2) also shall be turned over to the first party all of the supplies on hand in the way of wood, charcoal, lime, merchandise, groceries, feed, powder, caps and fuse, cyanide, chemicals, and all other supplies, the first party to pay for such supplies as are mentioned under this paragraph (3) their reasonable value. In determining what of said materials shall be paid for and what of the same shall be turned over without compensation, the original contracts shall govern.

"(10) It is further agreed by and between the parties hereto that this contract takes the place of and is a substitute for each of said original contracts, except in so far as they are referred to for the purpose of furnishing a basis of settlement and no matter of supplies, materials, maps and reports, etc.; but in the event the second parties fail to perform the obligations of this contract, then the obligations of the second parties and liability thereunder for all damages under the said original extension contracts shall exist in the same manner and to the same extent as if this contract had not been made, the full performance of this contract being a condition precedent to the second parties being relieved of any liability under said contracts."

In its bill the complainant alleged the death of Whitmore, the appointment of Falconer as administrator of his estate, and that both Falconer and Sizer were residents of the state of Montana, and not amenable to the process of the court below, and that after the expiration of one year from the date of the contract in suit it had tendered its deeds to Clark and Sizer, and to Falconer as the administrator of the estate of Whitmore, and that they had failed and refused to accept them, or to pay the \$400,000 which it claimed to be due. The prayer of the bill was for specific performance and general relief.

Neither Sizer nor Falconer ever made any appearance, but Clark demurred to the bill generally and specifically; his general demurrer being on the ground that the complaint did not state a case entitling it to any equitable relief, and also upon the ground that "it appears by complainant's own showing that it is not entitled to the relief prayed for in and by said bill." The demurrer being overruled, Clark answered, in which answer he set up various facts which he alleged showed a conspiracy entered into by and between the officers and agents of the complainant and his confidential employes and co-contractors, Sizer and Whitmore, and that his assent to the contract was obtained by false representations made to him in pursuance of such conspiracy, that the title of the complainant to the property is so defective as to be unmerchantable, and that the provisions in the contract were unconscionable, in that they purported to hold him bound, while the complainant reserved the right to nullify the same at any time. The evidence in the case was taken wholly by deposition out of the hearing of the court.

On final hearing the appellant objected to the power of the court to make any decree in the absence of his codefendants. The court below held that the contract by its terms excluded the appellee from the right to its specific performance, notwithstanding which the court proceeded to award the complainant judgment for the \$100,000 stipulated damages for breach of the contract.

Tobin & Tobin and F. S. Brittain, for appellant.
Drew Pruitt, for appellee.

Before GILBERT and ROSS, Circuit Judges, and DE HAVEN, District Judge.

ROSS, Circuit Judge (after stating the facts as above). The first and an insuperable obstacle to the affirmance of the decree appealed from is that the aggrieved party brought its suit in a court of equity to enforce the specific performance of a written contract, which contract showed upon its face, as the court below expressly held, that for its breach by the appellant and his associates the appellee should not be entitled to a specific performance of it, but should be limited to a stipulated sum as damages of \$100,000. Under such circumstances, the only appropriate tribunal for the recovery of that money demand was a court of law. It did not come within the jurisdiction of a court of equity. *San Francisco National Bank v. Dodge*, 197 U. S. 70, 25 Sup. Ct. 384, 49 L. Ed. 669; *Whitehead v. Shattuck*, 138 U. S. 146, 11 Sup. Ct. 276, 34 L. Ed. 873; *Thompson v. Central Railroad Co.*, 6 Wall. 134, 18 L. Ed. 765; *Phoenix L. I. Co. v. Bailey*, 13 Wall. 616, 20 L. Ed. 501. But, even if it could be held that the case made by the bill came within the jurisdiction of a court of equity, was the case, in view of the issues and of the evidence, such as justified the court below in retaining it for the purpose of awarding money compensation for the breach of the contract by the appellant and his co-contractors?

The contract recited that the appellee was the owner of the property it contracted to sell and which the appellant and his associates agreed to buy. It is true that the contract (which it was shown was drawn by the appellee's attorneys) also recited that the appellant and his associates had examined the appellee's title to the property and were satisfied therewith. In the same connection, however, it will be observed that although the contract recited that the appellee was the owner of the property, when it came to provide for the conveyance of it to the appellant and his associates upon the performance of their agreements, the contract provided for the transfer of "the titles which the first party [the appellee] through its directors or otherwise has in and to said property."

By his answer to the bill the appellant set up, among other things, that the appellee's title was defective, and in support of that issue introduced evidence tending to sustain it. That evidence the trial court failed to consider, deeming the appellant concluded by the provisions of the contract above referred to. If there was a mistake in regard to the title, and if, in truth, the appellee's title to the property was not good, we do not understand that, under the principles governing courts of equity, specific performance of such a contract would be enforced. Moreover, there are other provisions of the contract in question which we think would preclude a court of equity from enforcing specific performance of it. As will be seen from its recitals, two previous contracts had been made between the parties concerning the property, under which the appellant and his associates had, at their own expense, performed certain development work thereon, under

options to purchase the property, which options they declined to exercise, and, the same having expired, the appellee became entitled to the possession of the property, "together with all of the improvements, repairs, machinery, materials, tools, equipments and betterments placed thereon" by the appellant and his associates, together with other specified things, "excepting current supplies of wood, groceries, chemicals, and unused hardware supplies"; and proceeds the contract in question:

"Whereas, it is the desire of each of the parties to further develop said property by the development work hereinafter stipulated, to the end of more certainly determining the value of said property, so that the first party [appellee] may be able to sell the same to the best advantage to any purchaser which it may find, and in the event of a sale at a figure above \$600,000 to other parties that the first party [appellee] will out of such proceeds compensate the second parties [appellant and his associates] in part for the expenditures they have made in development of said property as herein provided; and, whereas, in order to carry out this arrangement and purpose, and to afford the second parties [appellant and his associates] an opportunity to buy said property at the price of \$600,000, in the event of a failure of the first party [appellee] to make a sale of said property during the life of this contract at more than \$600,000, and to afford the second parties [appellant and his associates] a preference right to buy said property at the price of \$600,000, as herein stipulated; and, whereas, it is necessary to keep said property open and the operating plant in operation; and whereas, the second parties [appellant and his associates], as a consideration in part for this option contract, is desirous of keeping open said offer to buy said property at the price of \$400,000, subject to the right of the first party [appellee] to accept the offer at any time during the life of this contract,"

—the respective parties stipulated and agreed in effect: (1) That the appellant and his associates should keep open for one year from the date of the contract in question an offer therein made of \$400,000 for the property, and to make such payment therefor within 30 days after being notified by the appellee of its acceptance; provided, that, if the offer should be accepted within the then next four months, the appellant and his associates should have until September 1, 1902, within which to make such payment. (2) The appellee reserved the right to sell the property to or contract with reference thereto with other parties at any time; provided that, before selling it for \$600,000, or less, to other parties, "the first party [appellee] shall give to the second parties [appellant and his associates] a preference right to buy the same at said price so offered to others, and to that end shall notify the second parties [appellant and his associates] of such contemplated sale or offer, and the second party shall promptly exercise its performance (preference) right upon being so notified and afforded an opportunity to do so, and shall have thirty days after electing to take the property in which to make the payment for the property"—with the further option to the appellant and his associates to buy the property at the end of one year for \$600,000, American gold, or its equivalent. (3) The appellee further agreeing that:

"If during the year up to May 1, 1903, the first party [appellee] shall sell said property or make a valid contract of sale thereof to other parties, resulting in a sale of the same at a price greater than \$650,000, it shall pay to the second parties \$50,000 out of the excess of the purchase price above \$600,000, except that, if such excess does not amount to \$50,000, then such amount as

the purchase price upon such sale shall exceed \$600,000; provided that, if the purchase price upon such sale shall not exceed \$650,000, the second parties [appellant and his associates] shall have the preference right to take the property at the price of \$600,000; provided, also, that in the event of a sale to other parties, partly on a credit, the payment of the \$50,000 or the excess over \$600,000, if less than \$50,000, if under this contract the second parties [appellant and his associates] shall become entitled to it, shall be apportioned among the time payments of the purchase money upon such sale in proportion as it shall bear to the whole; provided, however, that not less than one-half of the amount to which the second parties shall be entitled shall be paid out of the first cash payment."

The contract then provided for the right of free access to the mine by the appellee, and to all books and records of its operation, and required the appellant and his associates to remain in possession of the property, and at their own expense to operate it for one year, unless it should be sooner sold, and during the first 90 days to perform certain specified work in and about the mine, and during that period of 90 days to pay to the appellee 20 per cent. of the gross bullion output from the mine, or mill and cyanide or other reduction plant, and to operate the mill to its full capacity, and then provided that after the expiration of the 90 days, or the completion of the specified work, if sooner completed, the appellant and his associates should at the option of the appellee continue the operation of the mill and cyanide plant, and keep the mine unwatered, and, for the purpose of paying expenses, should have the bullion output of the mill and cyanide plant; provided, however, that if the output therefrom should exceed such expenses the excess should be paid to the appellee as royalty, with the further provision that after the completion of the specified work, if completed before the expiration of the 90 days, and in any event after the 90 days expired, the appellee should have the right to take possession of the property at any time, together with—

"all of the improvements, betterments, machinery, and appliances, tools, apparatus, buildings, and supplies of every kind useful in the operation of the property, and as to all such supplies as under either of said preceding contracts the first party is to pay for, upon said property being turned over to it, an inventory shall be made, and the same to be paid for at their reasonable value, it being understood that in determining what supplies and materials are to be turned over to the first party [appellee] without being paid for, and what of such supplies are to be paid for, said original contracts are to be looked to and to govern."

Then come, after certain provisions concerning the expenses of the work and certain settlements, the provision defining the appellee's right to accept the offer of the appellant and his associates to buy the property for the sum of \$400,000, and their obligation to pay the appellee \$100,000 in the event of their failure to make good such offer, and providing that upon the termination of the contract, "or at any time at which the first party shall elect to take possession of said property, the same shall be turned over to the first party, together with (1) all of the betterments, machinery, repairs, apparatus, supplies for all appliances, and machinery and all parts thereof, tools, assay appliances, and all other appliances upon the property, free of any cost to the first party, and (2) also shall be turned over to the first party all of the supplies on hand in the way of wood, charcoal, lime, merchandise, gro-

ceries, feed, powder, caps and fuse, cyanide, chemicals and all other supplies, the first party to pay for such supplies as are mentioned under this paragraph (3) their reasonable value," with certain minor provisions shown in the statement.

The effect of the contract was to require the appellant and his associates to do very extensive development work upon the property at their own expense for one year (save the right to apply 80 per cent. of the gross bullion output to expenses during the first 90 days); to operate the reduction works to their full capacity for one year, and pay the appellee 20 per cent. of the gross output during the first 90 days, regardless of the expense of getting it out, and all of the profits thereafter; to keep open their offer to buy the property for \$400,000 at any time within the year, even though the development work should prove the mine valueless, with the consequent liability in the sum of \$100,000 in the event of their failure to comply with the terms of the offer, should it be accepted; and with the reserved right on the part of the appellee to sell the property to any other party at any price it might fix, in the event the development work performed by the appellant and his associates should prove the mine to be of great value, with the condition that, in the event such sale to a third party should equal or exceed \$650,000, the appellee would pay \$50,000 thereof to the appellant and his associates, or any less excess over \$600,000, with the preferred right already mentioned to the appellant and his associates to become the purchaser at the price of \$600,000. The only real obligation the contract seems to have imposed upon the appellee was to pay for the stores and supplies the appellant and his associates might have on hand in the event it should resume possession of the property, which it reserved the right to take at any time after 90 days (thereby depriving the appellant and his associates of the right to further explore it), and to sell the property to the appellant and his associates at the end of the year for \$600,000, provided it had not already sold or contracted it to somebody else.

It is difficult to conceive of a much more one-sided contract. It is one that we do not think any court of equity should decree the specific performance of. "To stay the arm of a court of equity from enforcing a contract," said the Supreme Court in *Pope Manufacturing Co. v. Gormully*, 144 U. S. 224, 236, 12 Sup. Ct. 632, 637, 36 L. Ed. 414, "it is by no means necessary to prove that it is invalid. From time immemorial it has been the recognized duty of such courts to exercise a discretion, to refuse their aid in the enforcement of unconscionable, oppressive, or iniquitous contracts, and to turn the party claiming the benefit of such contract over to a court of law." In *Willard v. Tayloe*, 8 Wall. 567, 19 L. Ed. 501, the same court said:

"In general it may be said that the specific relief will be granted when it is apparent from a view of all the circumstances of the particular case that it will subserve the ends of justice, and that it will be withheld when from a like view it appears that it will produce hardship or injustice to either of the parties. It is not sufficient, as shown by the cases cited, to call forth the equitable interposition of the court, that the legal obligation under the contract to do the specific thing desired may be perfect. It must also appear that the specific enforcement will work no hardship or injustice, for if that result would follow the court will leave the parties to their remedies at law."

In *King v. Hamilton*, 4 Pet. 311, 327, 7 L. Ed. 869, the Supreme Court, in speaking of the power of a court of equity to decree specific performance, said:

"But this power is to be exercised under the sound judicial discretion of the court, with an eye to the substantial justice of the case. When a party comes into a court of chancery seeking equity, he is bound to do justice, and not ask the court to become the instrument of iniquity. Where a contract is hard and destitute of all equity, the court will leave parties to their remedy at law; and if that has been lost by negligence, they must abide by it. It is a settled rule; therefore, to allow a defendant in a bill for specific performance of a contract to show that it is unreasonable or unconscientious."

In *Marks v. Gates*, 154 Fed. 481, 484, 83 C. C. A. 321, 324, 14 L. R. A. (N. S.) 317, we said:

"A court of equity will not grant pecuniary compensation in lieu of specific performance unless the case presented is one for equitable interposition such as would entitle plaintiff to performance but for intervening facts, such as a destruction of the property, the conveyance of the same to an innocent third person, or the refusal of the vendor's wife to join in the conveyance"—citing *Cooley v. Lobdell*, 153 N. Y. 596, 47 N. E. 783; *Matthews v. Matthews*, 133 N. Y. 679, 81 N. E. 519; *Bourget v. Monroe*, 58 Mich. 563, 25 N. W. 514; *Eastman v. Reid*, 101 Ala. 320, 13 South. 46; *Milkman v. Ordway*, 106 Mass. 232.

In other words, the ancillary power to award compensatory damages can only be exercised in a case where the equitable relief prayed for might have been given. See *McQueen v. Chouteau's Heirs*, 20 Mo. 222, 64 Am. Dec. 178.

The case of *Cathcart v. Robinson*, 5 Pet. 264, 8 L. Ed. 120, relied on by the court below in support of its decision, is quite different from the present one. There Robinson properly brought his suit in the court of equity to enforce a contract of sale, as is expressly stated by the court in its opinion, while here the appellee never had any right to go into a court of equity, for the reason that the contract upon which the suit is based expressly showed upon its face, as the court below held, that the appellee was not entitled to specific performance of it, but only to damages in the event of its breach.

The judgment is reversed, and the case remanded, with directions to the court below to dismiss the suit, at the complainant's cost.

COONEY v. COLLINS et al.

(Circuit Court of Appeals, Ninth Circuit. February 21, 1910.)

No. 1,728.

BANKRUPTCY (§ 288*)—SUMMARY PROCEEDINGS BY TRUSTEE—JURISDICTION OF BANKRUPTCY COURT—ADVERSE CLAIM.

A court of bankruptcy is without jurisdiction of a proceeding by a trustee to recover property from an adverse claimant, who holds the legal title and possession and asserts his sole ownership, and who does not consent to the jurisdiction.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 288.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Petition for Revision of Proceedings of the District Court of the United States for the District of Montana, in Bankruptcy.

In the matter of Frank Henry Cooney, bankrupt. Petition by Walter E. Collins, trustee, against John W. Cooney. Order requiring respondent to turn over property, and he brings a petition for review. Reversed.

Louis P. Donovan, for petitioner.

Robert McBride, for respondents.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. This is a petition for revision, under section 24b of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432]), of the proceedings of the United States District Court for the District of Montana. The question presented is whether the bankruptcy court had power, by summary proceedings, to order the petitioner to surrender and turn over certain real and personal property, standing in his own name, to the trustee of the bankrupt.

The amended petition of the trustee for the order alleged, in effect, that certain real estate therein specifically described, situated in the state of Montana, stood upon the records of the several counties of the state in which the various pieces of property were respectively situate in the name of John W. Cooney, the petitioner here, and also alleged that certain personal property, specifically described in the petition of the trustee, also stood in the name of John W. Cooney, but averred, upon information and belief, that all of the property so mentioned and described was purchased by the bankrupt, Frank Henry Cooney, with his own money, and that no part of the consideration therefor was paid by the said John W. Cooney, and that the said Frank Henry Cooney has at all times been in possession of all of the property, having absolute control and management thereof, and that the taking of the title to the described property in the name of the said John W. Cooney "was and is colorable only and for the purpose of evading the creditors of the said Frank Henry Cooney."

The answer of John W. Cooney to the trustee's amended petition put in issue the averments in respect to fraud and the interest of Frank Henry Cooney, and alleged, among other things, that the real property described in the trustee's petition as lot 5 in block 2, West Excelsior addition to the city of Butte, "does stand in the name of this defendant and respondent, and has stood in his name for approximately four years, and that this defendant and respondent is the owner thereof by virtue of a deed, and that he built a house on said property himself, and that the said bankrupt, Frank H. Cooney, has not any interest in or possession of the said property, that the said property was not taken in the name of this defendant and respondent for the purpose of evading the creditors of the said Frank H. Cooney, but alleges that the said property was purchased by John W. Cooney, this defendant and respondent, and the whole of said consideration therefor was paid by said John W. Cooney with his own money, and that he now has, and at all times herein mentioned has had, possession of said prop-

erty"; that certain other of the real property described by the trustee "has been conveyed to one P. Vadney by deed executed by this defendant and respondent to the said P. Vadney approximately ten months ago; that there is a contract between this defendant and said Vadney, whereby said Vadney shall reconvey said property to this defendant and respondent on the payment of \$1,000 and interest by this defendant and respondent, John W. Cooney, to the said Vadney, and that the said Frank H. Cooney, the bankrupt, has not at this time and never had any interest in or possession of the said property, but alleges that the said property was purchased by John W. Cooney, this defendant and respondent, and the whole of the consideration therefor was paid by said John W. Cooney with his own money, and that he now has, and at all times herein mentioned has had, possession of said property"; that in respect to certain of the other specifically described real property mentioned in the trustee's petition the said John W. Cooney has an undivided one-sixth interest, and has had the said undivided one-sixth interest therein for approximately eighteen (18) months, "and has been the owner thereof by virtue of a deed executed and delivered by _____ to this defendant and respondent, and that the said Frank H. Cooney has no right, title, or interest therein, and never did have any right, title, interest, or possession therein, but alleges that the said property was purchased by John W. Cooney, this defendant and respondent, and the whole of the consideration therefor was paid by said John W. Cooney with his own money, and that he now has, and at all times herein mentioned has had, possession of said property"; that of another piece of the real property described in the trustee's petition the defendant John W. Cooney has been the owner for two years, by virtue of a conveyance thereof to him, the whole of the consideration for which was paid by him with his own money, and the possession of which he has ever since had, and in which property the bankrupt, Frank H. Cooney, never had any right, title, or interest, nor any possession thereof; that that portion of the real estate described in the trustee's petition which had been conveyed by the defendant John W. Cooney to P. Vadney was granted to him, John W. Cooney, "by deed executed by Peter R. Dolman September 2, 1904, and filed for record September 30, 1904, and that said property was purchased by John W. Cooney, defendant and respondent, and the whole of the consideration therefor was paid by said John W. Cooney with his own money, and that he now has, and at all times mentioned herein has had, possession of said property"; that in the property described in the trustee's petition as lot 5 in block 16 of the Leggat & Foster addition to the city of Butte the defendant John W. Cooney has no interest, the same being for the two years then last past the property of the East Butte Extension Copper Mining Company, and that in the property described in the trustee's petition as lot 9 in block 6 of the Rice addition to the city of Butte the defendant John W. Cooney has no interest, the same having been deeded to the East Butte Extension Copper Mining Company about three years previous to the order to show cause issued against the defendant; that certain of the other real estate described in the trustee's petition was conveyed to the defendant John W. Cooney about a year and a half prior to these proceedings, and th-

the bankrupt, Frank H. Cooney, never had any interest therein nor possession thereof, and that the whole of the consideration therefor was paid by the said John W. Cooney with his own money; that certain other of the real property described in the trustee's petition was acquired by the defendant John W. Cooney by virtue of a deed duly executed by Georgia Butler and Samuel M. Butler on the 1st of June, 1906, and duly recorded in the office of the county recorder of Missoula county, Mont., on the 2d of June, 1906, the whole of the consideration for which conveyance was paid by the said John W. Cooney with his own money, since which conveyance the property has been in his possession, and that the bankrupt, Frank H. Cooney, has not and never had any interest therein; that the shares of stock described in the trustee's petition were purchased by the defendant John W. Cooney with his own money, were issued to him in his own name, and since their issuance have been in his possession; and that the bankrupt Frank H. Cooney never had any interest therein nor any possession thereof. All of the above-mentioned allegations of the defendant John W. Cooney were verified by him of his own knowledge.

His objections to the determination, in such summary proceedings, of the right to the properties in question, were overruled by the referee in bankruptcy, which officer found, in effect, upon the conflicting evidence introduced before him, that all of the property in question really belonged to the bankrupt, Frank Henry Cooney, was paid for with his money, and put in the name of John W. Cooney for the purpose of defrauding the creditors of Frank Henry Cooney. The matter being brought before the court upon petition for revision of the action of the referee, like objections were there made by John W. Cooney to the jurisdiction of the referee, and of the power of the bankruptcy court to thus determine the property rights in question, resulting in the affirmation by the court of the referee's order. Hence the present petition for revision.

In so ruling we are of the opinion that the learned judge of the court below was in error. That court, as well as the counsel for the respondents here, largely rely in support of their position upon the case of *Mueller v. Nugent*, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405, which case was subsequently reviewed in the case of *Jaquith v. Rowley*, 188 U. S. 620, 624, 625, 23 Sup. Ct. 369, 371, 372, 47 L. Ed. 620, where the Supreme Court thus concluded its review of it:

"In other words, *Nugent's Case* simply holds that where the agent held money belonging to the bankrupt to which he had no claim, but simply refused to give up the property, which he acknowledged belonged to the bankrupt, the bankruptcy court had power, by summary proceedings, to order him to deliver such property to the trustee in bankruptcy"

—which was not only a "wholly different" case from that of *Jaquith v. Rowley*, but also from that now before us. Like the surety in the case of *Jaquith v. Rowley*, the petitioner here, John W. Cooney, by his verified answer not only claims the absolute right to hold all of the property in question as against everybody, but specifically alleges the reasons for his claim of ownership of it. Of course, his allegations in that behalf may not be true; still they make a case of adverse claim to the property on his part, to overcome which it was essential for the

trustee to proceed in accordance with the provisions of section 23 of the bankruptcy act and not by summary proceeding in bankruptcy. We think the case of *Jaquith v. Rowley*, 188 U. S. 620, 23 Sup. Ct. 369, 47 L. Ed. 620, is directly in point, on the authority of which the judgment of the District Court should be reversed, with directions to order the dismissal of the trustee's petition.

We do not think there is anything in the cases of *In re McMahan*, 147 Fed. 684, 77 C. C. A. 668, *In re Noel* (D. C.) 137 Fed. 694, or *In re Michie* (D. C.) 116 Fed. 749, in conflict with what we here hold. In the *McMahan* Case it was an undisputed fact that the actual possession of the land upon which *McMahan* asserted an adverse lien was in the trustee of the bankrupt, and it was, as we think, very properly held that, as the bankruptcy court had through its trustee the actual possession of the land, it was not only within its power, but it was its duty, to determine all questions in reference to the validity of liens upon the property. In the case at bar, however, one of the main questions raised by the adverse claimant was as to the possession of the property by the trustee; he setting forth under oath, not only that the bankrupt never had any title to or interest in the property in question, but never had any possession of it.

The cases of *In re Noel* and *In re Michie* seem to us to be in direct line with our conclusion. In the *Noel* Case (D. C.) 137 Fed. 698, Judge Morris said:

"I think the distinction between the controversies arising in bankruptcy which must be determined by plenary independent suits and those which may be heard on summary petition depends upon who has possession of the subject-matter of the controversy. If the bankruptcy court has possession, then, as a rule, the matter may be heard upon petition and answer. If a stranger has possession, and is holding by adverse claim, then an independent plenary suit is in most cases proper. In this case the property was in the possession of the bankrupt, and upon his adjudication his title and possession passed to the trustees. The possession of the trustee could not be disturbed by any form of adverse legal proceedings without the concurrent sanction of the court of bankruptcy. That court, having possession of the property, had jurisdiction, upon notice to those claiming to have liens and incumbrances upon it, to order the property to be sold by the trustees free of all incumbrances, if the court, in its discretion, should determine that such a sale was for the benefit of the unsecured creditors; and after such a sale, having in its control the fund arising from the sale, it would have jurisdiction to determine the conflicting claims of the parties whose liens had been displaced as to the property sold, and transferred to the fund in the court. *Ray v. Norseworthy*, 23 Wall. 128, 23 L. Ed. 116."

And in the *Michie* Case Judge Lowell held that a court of bankruptcy has no jurisdiction over a controversy between the trustee and one to whom the bankrupt conveyed property, as to such property, where such person has possession, and makes a real, though fraudulent and voidable, adverse claim, and does not consent to the jurisdiction.

The judgment of the District Court is reversed, with costs, and with directions to order the dismissal of the trustee's petition.

CORNUE v. INGERSOLL et al.

CUMMINGS v. SAME.

(Circuit Court of Appeals, First Circuit. February 16, 1910.)

Nos. 850, 851.

1. JUDGMENT (§ 829*)—COLLATERAL ATTACK—JUDGMENT IN REM.

A decree of a federal court, establishing a lien on a fund, cannot be collaterally attacked by a suit in a state court, in which the complainant asks to be adjudged owner of the fund.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1510-1515; Dec. Dig. § 829.*]

2. COURTS (§ 493*)—SUIT IN CONTEMPT OF FEDERAL COURT—DISMISSAL.

A decree was entered by a Circuit Court of the United States, on a mandate from the Supreme Court, adjudging a lien on a fund in the hands of an ancillary administrator. Complainants, claiming an interest in such fund, during the same term at which the decree was entered, and while it was still under control of the court, instituted suits in a state court, asking that they be adjudged owners of the fund to the exclusion of the complainant in the decree, who as a defendant removed such suits into the Circuit Court. *Held*, that such court properly took jurisdiction and dismissed the suits, as in contempt of its decree and an attempt to interfere with its execution.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 493.*]

Appeals from the Circuit Court of the United States for the District of Massachusetts.

Suits in equity by Ellen S. Cornue and Herbert P. Cummings, executor, respectively, against Eva A. Ingersoll, administratrix, and others. Decrees of dismissal (174 Fed. 666), and complainants appeal. Affirmed.

The two bills of complaint at issue were instituted in the state court, and were directed against a fund in one of the probate courts of Massachusetts upon which a lien had been established under direction of the Supreme Court of the United States, in favor of Eva A. Ingersoll, administratrix of the estate of Robert G. Ingersoll.

Identity of subject-matter, and the complainants' knowledge of the pendency and progress of the lien proceeding in the federal courts, and of the "judgments and decrees therein," are shown by the allegations of the bills.

Among the allegations which appear in each bill are the following:

"Fourth. * * * And thereupon said contestant party duly executed an assignment agreement and power of attorney, a copy whereof is hereunto annexed, marked 'Exhibit 1,' and made a part hereof, by the terms of which said Cummings, Ladd, Dunbar, and Cornue assigned to said Root and one Gideon Wells, now deceased, one-third ($\frac{1}{3}$) of their several interests in said estate out of which to reimburse said Root for all sums expended or to be expended on account of the settlement of said estate and opposing the probate of said will, the said Root to have the remainder of said one-third ($\frac{1}{3}$) as compensation for his time and services. * * *" (Exhibit 1 is dated September 25, 1890.)

"Forty-fifth. Said cause proceeded in said Circuit Court of the United States and in the Circuit Court of Appeals thereof, and on certiorari in the Supreme Court of the United States; and said Supreme Court remanded said cause with directions for the entry of a decree establishing said debt and subjecting three hundred sixty-eight and three-fourteenths eleven-hundredths ($368\frac{3}{4}/1100$) of such fund as might be distributed in Massachusetts under the order of the probate court of the county of Suffolk in said estate of Andrew J. Davis, deceased.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Index.

"Forty-sixth. In said cause no evidence was presented to said courts, or any of them, to show the fact aforesaid that said Root and said Coram had already, from the prior distributions of said estate, withdrawn their entire portion of said five hundred fifteen and one-half eleven-hundredths ($515\frac{1}{2}/1100$) of said estate, and said courts did not pass upon, or have jurisdiction to pass upon, the rights of said Cummings and said Cornue in the premises, and said suit and the proceedings therein, and the judgments and decrees therein, are wholly without effect upon the rights of said Cummings and said Cornue."

"Forty-ninth. As against the complainant there is no debt due to the administrator of the estate of Robert G. Ingersoll from any person by reason of anything done by said Ingersoll in connection with the estate of said Andrew J. Davis, deceased."

Exhibit 1, referred to in paragraph 4, contains the following:

"And we, the said Sarah Maria Cummings, Elizabeth S. Ladd, Ellen Cornue, and M. Louise Dunbar, do hereby severally constitute and appoint the said Henry A. Root and Gideon Wells our attorneys in fact, irrevocable, for us, and each of us, and in our and each of our names, place, and stead, jointly to demand, sue for, collect, receive, compound, receipt for, and full acquittance give for our and each of our interests in said estate."

The prayers of the bills were as follows:

"First. That it be determined by this court to what extent the complainant is entitled to have and retain the funds aforesaid upon and after the distribution of them under the order of the probate court, and that the complainant have a decree awarding said funds to complainant, as claimed in the bill of complaint.

"Second. That it be determined by the decree of this court in what manner any deficiency in said funds shall fall upon said Ellen S. Cornue and said Herbert P. Cummings as executor as aforesaid.

"Third. That the conflicting claims of the respondents upon the funds to which the complainant is entitled as aforesaid be denied.

"Fourth. That a receiver be appointed by this court to take, on behalf of the distributees designated by the probate court or said District Court, from said John H. Leyson the funds as aforesaid to the extent of five hundred fifteen and one-half eleven-hundredths ($515\frac{1}{2}/1100$) thereof, and that said receiver hold said portion of said funds and distribute the same in accordance with the decree of this court.

"Fifth. That said five hundred fifteen and one-half eleven-hundredths ($515\frac{1}{2}/1100$) of said fund be charged by decree of this court with a trust in favor of the complainant to the extent of the portion in equity due the complainant as set forth in the bill of complaint, and that any of the respondents to whom said five hundred fifteen and one-half eleven-hundredths ($515\frac{1}{2}/1100$) or any part thereof may come shall hold the same in trust for the complainant to the extent of the sum in equity due the complainant as aforesaid, and shall pay the same over to the complainant to such extent.

"Sixth. That the respondent Leyson be enjoined from removing said funds or any part thereof from this commonwealth, or otherwise dealing with the same, except as he may be so ordered by the probate court for Suffolk county.

"Seventh. That the remaining respondents, and each of them, be forthwith enjoined from receiving five hundred fifteen and one-half eleven-hundredths ($515\frac{1}{2}/1100$) of said fund or any part thereof except through a receiver or other officer of this court.

"Eighth. That this cause proceed to hearing and final decree in the absence of those respondents who are not residents of this commonwealth and who do not appear in this suit.

"Ninth. That the complainant have such other and further relief and such process as this court deems meet and proper."

These cases were removed from the state courts upon the ground of diverse citizenship, together with allegations as to the nature of the prior proceedings in the United States courts and the present proceedings in the state courts with reference to the same supposed subject-matter, which, it is claimed, raised a federal question. On the 25th of May, 1909, they were under hearing upon motion to remand, and were dismissed, and a final decree was entered as follows:

"Putnam, Circuit Judge. On hearing before the court, ordered, motion to remand bill denied, and bill dismissed, with costs, but without prejudice to any proceedings arising between persons interested in the estate of Andrew J. Davis, deceased, after the final decree in *Ingersoll v. Coram* entered by this court has been fully performed."

Subsequently the following rescript was filed as of May 25th, which shows the ground upon which the cases were dismissed:

"Putnam, Circuit Judge. The above cases came before us on motions to remand to the state court. On hearing the motions we denied them. We also entered summary decrees dismissing each bill, with costs, but without prejudice to any questions arising between the parties interested in the estate of Andrew J. Davis, deceased, after the decree in *Ingersoll v. Coram*, entered by this court, has been fully performed. These orders and decrees were entered with an oral expression of our views in reference to them; but, inasmuch as the complainants in each of those cases have signified to us an intention to take an appeal to the Circuit Court of Appeals, we now deem it proper to file this brief statement of the oral views thus expressed.

"We sufficiently identified the proceedings in *Ingersoll v. Coram* by a reference to the mandate from the Supreme Court in that case, which was filed in this court on January 25, 1909, pursuant to which mandate final disposition of *Ingersoll v. Coram* was made by this court. That mandate established the judgment of this court in favor of *Ingersoll*, administratrix, with a modification which appears therein, and which need not be stated particularly in this rescript.

"The bill in equity in the foregoing cases described quite fully the proceedings in *Ingersoll v. Coram* and the result in this court as we have stated it. The view we took of each of those bills was that on their face they not only set out the proceedings in *Ingersoll v. Coram* and the final judgment therein, but also on their face operated to delay, embarrass, and, perhaps, to some extent defeat, the appropriate execution of, our judgment in accordance with the mandate to which we have referred; and we were of the opinion that it appeared on the face of each of those bills that such was the purpose of each of them. At any rate, we were of the opinion that they did so operate as a matter of fact, and that on their face they set out sufficient to establish that they operated in the manner we have said, and that, therefore, on their face each raises such a federal question as justified removal to this court. We were also of the opinion that, as they were at least by implication of law contemptuous in their nature, we were justified in taking and maintaining jurisdiction over the same even in a summary manner. Therefore we refused each motion to remand.

"Also we were of the opinion, by reason of the operation of each with reference to the judgment of this court, especially with reference to the mandate from the Supreme Court, and from their contemptuous nature in implication of law, that the court in which the bill was originally filed had no jurisdiction over the subject-matter of either of them, and that, therefore, each bill should be dismissed. Moreover, in order to prevent their practical operation in delaying and embarrassing the execution of the judgment and mandate aforesaid, which would result if we permitted the litigation to be continued even in this court, we were of the opinion that the only remedy suitable under the circumstances was summary dismissal.

"We were strengthened in our conclusions by the expressions found in the opinion of Judge Aldrich, passed down in behalf of the Circuit Court of Appeals in *O'Connell v. Mason*, on August 25, 1904, reported in 132 Fed. 245, 247, 65 C. C. A. 541, 543, where the following is found:

"We have no doubt of the inherent and necessary power of courts of general jurisdiction to protect members of the public from vexatious suits through an exercise of the right to dismiss frivolous proceedings which, upon the face of the pleadings, present no cause of action recognized by the law. Unquestionably the power to dismiss exists quite independent of express statutory authority, and may be exercised in a proper case by the court of its own motion."

"The clerk is directed to file this rescript in each of the above cases the day it is dated, adding, also, 'nunc pro tunc as of the day when the motion to remand was denied and the bill was dismissed.'"

From the final decree the complainants claimed an appeal to the United States Circuit Court of Appeals for the First Circuit.

Edward F. McClennen (Brandeis, Dunbar & Nutter, on the brief), for appellants.

E. N. Harwood (Hollis R. Bailey, on the brief), for appellees Ingersoll and others.

William T. Read, for appellee Holton.

Horace G. Allen, for appellee Leyson.

Before COLT and LOWELL, Circuit Judges, and ALDRICH, District Judge.

ALDRICH, District Judge (after stating the facts as above). These two cases were summarily dismissed by the Circuit Court, upon its own motion, upon the ground that they were in contempt and evasion of law and in defiance of a final decree entered under the order of the Supreme Court. *Ingersoll v. Coram*, 211 U. S. 335, 29 Sup. Ct. 92, 53 L. Ed. 208; opinion of Circuit Court November 17, 1909, 174 Fed. 666. See, also, 148 Fed. 169, 78 C. C. A. 303; 136 Fed. 689.

They were originally commenced in the state courts of Massachusetts, and were removed to the Circuit Court of the United States upon the ground of diverse citizenship, and upon allegations which it is claimed raise a federal question upon the face of the bills. They are based upon an alleged out of court arrangement in Montana between five heirs of Davis, after a part of the estate had been passed over to the group en masse and without division, whereby Root and Coram retained more than the distributive shares of Mrs. Cornue and Mrs. Cummings to meet the expenses of litigation and other expenses, under an arrangement and under circumstances which, it is said, contemplated that the complainants' interests should be made good in the end out of the funds in Massachusetts. Thus they in effect say that their claim is one which should cut under the lien, upon the ground that they acquired title to the property from Root and Coram earlier than its creation; and it is conceded that, if this claim is established, it will absorb the entire fund against which the lien decree of the federal court is directed. In other words, in effect and substance, the complainants say that they individually own the entire property now in the probate court of Massachusetts against which the decree of the federal court is directed, and that they own it by virtue of a segregation and private adjustment of the community interests made between the heirs before the lien, and consequently that there is no property upon which the lien can operate. Such being their claim, the complainants could not have expected or even hoped to prevail in an independent proceeding in the state courts, except upon the hypothesis of a judgment based upon findings and holdings that the express terms of the decree of the Circuit Court, entered in accordance with the opinion of the Supreme Court, are invalid and inoperative in respect to the property in question.

It was plainly the purpose to secure a result in another court which would wholly prevent the execution of the decree of the Circuit Court of the United States. With that purpose, the complainants invoke independent collateral proceedings in another court, through which it is intended to drive a fatal blow at the right established by the decree of the Circuit Court. Indeed, the purpose is made quite plain by the allegations and prayers, which plainly mean, if they prevail, a complete and effective overthrow and nullification of the operative effect of the decree of the Circuit Court in respect to the property right which it assumed, in clear and unmistakable terms, to declare and establish. If such process is possible by way of collateral attack, the inevitable result would be a direct conflict between the two courts, and direct conflict between their final decrees directed against the same specific property, because the decree of the Circuit Court assumes to define the status of the property right, and the decree sought in the state court is one which would completely nullify, not only the operativeness, but the express terms, of the decree of the Circuit Court, which was a court of competent jurisdiction, and one which had first assumed control over the subject-matter in controversy.

To the proposition that the subject-matter of the controversy in question was something which might be dealt with finally and effectively in the federal courts, it is only necessary to refer to the recent decision of the Supreme Court in *Waterman v. Canal-Louisiana Bank*, 215 U. S. 33, 30 Sup. Ct. 10, 54 L. Ed. — (December, 1909), and to the familiar general rule that, as between two courts of competent jurisdiction, the one which first assumes jurisdiction over a controversy will hold it for the purpose of ascertaining and establishing the controverted rights.

These proceedings, notwithstanding the proper jurisdiction of the federal courts, seek in the end to seize and hold a property now in the custody of the probate court of Massachusetts, notwithstanding, and in violation of, a final decree entered against it in accordance with the decision of the Supreme Court of the United States, in which that court declared a right in respect to the same property which it specifically described and named. Thus, at their inception, they seek a result in a collateral proceeding which would utterly set at naught the authority of the Supreme Court sought to be enforced, with respect to subject-matter over which it had assumed jurisdiction, and in respect to a right which it had assumed to establish, through a final decree entered under its direction at the end of litigation. An independent proceeding to such an end would be subversive of judicial authority; and a rule which would permit it would put at unrest and in disorder rights supposed to have been settled and established by courts of competent jurisdiction and of last resort.

Previous to the will contest, the *Ingersoll* service, and the *lien* litigation, a one-third interest of Mrs. Cornue and of Mrs. Cummings in the Davis estate was assigned to Root and another, "to be expended on account of the settlement of said estate and opposing the probate of said will." The fact of such assignments was before the Supreme Court (211 U. S. 335, 337, 29 Sup. Ct. 92, 53 L. Ed. 208), and is established for purposes of this case, because it is set out on the face of

the present Cornue and Cummings bills, at paragraph 4, and the established fact of the assignments is something important to be considered upon the question of estoppel and adjudication. The decree in the Circuit Court, so far as the Cornue and Cummings interests were concerned, took jurisdiction over that one-third only, and it is not understood that the decree operates upon any interests other than those of Root and Coram as enlarged, of course, by the assignments of the one-third interests of Mrs. Cornue and Mrs. Cummings and others. If these complainants had any possible interest in the one-third which they had conveyed, the only part of their interests upon which the decree operated, that interest, as was doubtless assumed by the Supreme Court, was represented in the original lien proceedings by their assignees and by the administrator, who had the custody of the property, who answered, and who rightfully represented whatever community interest there was centering in the estate over which he had control.

It must be remembered that the lien proceeding was quasi in rem (Black on Judgments, §§ 792-795), and in no sense was the decree in personam as to these complainants. The decree operated in rem only as to the Cornue and Cummings interests in the hands of Root and Coram, who were the assignees, and held, in addition to their own original interests, the legal title to the Cornue and Cummings interests to which the lien attached. It must also be remembered that the independent proceedings in the state courts were in no sense proceedings to correct or modify a decision which the court having custody of the res had assumed to make; but they are proceedings which entirely ignore and set at defiance all that has been done in respect to the res, over which at least the court had rightful and unquestionable jurisdiction. The subject-matter, in the lien sense, so far as concerns the shares of these complainants, with which they had parted title, was the one-third interest upon which the lien is asserted, and over this the United States court had properly assumed jurisdiction, and had established a right by its decision.

Among the higher duties of courts is that of seeing that their final process is effective to secure and establish the rights which, at the end of litigation, are found to exist. The Supreme Court charged the lien upon specific property interests which were described in apt words. The effect of the decision was to attach the lien to the property and create a right therein in behalf of the Ingersoll estate.

The decision of the Supreme Court is to be accepted as it is expressed, and we deem it neither necessary nor proper to attempt any defense or explanation of the result reached, further than to say that the fact of the assignments was before the Supreme Court (211 U. S. 335, 370, 29 Sup. Ct. 92, 53 L. Ed. 208); that upon such status of legal title to the one-third, with such parties as the Supreme Court had before it, and upon such representative conditions as existed in respect to the res through the appearance of the assignees of the one-third Cornue and Cummings interest and the Cummings answer (211 U. S. 335, 342, 29 Sup. Ct. 92, 53 L. Ed. 208), and upon such representative capacity as was involved in the appearance and answer (211 U. S. 335, 342, 29 Sup. Ct. 92, 53 L. Ed. 208) of the administrator of the estate, who had

custody of the community interests, and who joined in the common purpose to defeat the lien, that court assumed to establish the right.

Upon argument the complainants put their case upon the ground that the decree of the federal court amounts to a judicial invasion of their rights without notice. The complainants, at least, had knowledge of the lien proceeding and the Supreme Court decision at the time they started these suits in the state courts, and, having that knowledge, and feeling aggrieved, they might well have acted with the regard ordinarily held for a final decision by a court of competent jurisdiction. An orderly and appropriate remedy would have been some one of the usual and well-known proceedings in the nature of intervention to correct the decree, like a bill in the nature of a bill in review, like an auxiliary bill in equity joining all the parties, or any one of the simple intervening petitions for that purpose, which addresses itself to the court charged with the duty of enforcing its final decree, to the end that it may be corrected if wrong is being done. Such a proceeding would become a part of the case before the court which had assumed to establish a right, and one, of course which would naturally involve all necessary and proper considerations of notice and estoppel. Such proceedings were invented to avoid circuity of action, multiplicity of suits, and the menace to rights involved in threatened judicial conflict, and to meet situations like the one in question, and to afford a full, proper, and adequate remedy. Such remedies are based upon the charitable assumption, usually indulged, that a court of competent jurisdiction can do justice and right wrongs, if, through inadvertence, its decrees are operating too broadly.

We take judicial notice of the scope of the lien proceeding and of what had been decided in the Circuit Court, the Court of Appeals, and the Supreme Court, as well as judicial notice of the important fact that the term of the Circuit Court, in which the decree was entered, was still open. The February term of the Circuit Court begins on the last Tuesday of February and ends on the third Tuesday of October. The decree was entered April 15, 1909, and thus the lien decree directed by the Supreme Court was within the control of the Circuit Court at the time the complainants instituted their proceeding in the state court.

The term being open, the cases which hold that federal courts lose control of their decrees at the end of the term have no application whatever, and the power of the Circuit Court, upon apt proceedings, to correct its decree, if an inadvertent wrong was being done, was at that time something beyond question. *Ex parte Lange*, 18 Wall. 163, 21 L. Ed. 872; *Goddard v. Ordway*, 101 U. S. 745, 752, 25 L. Ed. 1040; *Ætna v. County Commissioners*, 79 Fed. 575, 25 C. C. A. 94; *Phillips v. Negley*, 117 U. S. 665, 675, 6 Sup. Ct. 901, 29 L. Ed. 1013; *Freeman on Judgments*, § 100; *Black on Judgments*, §§ 301, 305; *Seton on Decrees*, c. 787; 2 *Daniell, Ch. Pl. & Pr.* (6th Ed.) §§ 1026, 1027; 17 *Am. & Eng. Enc. Law* (2d Ed.) 837.

If there was a grievance, it was not necessary and justice did not require resort to independent process in another court—process which in substance and effect, if maintained, must entirely ignore the intended operative effect of the decision of the Supreme Court. Thus

the conclusion is inevitable that the purpose was to get away from the court exercising jurisdiction in respect to the subject-matter of the property in question, and which had assumed to establish a right, and to seize and hold through the instrumentalities of state process property which the Supreme Court had assumed to decide belonged to another party.

The complainants urge their supposed grievance with surprising and unusual warmth and vigor, upon the erroneous supposition that the failure of the Circuit Court to loosely abandon and recede from its own final mandate under subversive collateral attack left them without redress, and that important and sacred property rights have thus been wrested from them, and great wrong done, through judicial intervention without notice, and in violation of fundamental law. The argument which involves the claim of judicial invasion is an unfortunate one. We are reluctant to accept such an argument seriously, because we do not think the premises in this case warrant it. Moreover, the history of American courts is not one of judicial invasion. Courts are usually content if they succeed fairly well in the direction of orderly procedure, in the avoidance of unseemly conflict of judicial authority, and in making their decrees effective to establish rights which it is found that parties are entitled to.

Aside from the idea of having intervening and ancillary remedies, with scope and function sufficient to avoid circuity of action and multiplicity of suits, and of affording direct remedies and opportunities for redress in the same court, to the end that useless conflict shall not occur between different courts, is the other idea that judgments and final decrees shall not be subject to collateral attack. If adverse independent collateral proceedings like these were recognized and encouraged, property rights would be in confusion, and all sorts of conflict of jurisdiction and decision would result, and in the end, logically and necessarily, force; because with two adverse decrees in rem, and neither party yielding, how, in the last analysis, could the property right be at rest, except through force? Surely each of two adverse independent final decrees in rem could not effectively operate to take the whole of a specific property.

Speaking with moderation by way of characterization of the particular proceedings in question, they are in their nature insidiously and alarmingly well calculated to bring courts, which aim to exercise their respective rightful jurisdictions under motives and principles of useful comity, into direct, open, and unseemly conflict upon final process. It was to avoid deprecated conflict of judicial authority that rules against collateral attack upon judgments and final decrees, as well as ample remedies in the nature of direct attack, were invented and enlarged, to the end that parties claiming to be aggrieved by the operation of a decree without notice may have their day in court and full redress.

The rule which requires direct attack and forbids collateral attack upon final judgments and decrees is a rule of public and judicial necessity, and is founded upon considerations which wholly exclude the idea of a laxity which shall tolerate an independent collateral proceeding to disestablish in another trial that which has been expressly es-

established upon a former trial upon the merits. As argued, it is true, a plea in bar may furnish a remedy against this; but that is not the only remedy, and where the identity of the property is unmistakable, and the purpose to disestablish the result of a former adjudication is clear, courts may not always subject parties to another trial upon a plea in bar, and to the expense and delay incident to such a defense.

In its consideration of the question of contempt and evasion of law, and what had theretofore been decided in respect to the property in question, the Circuit Court was not dealing with the question whether the state court had in fact assumed jurisdiction, whether a plea in bar would be effective in that court or any other, or at all with the question as to what the state court would probably do or not do. It was only dealing with the purposes of the complainants, in view of its own knowledge as to identity of parties and property, and as shown upon the face of their bills.

These proceedings, instituted in one court to disestablish or render inoperative what had been established in another, were removed to the court which established the right sought to be overthrown; and that court, having before it the cases upon motion to remand, without deciding or considering the question of diverse citizenship, or other particular grounds upon which they were removed, finding them to be in contempt of law and of what it had done under the direction of the Supreme Court, denied the motion to remand and summarily dismissed them.

Having found the proceedings to be in contempt and in evasion of the decision already made, we are not aware of any imperative rule of law which required the Circuit Court to lend potency to their existence by considering the question of diverse citizenship, or, on motion of the complainants, who held its decrees in contempt, to lend force to their offending purpose by remanding their cases to the state court. If the requisite diverse citizenship did not exist, as the complainants claimed, surely the order of dismissal violated no substantive right.

These cases having been removed to the Circuit Court, that court treated the proceedings as not ancillary, but in contempt of what the federal court had decided and was doing, and dismissed them, and the order or decrees should be affirmed. In each case the decree is as follows:

The decree of the Circuit Court is affirmed, and the appellees recover their costs of appeal.

RENNIE v. MUTUAL LIFE INS. CO. OF NEW YORK.

(Circuit Court of Appeals, First Circuit. February 11, 1910.)

No. 847.

1. INSURANCE (§ 56*)—MUTUAL COMPANIES—AUTHORITY OF PRESIDENT TO MAKE CONTRACT—CONSTRUCTION OF BY-LAWS.

The by-laws of a life insurance company required the president to report quarterly to the trustees a summary of the business of the preceding quarter, stating the contracts that had been made, etc. They also provided that the president should have "the general direction and superin-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tendence of the affairs and of the officers of the company," and should establish rules and regulations for the conduct of the business of the company. *Held*, that such provisions did not vest the president with power to make an oral contract with a general agent, binding the company after the termination of his agency, in a certain contingency to pay him a sum annually during the remainder of his life sufficient for his support, and that in the absence of ratification by the company, or a course of dealing from which the authority of the president might be inferred, such a contract was not binding.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 70; Dec. Dig. § 56.*]

2. CORPORATIONS (§ 432*)—UNAUTHORIZED CONTRACTS BY OFFICER—RATIFICATION.

Evidence considered, and *held* not to establish a ratification by a corporation of an unauthorized contract claimed to have been made by its president.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1717; Dec. Dig. § 432.*]

In Error to the Circuit Court of the United States for the District of Massachusetts.

Action by Zenas Crane Rennie against the Mutual Life Insurance Company of New York. Judgment for defendant, and plaintiff brings error. Affirmed.

Samuel H. Pillsbury (Currier, Rollins, Young & Pillsbury and Philip C. Stanwood, on the brief), for plaintiff in error.

William D. Turner (Reginald Foster and George Hoague, on the brief), for defendant in error.

Before PUTNAM and LOWELL, Circuit Judges, and HALE, District Judge.

HALE, District Judge. This is an action upon an oral contract, alleged to have been made in September, 1886, whereby, in consideration that the plaintiff would accept the position of general manager for the defendant in Australia and go to Australia in order to be general manager, the defendant corporation agreed that if, on the termination of his employment as said general manager, the plaintiff had not succeeded in building up a satisfactory renewal commission account, the defendant would pay to him annually for the remainder of his life an amount sufficient to support him. At the close of the evidence in the court below, a verdict was directed for the defendant, on the ground that the evidence did not show authority of the president to make the contract; nor did it prove any subsequent ratification of the contract by the corporation. To this ruling the plaintiff—the plaintiff in error in this court—excepted, and now assigns the ruling as error.

The testimony shows that the alleged oral contract was made by the president. The defendant says that the president had no authority to make the contract, and that it was never ratified afterwards by the corporation or by its trustees.

1. Did the president have authority to make the contract?

The following by-laws relating to this issue are brought to the attention of the court:

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"(4) Quarterly meetings of the trustees shall be held on the first Wednesdays of January, April, July, and October, and a report shall be made to them by the president of the concerns and business of the company during the previous quarter, stating particularly the contracts that have been made, the sums of money that have been received and on what accounts, the manner in which the same shall have been invested or paid and the amounts on hand and the amounts that should have been received during said quarter, and a general balance sheet exhibiting a full statement of the funds, investments, payments, and liabilities."

"(11) The president shall, if present, preside at all meetings of the trustees. He shall be ex officio member and chairman of all standing committees except the auditing committee and committee on expenditures, which latter committee shall choose their own chairman. He shall also attend the meeting of any special committee when requested by the chairman. The president shall also have the general direction and superintendence of the affairs and of the officers of the company, and shall establish rules and regulations for the conduct of the business of the company and for the direction of its officers; and in all cases in which the duties of the subordinate officers, employees and the agents of the company are not specially prescribed by its by-laws or by a resolution of the board, they shall obey the orders and instructions of the president."

"(17) There shall be a secretary, who shall hold office during the pleasure of the board, who shall have power with the president to make contracts for insurance on life and for annuities and all other contracts necessary for the company in the management of its affairs in conformity with the rules and regulations of the board for the time being; but no policy or policies shall be issued on any single life for a sum in the aggregate greater than \$50,000. He shall have the general management of the office business and of the clerks employed in the insurance department of the company, and of the general correspondence of the company except such as relates to business expressly in charge of the several departments herein provided for. In the absence of the secretary the assistant secretary shall discharge such of the duties of the secretary as may be assigned him by the president, and the president may also, in his discretion, detail any officer or head of a department to act as secretary pro tem."

"(25) No commissions or compensation, direct or indirect, for procuring or facilitating loans from the company shall be received by any trustee or by any of its officers or other person in its employment; and neither the solicitor nor any person in his office, nor any person whatsoever receiving a fixed salary, shall receive pay from or have any claim against the company, excepting his salary; and such salary attached to the office or employment shall be full compensation for all services rendered to the company or performed on its behalf."

"(35) The finance committee shall consist of six trustees, who shall meet at least once every week. All investments of the company shall be made under its direction, and it shall have the supervision of the securities held by the company and select the depositories of its funds. It shall determine all questions of salary and compensation for services when not fixed by the board or other appropriate committee."

"(40) The committee on agencies shall consist of five trustees. It shall have the general supervision of the agency department of the company's business, and recommend to the board what amount shall be paid by way of compensation, settlement, or commutation to any agent or his representatives."

Touching this question, the plaintiff rests his case upon section 11, by which the president is empowered to have the general direction and supervision of the affairs and officers of the company, and to establish rules for the conduct of its business; also upon section 40, which gives the president power to fix the salary or compensation of agents; and, still further, upon section 4, which provides that at each quarterly meeting of the trustees a report shall be made by the president of the business of the company for the previous quarter, stating particularly

the contracts made during the quarter. The plaintiff insists that by these provisions of the by-laws the practical control of the company, in the general course of its business, is given to the president; that he is empowered to fix the compensation of agents, and that this power is not given to the committee on agencies, but that the power of this committee is only to recommend what shall be paid as compensation; and that such authority does not negative the power of the president to make a contract like this. The plaintiff urges, too, that the duty of the president to report to the trustees all contracts made during the past quarter implies that the president had power to make the contracts which he reports, and that such power of the president tends strongly to show that the president had authority to make the contract. The learned counsel for the plaintiff further urge that the plaintiff is not confined to the by-laws alone for proof of the president's authority, but that such authority is shown also by the general and uniform course of dealing of the corporation in the conduct of its business; that President McCurdy conducted the negotiations and wrote the letters touching all matters between the company and the plaintiff; that he made the contract, having full apparent authority; and that the whole testimony tends to show that his authority was recognized and affirmed by the course of dealing of the corporation and its trustees. The plaintiff insists that he was justified in relying upon the apparent authority of the president, and that the corporation cannot now rest solely upon its by-laws, of which the plaintiff was ignorant, and plead the lack of explicit authority given by them, but that the whole question of authority should have been left to the jury.

Upon an examination of the by-laws, we are persuaded that they were not intended to give the president power to make such a contract as is now before the court. It seems clear that the contracts mentioned in the fourth by-law are the ordinary business contracts of the company referred to in section 17, which it is the duty of the president to report, as a statement of the business and assets of the company, at the end of the quarter. It seems clear that if it had been intended to give to the president the power to make so vital a contract for an undefined period, imposing upon the corporation obligations which could not be measured at the time of the making, such power would have been expressly conferred upon him, and would not have been allowed to rest upon mere implication. The daily conduct of the corporation business demanded that the president should have the power, with the secretary, and without calling the trustees together, to make contracts for insurances, for annuities, for other daily matters of routine, and at seasonable times to make report of such contracts; but we can hardly believe that the formal rule and law of the corporation intended to give the president power to bind the company for an indefinite number of years by an oral contract to do an extraordinary thing. The evidence shows how dangerous it would be to invest a president with such power as is here claimed. For whenever a president had ceased to hold his office, either by death or resignation, every employé, and every one who dealt with the company, might claim that he had a binding verbal agreement; and thus it may readily be seen

that, if such authority existed, it might embarrass and wreck the corporation. It is clear to us that there is nothing in the by-laws authorizing the president to make this contract. See *Carney v. New York Life Insurance Company*, 19 App. Div. 160, 45 N. Y. Supp. 1103, affirmed by the Court of Appeals in 162 N. Y. 453, 57 N. E. 78, 49 L. R. A. 471, 76 Am. St. Rep. 347, where the reasoning of the court is helpful upon the issue which we have just discussed, although upon somewhat different facts.

It is true, however that the plaintiff is not confined to the letter of the by-laws in his endeavor to show the authority of the president. Parties are not held to any particular mode of proving authority of an agent of a corporation. His authority may be proved by circumstantial evidence—by testimony drawn from the whole course of dealings of the parties. A contract may be implied from corporate acts without either a vote or deed or writing. 2 Kent's Comm. 291; *Morawetz on Private Corporations*, § 618; *Peterson v. Mayor*, 17 N. Y. 449; *Olcott v. Railroad Co.*, 27 N. Y. 546, 84 Am. Dec. 298.

In *Bank of U. S. v. Dandridge*, 12 Wheat. 64, 70, 6 L. Ed. 552, Mr. Justice Story said:

"If officers of a corporation openly exercise a power which presupposes a delegated authority for the purpose, and other corporate acts show that the corporation must have contemplated the legal existence of such authority, the acts of such officers shall be deemed rightful, and the delegated authority will be presumed."

But, upon examining the evidence before us, it can hardly be said that, in making the conversation which is alleged to constitute a contract, the president was acting in the open exercise of any power, within the meaning of the language of Mr. Justice Story; and it clearly cannot be said that any corporate acts of the corporation have been shown which contemplated the legal existence of any authority on the part of the president. The whole course of business negatives the authority of the president to make such contract, and leads to the irresistible conclusion that he had the authority, which we have just mentioned, to make only the ordinary routine contracts from day to day, but not to make other contracts, and that he clearly had no power to make an indefinite agreement for a long number of years. On the question of the president's authority we are, then, compelled to conclude that there was no evidence, either direct or circumstantial, which ought to have been submitted to the jury.

2. Was the contract ratified by the corporation?

Ratification may undoubtedly be proved by a course of conduct consistent only with the supposition that the party ratifying intended to adopt the act as his own. Story on Agency, §§ 239, 252.

The evidence proves beyond a doubt that the act of the president in making the alleged oral contract was never reported to the corporation or to its trustees. It is not now necessary to enter into a discussion of the various letters and other writings put in evidence upon this question. It is enough to say that, instead of showing knowledge on the part of the corporation, they distinctly disprove such knowledge. The whole conduct of the plaintiff is inconsistent with his having asserted any contract such as he alleges. The testimony negatives the infer-

ence that the corporation had knowledge of such contract. After a long, but not altogether successful, administration of the company's business as general manager in Australia, under a large salary, the plaintiff was taken from his position and sent back to America upon a pension of \$3,500 a year. When removed from the management of the Australian business, and afterwards when deprived of his pension, he does not undertake to assert any contract with the corporation, but urges consideration on the ground of his long service, his dependence upon the company's bounty, and the policy of the company to reward faithful employes. In an elaborate address to the committee of the company, after his pension had been stopped, he takes great pains to recite everything that can help his case; but he nowhere recites that he relies upon any contract with the company. There is no evidence whatever to show that the company had knowledge of a contract, or in any way ratified the contract which is now asserted.

In considering whether the direction of a verdict for defendant is justifiable, it is clearly the duty of the court to take the view most favorable for the plaintiff. But the case presents facts about which but one inference can fairly and reasonably be drawn from the evidence, either as to the authority of the president to contract or as to the subsequent ratification by the corporation. The learned judge who presided at the trial in the court below was clearly justified in taking the case from the jury and directing a verdict for the defendant.

3. It is unnecessary here to consider whether an agreement was ever, in fact, entered into between the president of the company and the plaintiff. The plaintiff offered certain testimony, in the court below, as to his conversation with the president in September, 1886, from which, he claims, a contract resulted. On the other hand, the defendant says that no contract was ever made, and relies upon inferences to be drawn from all the circumstantial evidence. It urges that the conduct of the plaintiff, in never asserting a contract, and in acting inconsistently with its existence, tends strongly to negative the fact that the contract was ever made, and that the whole course of business of the corporation tends to the same result. If this had been the only point at issue, it might have been the duty of the court to submit the case to the jury upon the direct evidence upon the one side and the circumstantial evidence on the other. We do not pass on this question. It is enough to say that, upon the question of the authority of the president and of the ratification by the corporation, there was nothing which ought fairly to have gone to the jury, and it was clearly the duty of the presiding judge to direct a verdict for the defendant.

4. The plaintiff also assigns as error that the trial court excluded evidence that the plaintiff, in 1889, sold his Springfield office to the defendant company, and put the money into the Australian business, by arrangement with President McCurdy. The court finds that this evidence was properly excluded. It was not material upon any issue in the case. It did not tend to show that the contract of 1886 had been made, or that the president had any power to make it. The only possible question could be whether it was a part of the course of business, and had some bearing upon the question of ratification. We are of the opinion that it was not material on the question of ratification.

Upon this point, however, it is proper to say that, on examination of the record, it appears that substantially the same fact was brought to the attention of the court in the memorial or address made by the plaintiff to the committee of the corporation, to which we have previously adverted. It appears, further, on examination of the record, that in cross-examination the plaintiff was asked touching this matter; so that, if it can possibly be held that the evidence had any bearing on ratification, we find that it was substantially presented in another form in the court below. The evidence was properly excluded.

The judgment of the Circuit Court is affirmed, and the defendant in error recovers its costs of appeal.

GREAT FALLS NAT. BANK et al. v. McCLURE†
(Circuit Court of Appeals, Ninth Circuit. February 7, 1910.)

No. 1,717.

1. ESTOPPEL (§ 3*)—MATTER OF RECORD—ALLEGATIONS IN PLEADINGS.

An allegation in a bill in equity that defendant had attached and levied upon "all the property of every kind and character" owned by a corporation estops the complainant to claim in subsequent litigation between the same parties that certain property of the corporation was not covered by such levy and a sale made thereunder.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 2-5, 7; Dec. Dig. § 3.*]

2. ATTACHMENT (§ 183*)—LIEN—MERGER IN JUDGMENT.

Under Rev. Codes Mont. § 6807, which provides that judgments of the district courts shall be liens on all of the real property of the judgment debtor for six years after their rendition, the lien of an attachment is merged in that of the judgment recovered in the action, which continues and may be enforced by execution and levy against any of the realty of the defendant, whether covered by the attachment or not, at any time within six years, but not afterward; and such statute also applies to judgments of federal courts within the state, by virtue of Act Aug. 1, 1888, c. 729, § 1, 25 Stat. 357 (U. S. Comp. St. 1901, p. 701), which provides that such judgments shall be liens throughout the state in the same manner and to the same extent as those of the state courts of general jurisdiction.

[Ed. Note.—For other cases, see Attachment, Dec. Dig. § 183.*]

Appeal from the Circuit Court of the United States for the District of Montana.

Suit in equity by Charles D. McClure against the Great Falls National Bank, the American Engineering Works, and Ed Hogan, Sheriff of Cascade County, Mont. Decree for complainant, and defendants appeal. Affirmed.

Clayberg & Horsky and A. C. Gormley, for appellants.

Ira T. Wight and C. E. Pew, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. This cause was heard and disposed of in the court below upon the pleadings of the parties, resulting in the sustaining of the complainant's demurrer to the defendants' cross-bill and the awarding to the complainant of the injunction sought by his bill.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep.'s Indexes
† Rehearing denied March 11, 1910.

The bill of the complainant, who is the appellee here, alleged in effect, among other things, that on December 14, 1901, he commenced an action in the court below against the Diamond R Mining Company to recover judgment for certain moneys advanced by him to that company, in which action he procured a writ of attachment, under which the marshal duly levied upon all of the personal and real property of the Diamond R Mining Company, the same being situate in Cascade county, Mont., in which action he recovered judgment on the 16th day of January, 1902, for \$86,180 and costs in the sum of \$53.30; that in February, 1902, the defendant Great Falls National Bank recovered a money judgment in the district court of the Eighth judicial district of the state of Montana, in and for the county of Cascade, in an action therein pending in which that bank was plaintiff and the Diamond R Mining Company was defendant, and that on the 17th of December, 1904, the defendant American Engineering Works recovered in the same court a similar judgment against the same mining company; that on the 10th day of January, 1907, the complainant caused to be issued out of the court below a writ of execution upon the judgment so recovered by him, which writ directed the marshal of the court to levy upon and sell all of the property of the Diamond R Mining Company found in the district of Montana, and to apply the proceeds thereof, or so much as might be necessary, to the satisfaction of the complainant's judgment, with interest and costs, in pursuance of which writ of execution the marshal duly levied upon all of the property, both real and personal, of the mining company, all of which was situated in Cascade county, and that, after giving due and legal notice of the sale of the personal property, the same was sold to the complainant, he being the highest and best bidder therefor, and that on the 26th day of February, 1907, the marshal, having theretofore given due and legal notice of sale in the manner required by the laws of Montana and by the rules of the court below, sold all of the real property of the mining company so levied upon to the complainant, he being the highest and best bidder therefor, on which day the marshal duly executed to the complainant his certificate of sale of the said real property so sold to the complainant, a copy of which is annexed to the bill; that, no redemption of the property so sold having been made within one year, the marshal on the 27th day of February, 1908, duly executed to the complainant his deed of the said real property in due form, and that the complainant remains the owner and in possession thereof; that on the 25th day of February, 1907, the defendant Great Falls National Bank filed in the court below its bill of complaint against the complainant in the present action, Charles D. McClure, the Diamond R Mining Company, and A. W. Merrifield, United States marshal for the district of Montana, a copy of which bill is annexed to and made a part of the bill in the present suit, upon which bill the bank sought to obtain a decree adjudging that McClure "waived, abandoned, and lost" whatever lien he may have had or claimed upon the property of the mining company, by reason of his laches and unreasonable delay in enforcing his judgment, and also, in view of certain alleged frauds upon McClure's part, prayed that his aforesaid judgment be decreed to be void as to the bank, that the writ of execution issued thereon be recalled,

and that the defendants to the bill be enjoined from selling or disposing of any of the property of the mining company under that writ of execution. The trial court sustained McClure's demurrer to that bill filed by the Great Falls National Bank, and dismissed it, and, the case being brought here, we affirmed that judgment. Great Falls National Bank v. McClure et al., 161 Fed. 56, 88 C. C. A. 220. A similar bill to that brought by the bank was brought in the court below at the same time by the American Engineering Works against the same defendants, with a like result.

The bill in the present suit alleges that on or about the 7th of November, 1908, the Great Falls National Bank caused a writ of execution to be issued upon the aforesaid judgment recovered by it in the state court, and delivered to the sheriff of Cascade county, directing him to levy upon and sell any property of the Diamond R Mining Company found in that county to satisfy its judgment, and that at the same time the American Engineering Works caused a similar execution to be issued upon its aforesaid judgment recovered in the state court, with like directions to the sheriff. The bill in the present suit then alleges:

"That said defendants American Engineering Works and Great Falls National Bank, conspiring together to harass your orator and to defraud and deprive him of his said property, and ignoring and disregarding the decrees and orders and process of this honorable court, and well knowing that said property was then and there and still is the property of your orator, directed and procured said sheriff to levy or make a pretended levy upon and sell certain of said mining property described in said Exhibit A, and so belonging to your orator, including said ore bins, tramway, blacksmith shop, and portion of said power house described in said Exhibit A, and certain other of the fixtures and appurtenances of said mining property so transferred to and owned by your orator as hereinbefore fully set forth; that on the 20th day of November, 1908, said sheriff made a pretended sale of said property under said writs of execution to one R. S. Ford, for and on behalf of said Great Falls National Bank; that said defendant Ed Hogan, as such sheriff as aforesaid, has given notice, by posting and by publication, that he will sell the Equator quartz lode mining claim at public auction on the 4th day of December, 1908, at the city of Great Falls, Mont., under and by virtue of said writ of execution aforesaid; that said defendants will, unless restrained by your honors, sell said Equator quartz lode mining claim (said mining claim being a part of the real property described in Exhibit A hereto attached), and will seize and remove said fixtures and appurtenances so pretended to be sold on November 20, 1908, as aforesaid, thereby greatly injuring the said property of your orator and casting a cloud upon the title of your orator to said mining property, all to the great and irreparable loss and injury of your orator."

The contention on the part of the appellants is that the Equator quartz lode mining claim, which they admit was owned by the Diamond R Mining Company, was not levied upon under the writ of attachment issued in the suit of McClure against the mining company, and was never sold by the marshal under the execution issued in that action, and was never conveyed by his deed to McClure. The marshal's certificate of sale expressly states that it was so sold, and his deed to McClure, made in pursuance of the certificate and sale, purports to convey among other properties sold, the Equator quartz lode mining claim. This is not questioned by the amended answer or the cross-bill. It is true that in those pleadings it is alleged that the sheriff's certificate of sale and deed are void as to the Equator claim for the reason that it was not covered by the writ of attachment issued in the action of McClure

against the mining company, and was not in fact sold by the marshal under the execution issued in that action. But the bill in the present case shows that the bank expressly alleged in its former bill that the Diamond R Mining Company had no other property than that covered by the attachment issued and levied in the action of McClure against the mining company, and also alleged, in express terms, that McClure, in his aforesaid action, levied upon and attached "all the property, of every kind and character, belonging to the said defendant Diamond R. Mining Company," and, further, that in the aforesaid action of the bank against the mining company, the sheriff of Cascade county, Mont., levied upon "all and singular the same and identical real estate and appurtenances aforesaid, including the concentrator building, power house, and all other buildings situated upon and appertaining to said real estate."

Those allegations, being at the time verified and remaining unexplained, preclude the bank from now relying upon contrary allegations. "Any confession or admission made in pleading in a court of record, whether it be express, or implied from pleading over without a traverse, will forever preclude the party from afterwards contesting the same fact in any subsequent suit with his adversary." Bouvier, Law Dictionary (11th Ed.) "Estoppel by Matter of Record."

Section 6807 of the Revised Codes of Montana, in force at the times here in question, provides that judgments of the district court of the state become a lien upon all of the real property of the judgment debtor within the county from the date of its docketing, and that such lien continues for six years. Whatever lien the Great Falls National Bank may have acquired on the Equator quartz lode mining claim by virtue of the writ of attachment issued in its action against the Diamond R Mining Company became merged in its judgment entered February 12, 1902, and, by virtue of the Montana statute cited, expired February 12, 1908. Regardless of any attachment lien in McClure's favor, his judgment became a lien on all of the real property of the mining company by virtue of the United States statute (Act Aug. 1, 1888, c. 729, § 1, 25 Stat. 357, 4 Fed. St. Ann. 5 [U. S. Comp. St. 1901, p. 701]), and the sale under that judgment passed the title of the judgment debtor to the purchaser.

The judgment is affirmed.

MONTANA COAL & COKE CO. v. KOVEC.

(Circuit Court of Appeals, Ninth Circuit. February 7, 1910.)

No. 1,705.

1. MASTER AND SERVANT (§ 288*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—ASSUMPTION OF RISK.

A coal miner, directed by his employer to operate an engine about which he had no knowledge or experience and was given no instruction, cannot be held as matter of law to have assumed the risk.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1068-1088; Dec. Dig. § 288.*]

Assumption of risk incident to employment, see note to Chesapeake & O. R. Co. v. Hennessey, 38 C. C. A. 314.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. MASTER AND SERVANT (§§ 153, 288, 289*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—ACTION—QUESTIONS FOR JURY.

Plaintiff, who was a coal miner employed by defendant in its mine, was directed by his superior to go and operate an electrical engine used to draw cars up an incline. There was gearing on either side of the place where he stood in operating the engine, within one or two feet, wholly unguarded, and he was required to keep his foot on a brake which vibrated with the action of the engine. His foot slipped from the brake, and he fell against the gearing and was injured. He had no experience in running the engine, and was given no instruction. *Held*, that defendant was chargeable with breach of duty in setting him at such work without instruction, and that, while the gearing could be seen and the danger therefrom was apparent if a person fell into it, the questions of assumption of risk and contributory negligence were properly submitted to the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 314-317, 1068-1132; Dec. Dig. §§ 153, 288, 289.*]

In Error to the Circuit Court of the United States for the District of Montana.

Action by Andrew Kovec against the Montana Coal & Coke Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Carpenter, Day & Carpenter, for plaintiff in error.

Thomas J. Walsh and Cornelius B. Nolan, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. The defendant in error sued and recovered a verdict and judgment for damages in the court below against the plaintiff in error for injuries sustained by him under circumstances hereinafter indicated. The case shows that he was in the employ of the company for several years as an ordinary coal miner, and was so working on the day of the accident to him. There was testimony going to show that the mine was a deep and extensive one, and that in the working of it cars of coal were drawn up various slants to the main track by means of engines operated by electricity. At other places they were drawn by mules.

William England testified, on behalf of the plaintiff, that he was employed by the company at the time the plaintiff was injured; that as the operations were carried on it was necessary that somebody should always be with the cars while they were moving, and also some one to operate the engines; that the engine by which the plaintiff was injured was at the second slant, as it was then called, some distance below the surface of the ground. Being asked whether there is a "driver for every engine there is in the mine," the witness answered:

"A. Well, there is a regular engineer for some of them, and in some places where there is not so much to do the driver does it. Q. That is, there is an engineer in some places where there is a lot of work to be done with the engine? A. Yes, sir. Q. And in places where there is not so much work. you say, it is done by a driver? A. Yes, sir; if there is one there. Q. Did you ever know of the work being done there by anybody else other than the driver or an engineer? A. I don't know. I think they did on night shifts. Sometimes there was a driver and sometimes there wasn't. Q. Of course, if there was not a driver there, and if there was not an engineer there, and it became necessary to operate the engine, it would have to be operated by whom? A. By the fellows who were working there. Q. Do you know whether they were engineers or not? A.

*For other cases see same topic & § NUMBERS in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

No, sir; I don't. Q. You were not an engineer, were you? A. I wasn't altogether one. I have had some experience with them. Q. You have had some experience? A. I have run them lots of times. Q. Do you think that it requires any experience to operate one of those engines? A. You have got to be shown how to run it all right. Q. What do you say? A. You have got to be shown how to run it. I know I did. Q. Now, were you the driver in this particular slant, where this particular engine was operated? A. There was two drivers there. There was one driver off that day; but I was supposed to be there that day, I guess. The other driver was out hunting. Q. The other driver was out hunting? A. Yes, sir. Q. Did you yourself have occasion to use that engine that day before the accident? A. Yes, sir. Q. About how many times? A. Either four or five times. I don't remember exactly. About four times, I guess. * * * Q. When you were operating the engine there, to what matters did you have to give attention? A. Well, you fixed the engine first, and then you had to give attention to the cars when they were coming up. Q. Did you have to use your hands at all? A. Yes, sir; you had to use one on the clutch, and one on the lever. Q. Did you have to use your feet? A. Yes, sir; one foot for the brake. Q. Did you have to use your eyes? A. Yes, sir. Q. What would you be using your eyes upon? A. Watching the cars. Q. Now, going to the brake itself, as it was there that morning, will you tell us its location? A. It was underneath. You had your foot down on it like that (illustrating). It was underneath. Q. Underneath? A. Yes, sir. Q. Do you know whether there were any timbers near it? A. Yes, sir; I do. Q. What character of timbers were they? A. I don't know what you would call them. They were big 2x4's like. About that wide (indicating), I guess; about 12 inches, I guess. Q. In operating the engine, where were you standing with reference to where the brake was, and with reference to the space caused by those timbers? A. Standing right in them. There was one across there, and one in back there, and one along the sides like that (illustrating). Q. So that you were in a kind of a box, were you? A. I was standing right here (illustrating). Q. As to the brake itself, what kind of a piece of mechanism was it? A. It was a piece about that wide (indicating). I guess; and it ran out that way (indicating). I never looked at it much. Q. Was it wider than the sole of a man's shoe? A. Not much wider, if it was any. Just about the size, I guess, of a man's shoe; about the size of your shoe. Q. Do you know whether or not it was perfectly still there that morning? A. No; it kept shaking when the trip was coming up—when it was pulling on the engine. Q. It kept shaking? A. Yes, sir. Q. Did you see any gearing there? A. Yes, sir. Q. Where was the gearing, with reference to where you were standing? A. Right on the side; on the lefthand side. Q. Could you tell us whether that treadle or that brake was so constructed there, or was of such a character, that you miss it or slip on it? A. Well, I guess if you would slip on it, you would be liable to fall. Q. If you did fall, where would you fall with reference to the gearing? A. You would fall into them, I guess. There is two of them there—either on the right side or left side. Q. What would you say as to whether or not, in your judgment, that gearing, as it was there, was reasonably safe? A. It was not, if you would fall. It was safe, if you were standing up. Q. There is no doubt about that. But, in the light of the fact that you might fall, what would you say as to whether or not, in its exposed condition there, it was reasonably safe? A. No, sir; it was not. Q. About how far away was the gearing from the man who stood there operating the machine? A. It would be about like this (illustrating). Q. About a foot or two away from him? A. Yes, sir."

There was testimony tending to show that on the day of the plaintiff's injury he was working in the mine at his regular employment as a common miner, when he was told by the boss having supervision of him to run the engine concerning which England was questioned; that the plaintiff knew nothing about machinery, and was not given any instructions in respect to the operation of the engine, nor told of the dangers attending the running of it; that shortly after he undertook its operation his foot slipped from the brake, thereby throwing him on

to the cogwheels, which were unguarded, and which resulted in the loss of one of his hands.

The sole point made on behalf of the plaintiff in error is that the court below erred in refusing to grant a motion made by it for a nonsuit, and likewise erred in refusing, upon the conclusion of all the testimony, to grant a motion made on its behalf for an instruction to the jury to render a verdict for the defendant. In submitting the case to the jury, the trial court did so in instructions so fair and clear that no exception thereto was taken by either party to the action. We therefore have to deal only with the refusal of the court to take the case from the jury, to which action the defendant reserved an exception, and, in support of its assignment of error in that behalf, contends that it appeared from the evidence, first, that the plaintiff was not compelled to operate the engine; second, that the danger from operating it with an exposed cogwheel was obvious to the plaintiff, and that he therefore assumed the risk of operating the engine with that danger in view; and, third, that putting his foot on the brake as he did was contributory negligence on his part.

The contention that the plaintiff was a volunteer in the work which resulted in his injury, in view of his testimony that he was afraid to disobey the order of the boss lest he might lose his job, is wholly without merit. So, too, is the contention that the plaintiff assumed the risk that resulted in his injury. The plaintiff undoubtedly assumed the risk incident to the work for which he was employed, namely, that of a common miner; but when he was, by the defendant's direction, taken from that work and ordered to operate machinery, about which he knew nothing and was told nothing, surely a trial court should not be held to have erred in submitting to the jury, under correct instructions, the question of the assumption of risk upon all the facts and circumstances of the case, especially where, as in the instant case, there was testimony tending to show that the brake from which the plaintiff's foot slipped, thereby causing his fall and injury, vibrated more or less violently when the engine was put in motion, which danger could not be obvious to one not familiar with such machinery when it was not in operation.

In the case of *Mountain Copper Company v. Pierce*, 136 Fed. 150, 69 C. C. A. 148, where an inexperienced servant was directed by the defendant smelting company to adjust a belt on a pulley shaft, without instructing him with reference to a collar and set screws projecting from a shaft, by which he was caught and seriously injured while endeavoring to adjust the pulley, we said:

"He [the plaintiff] testified that he knew nothing about the collar or set screws, and that neither the foreman, nor Ryan, nor any one else, told him of their existence, nor the danger attending the operation, or how to perform it. While it is contended on the part of the plaintiff in error that both the collar and set screws could have been seen by the defendant in error if he had properly looked, it is not contended that he was told of their existence, or of the danger attending the operation or how to perform it. True it is that the defendant in error knew that it is dangerous to approach shafting, belting, or other machinery in motion. That fact not only appeared from his own testimony, but is a matter of such common knowledge that every one in his senses must be held to know it. Nevertheless it is the duty of the master, before sending or permitting an inexperienced employé to perform such dangerous work, to instruct him how to perform it, and especially to inform him of any

hidden, concealed, or obscure danger. * * * The law in our opinion made it the duty of the plaintiff in error to inform the defendant in error of the collar and set screws, and how to perform the dangerous task, before sending or permitting him, in the course of his employment, to undertake it."

The defense of contributory negligence, interposed by the defendant to the action, was also properly submitted to the jury under proper instructions.

The judgment is affirmed.

JANOSKI v. NORTHWESTERN IMPROVEMENT CO.

(Circuit Court of Appeals, Ninth Circuit. February 7, 1910.)

No. 1,768.

1. TRIAL (§ 178*)—DIRECTION OF VERDICT—GROUNDS.

In passing on a motion to take a case from the jury, it is the duty of the court to take that view of the evidence most favorable to the party against whom the motion is made, and from that evidence, and the inferences reasonably and justifiably to be drawn therefrom, determine whether or not, under the law, a verdict for such party could be found.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 402; Dec. Dig. § 178.*]

2. MASTER AND SERVANT (§ 289*)—ACTION FOR INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Evidence considered, in an action against a coal mining company to recover for the death of an employé, who was killed by the sudden starting of machinery about which he was working, making repairs, and held such as to require the question of his contributory negligence to be submitted to the jury.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 289.*]

In Error to the Circuit Court of the United States for the Western Division of the Western District of Washington.

Action by Josephine Janoski, in her own behalf and as guardian ad litem of Agnes Janoski, a minor, against the Northwestern Improvement Company. Judgment for defendant, and plaintiff brings error. Reversed.

Bates, Peer & Peterson, for plaintiff in error.

George T. Reid and J. W. Quick (Charles S. Gleason, of counsel), for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. The plaintiffs in error were plaintiffs in the court below; the defendant in error being the defendant there. We are of the opinion that the trial court erred in directing, as it did, a verdict for the defendant. The action was for damages for the death of one John Janoski, alleged to have been caused by the negligence of the defendant. The complaint alleged, among other things, that the deceased was employed by the defendant as carpenter, electrician, and machinist in and about its coal mines in Pierce county, Wash., where the defendant maintained a large transmission wheel, about 12 feet in

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

diameter, over which a rope ran, furnishing the power to certain of its machinery; that on October 5, 1907, Janoski was directed by the defendant's superintendent to go upon an elevated platform surrounding the wheel, which platform was, according to the evidence, about 4 feet wide, and to remove certain twists and kinks from the rope, and also to remove a piece of 2-inch pipe which had been stuck through the spokes of the wheel, and that while Janoski was engaged in that work the superintendent caused the wheel to be suddenly started without warning to the deceased, resulting in his fall and subsequent death. The answer of the defendant, besides denying the allegations of negligence on its part, pleaded, among other things, contributory negligence on the part of Janoski, which affirmative defense constituted the ground of the court's ruling, as will be seen from its opinion which is as follows:

"I think the defense of contributory negligence on the part of the deceased has been fully made out, in all views that may be taken of the case, by the uncontradicted evidence and by the testimony of witnesses who were there and have been called as witnesses for the plaintiff. He was in a situation which required care on his part, as well as every man there, for his own safety and that of those who were working with him. If he knew that the wheel was about to be started in operation with the gas pipe block in, that it was liable to cause injury to the machinery, or inflict an injury to himself or any person there, he was under obligation to check it. All he had to do was to say, 'Wait.' One word would have been sufficient to delay the starting of the machine until he could have removed the pipe. He must be assumed to know that the gas pipe was there; for, according to the testimony, he put it there, and was in the best position for any one to see it. He was the one who would have removed it, if it had been removed, and in disregard of the warnings which others had, and which he could have heard if he had been paying attention, it must be assumed that he was for the time being inattentive, to permit the machine to be started without first removing the gas pipe; that not doing so was negligence, and at least a contributing cause of the injury, if that piece of pipe caused the injury. I grant the motion."

As a matter of course the court cannot, in such cases, undertake to weigh conflicting evidence, and the law is well settled that in passing upon a motion to take a case from the jury, it is the duty of the court to take "that view of the evidence most favorable to the party against whom it is moved to direct a verdict, and from that evidence, and the inferences reasonably and justifiably to be drawn therefrom, determine whether or not, under the law, a verdict might be found for the party having the onus." *Mt. Adams & E. P. Inclined Railway Company v. Lowery*, 74 Fed. 463, 20 C. C. A. 596; *Jenkins & Reynolds Company v. Alpena Portland Cement Company*, 147 Fed. 641, 77 C. C. A. 625, and numerous cases there cited.

It appears from the record that there was testimony going to show that one McDowell was the superintendent and one Hosko was the machinery foreman of the mine, and that about 25 or 30 feet out from and to one side of a point underneath the wheel was what was called a picking table, at which workmen picked out slate. John Urick, a witness on behalf of the plaintiffs, testified, among other things, as follows:

"I was blacksmithing, helping around the machinery in all kinds of work. John Janoski was a carpenter, electrician, looked after machinery, and certain parts of the work we helped each other in. He got hurt on Saturday between

2 and 3 o'clock in the afternoon. John and I were out in the blacksmith shop that day eating our dinner—we were late to dinner—when Hosko, the bunker boss and machinery foreman for the mine, came over to the blacksmith shop and wanted us to splice the rope on the big transmission wheel. We went over to the bunker to do this. There was there at the time a fellow who was picking slate, a couple of Italians, George Dorke, Hosko, and I, and John Janoski and Mr. McDowell came with us. When Janoski and I first came there, we took the tightener up with the block and tackle. Mr. McDowell was there at the time. This tightener was taken up with a block and tackle to give slack to the rope, and bring it down on the floor, so we could splice it. We raised that up, and the rope was not exactly on that side. We had to turn the wheel before we raised that up, so that the rope came on the side so we could splice it. The part of the rope that needed splicing was not on the left side of the wheel, but was further over, and you had to turn the wheel to get it where you could splice it. We then raised the tightener up, took the rope off there to go ahead with our splicing. While we were doing this the transmission wheel was moving a little. It pulled the rope out of our hands while we were splicing. We decided to put something in the wheel to keep it from turning around. Hosko, Mr. McDowell, Janoski, and I were all there, and we all said, 'We got to block that wheel.' We put a piece of pipe under the spoke in the big wheel on the upper platform. To loosen the rope we raised the tightener up. When the rope would come off here, it would come down on the floor, and we spliced it right there on the floor. We were putting the pipe in there (indicating the spoke of the wheel). John Janoski put the pipe in, and put the pipe right in this spoke here (referring to the spoke in the big wheel). He put the pipe right across here, maybe eight feet long. The pipe was lying on the platform all the time. We were trying to put the groove in that side. Janoski put this pipe that was lying there through the wheel. At this time Mr. McDowell and Hosko were standing down below where Janoski was. There was nothing to prevent us from seeing what Janoski was doing. I saw Janoski put the pipe in. After Janoski had done that he came down on the floor, and we commenced to splice the rope. It probably took half or three-quarters of an hour to splice the rope. McDowell was there all the time, from start to finish. After the splicing was done, Janoski went on top, loosened the tightener, and let it down. I was underneath, holding the rope. I was standing right there (indicating platform on model directly under wheel), on the right side of the wheel. We put the rope here (indicating), after Janoski let the tightener down. We have to turn the wheel once or twice on the shaft before it tightens the rope up. Little kinks form in the rope, made by the splicing. After Janoski let the tightener down, he went up to straighten the kinks, put the rope in the groove. He could not reach from below, had to go up. He straightened the kinks out, so that when the wheel started the rope would run in the proper groove. If we did not do this, it would tangle and tear everything. When Janoski was taking the kinks out above, I was taking the kinks out down below, so the rope would follow in the groove. While we were doing this, Hosko was walking over toward the picking table, and he said, 'Watch yourselves!' to George and the others at the picking table and down below in that part of the washer house. After he had said that, he stepped back toward the wheel, and said to Mr. McDowell, 'Are you ready to start up?' Mr. McDowell said he was, and to ring the bell. When this signal was given, Janoski was straightening up the kinks, had not got his work done, and was not ready for the thing to start. When Hosko rang the bell, the engineer happened to be right near the clutch in the engine room, and threw it on quick, and the machinery started up, all at once. The pipe bent, went around, and hit Janoski on the head, and knocked him down on the floor where I was standing. Before McDowell told Hosko to start the machinery, no one asked Janoski if he was ready to have it started. At the time he was still working taking out the kinks, and I was holding the rope from below. Janoski did not say that he was ready for the machinery to start. He did not say anything."

Certainly this was testimony tending to show that the superintendent knew of Janoski's position, what he was doing, and without any notice to him, and without making any inquiry as to whether Janoski had

finished the work he was sent to do, that he directed Hosko to ring the bell and start the machinery. And there was more testimony tending in the same direction. George Dorke, a witness for the plaintiffs, testified, among other things, as follows:

"I remember when the splicing of the rope was done the day that John Janoski was hurt. There were present during the time the splicing was being done John Urick, John Janoski, John Jacobson, Mr. McDowell, the superintendent, and Hosko, the bunker boss. They were about half an hour at the work. I was working shoveling out rock at my working place while they were splicing the rope, finishing my work about ten minutes before the splicing was completed. There were two Italians, named Frank and Mike, who were at work down below me on the ground; one pushing out to a rock pile the rock I had shoveled out, and the other shoveled out slack. There were wheels and chains that drive the pulley and hoisting chains located near their working places. This machinery was standing still while the splicing was being done, the same as the picking table and other machinery about which I was working. When I got through with my work, I sat down on the edge of the table and waited for them to start. I did not go up where they were working. Shortly before the machinery started, Hosko stepped over to the edge that is open, where he could see down below in the bunker, toward where I was, and toward where the other boys were, below me. He said, 'Watch yourselves!' and I said, 'All right.' He was walking around doing something for a few minutes, I don't know what, and not walking toward the south end of the coal bunker. He said, 'Watch yourselves!' again. He came in there to see down below, and asked me for the other fellows, and I told him Frank was on the rock pile doing something, and he hollered out to Frank to come in, and Frank did so. After that he came down the third time, and did not see all of us, as little Mike was down below yet, and he was going to ask for him, and I told him he was not up yet. He was going to the south end again, and hollered out for Mike, who was working on the dumping pile, and he (Mike) was coming up the ladder to the south end, and little Frank answered for him. Hosko started over toward the wheel, and asked McDowell whether everything was ready to start. McDowell said, 'Yes,' he thought everything was ready to start. Hosko went and pulled the wire, stepped from the wheel up this direction to the southwest side to pull the wire, which gave the signal to the engine room. When he did that I turned myself to the table to do my work again when the rock came along, and I did not do any more than this when the engine started. Then I heard something drop, make a heavy fall. I turned around, and saw Hosko run for the wire to stop the machinery. The Italians and I ran up, and John Janoski was lying on the floor, unconscious."

John Urick, being recalled, testified among other things as follows:

"This same rope had been spliced on the previous Wednesday of that same week. John Janoski, Hosko, and I did the splicing. McDowell, the superintendent, was not there when we started splicing the rope on Wednesday, but came when we were about half through. The wheel was blocked that day with the same pipe that it was when Janoski was killed. I put the pipe in myself, and put it in the same way that Janoski put it in the time he got hurt. I took the pipe out of the wheel myself, and McDowell was there when the pipe was taken out and when the machinery started up again. Hosko started up the machinery on the order of McDowell. The day Janoski was hurt neither Hosko, nor McDowell, the engineer, nor any one said anything to him about not putting the pipe in the wheel. * * * When Hosko asked if everything was ready before he pulled the wire, McDowell said it was all right, and I said it was all right, because McDowell was there and said so."

Testimony was also given, apparently without objection, tending to show that McDowell said "that for the minute he had forgotten that Janoski was up on the platform, and that when he ordered the engine started he forgot all about Janoski being up there." Statements of

Hosko were also given in evidence, also without objection so far as appears, to the effect that "when he said, 'Watch yourselves!' he was talking to the pickers, and not to Janoski," and that "he also said he did not think anything about Janoski being on the platform when he started the engine, and that McDowell was the one who said, 'All right; go ahead,' as he (Hosko) asked if they were all ready."

We think it clear that the case was one for the consideration and determination of the jury, under appropriate instructions, and accordingly must reverse the judgment and remand the case for a new trial.

Ordered accordingly.

GIMBEL BROS. V. GLOVERSVILLE SILK MILLS.

(Circuit Court of Appeals, Second Circuit. February 8, 1910.)

No. 122.

1. SALES (§ 53*)—VALIDITY OF CONTRACT—WAIVER OF CONDITION—QUESTION FOR JURY.

Defendant, which conducted a large department store, had a rule, known to plaintiff, that no order given by it for goods should be valid unless confirmed by its registry bureau. Its glove buyer gave an order to plaintiff for gloves to be made and shipped in the future, a certain portion each month. Such order was not registered; but a subsequent order was given, covering deliveries to be made in part during the same months, and was registered. Deliveries were made during certain months in accordance with the terms of the first order, but not with the second, and the goods were received and paid for, but subsequent shipments were not paid for. There was also correspondence between the parties relating to the first order, which tended to show that defendant had knowledge of and recognized such order. *Held*, that the question whether defendant had waived its requirement of registry with respect to such order, and was bound thereby, was properly submitted to the jury.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 53.*]

2. APPEAL AND ERROR (§ 1050*)—REVIEW—HARMLESS ERROR.

Where defendant refused to receive and pay for goods which plaintiff claimed it had ordered, denying the validity of the order, because not registered as required by its rules, which were known to plaintiff, but plaintiff claimed that such rule had been waived, the reception of evidence that the market price of the goods had declined before defendant refused to accept them, even if not relevant to the issue of waiver, was not prejudicial error.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1050.*]

Ward, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Northern District of New York.

Action by the Gloversville Silk Mills against Gimbel Bros. Judgment for plaintiff, and defendant brings error. Affirmed.

The defendant in error, which was plaintiff in the court below and will hereinafter be so designated, is a New York corporation engaged in the manufac-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ture of silk gloves and located at Gloversville, N. Y. The plaintiff in error, which will hereinafter be called the defendant, is a Pennsylvania corporation engaged in the operation of a large department store in Philadelphia. This action was brought to recover the price of a quantity of silk gloves alleged to have been manufactured by the plaintiff upon the order of the defendant and duly shipped to, but not paid for by, the latter. The defendant denied that the gloves in question had been ordered by it, and set up, particularly, that there was a regulation of its business, of which the plaintiff had knowledge, that no order should be valid unless confirmed by its registration bureau and that any order accepted in disregard of such regulation should be at the seller's risk. The action was tried before a jury, and a verdict rendered for the plaintiff. The defendant has brought this writ of error. Other material facts are stated in the opinion.

Jellenik & Stern (B. N. Cardozo and Nathan D. Stern, of counsel),
for plaintiff in error.

H. D. Wright, for defendant in error.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

NOYES, Circuit Judge (after stating the facts as above). It is clear that, if the question of registry were out of the case, the verdict of the jury was not improper. There was evidence from which they might have found that the gloves were ordered, were manufactured as ordered, were delivered, and were not paid for. It is likewise certain that the regulation of the defendant that orders should not be binding unless registered was a valid requirement of which the plaintiff had notice. We shall also assume that the registry regulation applied to the order in question. As, then, it is admitted that it was not registered, the defendant was entitled to a verdict, unless it waived the registry requirement. The case turned upon the question of waiver.

The trial court submitted to the jury this question whether the defendant waived its registry regulation, and the primary inquiry here is whether there was evidence to justify such submission. In considering this question we are not to weigh the testimony upon the one side and the other. The conclusion which we might reach is immaterial. We have only to determine whether, considering all the testimony and all the circumstances, and the inferences most favorable to the plaintiff properly to be drawn therefrom, the jury were warranted in finding that the registry regulation was, with respect to this order, waived. To present clearly the testimony bearing upon the question of waiver requires a brief preliminary statement of the evidence, showing the situation of the parties before that question arose. There was evidence from which the jury might have found these facts:

The plaintiff manufactures silk gloves upon orders only, and for several years prior to 1907 had had dealings with the defendant. About April 1, 1907, the plaintiff's Philadelphia agent, one Minster, called upon one Montague, who was the buyer for, and manager of, the defendant's glove department. Montague gave Minster an order for gloves for delivery in 1908, and a detailed statement was prepared showing the styles, sizes, and colors required. A short time afterwards this order was modified at the request of the plaintiff through

Minster, and a considerable part of it canceled. In September, 1907, certain additional changes and cancellations were made at the request of Montague and a new order was made out. Again in November, 1907, Minster and Montague had another interview concerning further changes in the order, and as a result a final revised order was agreed to for gloves to the amount of \$9,816, to be delivered in February, March, April, May, June, and July of 1908. Neither this order nor the preliminary orders were registered. This revised order is the one upon which the plaintiff bases its demand. It says that, while a large part of the goods embraced in this order were delivered and paid for according to its terms, certain later deliveries were not paid for. The defendant on its part calls the alleged order a mere estimate, and were we weighing the testimony there would be much to support its contention. But, as already stated, there was evidence to warrant the jury in finding that the order was given as such, and that is sufficient here.

Coming, then, to the question of waiver—as it is admitted that large shipments of gloves were made by the plaintiff to the defendant during the period covered by the unregistered order and were accepted and paid for by it—there would be little difficulty, if there were no other orders involved, in finding that there was an order which the parties treated as valid and subsisting, whether registered or not. But this was not the case. Montague did obtain in January, 1908, the confirmation by the defendant's registry bureau of an order to the plaintiff for \$4,300 worth of goods. But, as pointed out in the defendant's brief, there was no similarity between the registered order and the revised and unregistered order to which we have referred. The registered order calls for \$300 in February; the unregistered, for \$294. The registered order calls for \$1,000 in March; the unregistered, for \$1,518.50. The registered order calls for \$1,500 in April; the unregistered, for \$1,881.50. The registered order calls for \$1,500 in May; the unregistered, for \$3,350.50. The registered order does not call for anything for June or July; the unregistered calls for \$2,182.50 and \$463, respectively. A second order was registered by the defendant in April, 1908, for goods to the value of \$387.50; but this order seems to have no especial significance in the case.

In determining, then, whether the defendant insisted upon following its registered order, or recognized the revised order as in force although unregistered, we must look to see whether the goods actually shipped to, and accepted and paid for by, the defendant correspond to the requirements of the one order rather than the other. If the shipments made and accepted were in accordance with the unregistered order, and not in accordance with the registered order, the inference could properly be drawn that the defendant recognized the former, notwithstanding the want of registry. The registry requirement was for its own benefit. It could disregard it if it chose. It could waive it by recognizing and living up to unregistered orders. Now the testimony shows that for three months shipments were made to, and accepted by, the defendant which corresponded to the unregistered order, and not to the registered order. Thus:

February:

Goods called for by unregistered order.....	\$ 294 00
Goods actually shipped and paid for.....	294 00
Goods called for by registered order.....	300 00

March:

Goods called for by unregistered order.....	\$1,644 50
Goods actually shipped and paid for.....	1,644 50
Goods called for by registered order.....	1,000 00

April:

Goods called for by unregistered order.....	\$1,881 50
Goods actually paid for.....	2,007 50 ¹
Goods called for by registered order.....	1,000 00

It also appears that \$399 was paid for a shipment of May 1, 1908, but whether this included goods included in the second registered order for \$387.50 does not appear. Indeed, the testimony covering the shipments and payments could not have been presented in more unsatisfactory form. The later shipments admittedly were not paid for. There was thus testimony that several shipments which were accepted and paid for by the defendant corresponded exactly with the unregistered order, and not at all with the registered one. The defendant paid for many more gloves than its registered order called for. Furthermore there was testimony that the registered order was wholly deficient in details of styles and colors and that goods could not have been shipped under it alone. There was also testimony tending to show that the details of the unregistered order were followed.

Letters from the defendant were also introduced in evidence tending in some degree to show that it had knowledge of the existence of the unregistered order and recognized it. Thus in March, 1908, the plaintiff wrote the defendant about the June and July deliveries of the unregistered order—the registered order called for nothing in either month—and inquired whether the quantities ordered would be sufficient, and asked for additional orders. The defendant did not disclaim orders for these deliveries, but said:

"We have gone over the later deliveries with Mr. Minster and made all the changes we think wise. We will place no further orders now."

So there are other items of correspondence tending to show a recognition by the defendant of the unregistered order.

Without further reviewing the testimony, it is sufficient to say that, in our opinion, taken all together it was of such a nature that the court was bound to submit to the jury the question whether the defendant waived the registry regulation with respect to the order. This disposes of the first question in the case.

It is next contended by the defendant that the trial court erred in charging the jury that the acceptance of, and payment for, part of an unregistered order might be a waiver of the requirement of registration, because there was no evidence of the acceptance of part of any unregistered order. As we have just seen, however, there was testimony tending to show such acceptance. The charge of the trial court was right.

¹ Note.—The difference between the amount paid and the amount of the unregistered order—\$126—seems to cover a special shipment of 12 dozen gloves.

It is also urged that the court erred in admitting in evidence the letters signed "Gimbel Bros., per Montague," and "Gimbel Bros., per Lloyd." These letters tended in some degree to show a waiver of the registry regulation, appear to have been sent and received in regular course of correspondence, were upon the defendant's letter heads and were signed by the defendant through its apparently authorized agents. There was no error in admitting them.

It is finally urged that the court erred in allowing the plaintiff to prove that the price of gloves had fallen in the spring of 1908. Of course, the defendant is right in the proposition that, if the defendant had not waived the registry regulation, it would not have been bound by the unregistered order, irrespective of motive. Equally true is it that, if it had waived the registry provision, it could not have escaped the order no matter how much it desired to. But still, for the purpose of throwing light upon the conduct and situation of the parties and as explanatory of any change in the position taken by the defendant, we think there was no prejudicial error in receiving the testimony. And if, as the defendant says, the evidence did not, in reality, tend to impeach its version of the transaction any more than it did the plaintiff's, there was certainly no such error in receiving it as requires a reversal of the judgment.

No prejudicial error is disclosed in any of the remaining assignments of error.

The judgment of the Circuit Court is affirmed.

WARD, Circuit Judge (dissenting). The trial judge charged, and the opinion of the court assumes, that business was to be done between the parties upon registered orders restricting the amount of the defendant's liability. The purpose of the system was to protect the defendant against contracts made by its buyers. In view of this the original calculation by the defendant's buyer of business for 1908 could not have been a contract binding on the defendant. But the court is of the opinion that there was evidence entitling the jury to find that this original estimate, as subsequently revised, became the contract between the parties, and that the system of registered orders was waived. Such a conclusion cannot be admitted, unless what was done by the defendant was inconsistent with the registered order system. The facts that the registered orders given by the defendant for 1908 did not equal the amount of business which its buyer estimated would be done, that those orders left the specifications for the goods to be manufactured to be fixed either by the estimate or by the buyer, and that the buyer was permitted to change the dates of shipment mentioned in the registered order, seem to me entirely consistent with the system of registered orders and no evidence of waiver of the condition that the amount of the defendant's liability was to be fixed by it. Testimony that the market price of gloves fell before the defendant refused to register further orders was entirely irrelevant upon the question whether the defendant had waived the agreed method of doing business. The purpose was to show a motive for the defendant's position, and, even if the testimony might also show a motive for the plaintiff's position, the defendant's objection, if good, should have been sustained.

I think the judgment should be reversed.

SCRUGGS & ECHOLS v. AMERICAN CENT. INS. CO. OF ST. LOUIS.

(Circuit Court of Appeals, Fifth Circuit. February 22, 1910.)

No. 1,906.

1. INSURANCE (608*)—ACTIONS ON POLICIES—EQUITY JURISDICTION.

Where each of several policies of insurance on the same property contains a clause providing that "this company shall not be liable under this policy for a greater proportion of any loss on the described property * * * than the amount hereby insured shall bear to the whole insurance, whether valid or not," they are independent contracts, the liability of one company not being affected by that of any other, and afford no ground for a resort to equity for an accounting, or to enforce contribution, or for the granting of an injunction at the suit of one insurer restraining the prosecution of actions at law against the others.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 608.*]

2. EQUITY (§ 51*)—ACTIONS ON POLICIES—EQUITY JURISDICTION—PREVENTING MULTIPLICITY OF SUITS.

The fact that an owner of property which has suffered a loss through fire is compelled to bring several actions at law against different insurers does not entitle one of such insurers to appeal to equity on the ground of preventing a multiplicity of suits.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 167-171; Dec. Dig. § 51.*]

Appeal from the Circuit Court of the United States for the Northern District of Alabama.

Suit in equity by the American Central Insurance Company of St. Louis against Scruggs & Echols and others. Decree for complainant, and defendants Scruggs & Echols appeal. Reversed.

This suit was brought in the court below by the appellee, a Missouri corporation, against the appellants, citizens of Alabama, and three fire insurance companies.

The following is a brief statement of the facts alleged in the bill:

The appellee, American Central Insurance Company of St. Louis, issued its policy of insurance to appellants, Scruggs & Echols, in the sum of \$2,500, covering a building as therein described. Three other companies, which are made defendants, issued separate policies to Scruggs & Echols covering the same building. It was provided in each of these four policies that "no company shall be liable under its policy for a greater proportion of any loss on the described property, or for the loss by and expense of removal from premises endangered by fire, than the amount insured by such policy shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property." Each of said policies also provided: "This entire policy shall be void if the interest of the insured in the property be not truly stated herein," and that "this entire policy, unless otherwise provided by the agreement indorsed hereon or added hereto, shall be void if the interest of the insured be other than unconditional and sole ownership," or "if the subject of insurance be a building on ground not owned by the insured in fee simple."

While the policies were in effect, a fire occurred, by which the building, the subject of insurance, was partially destroyed; the total amount of damage thereto being less than the aggregate amount of insurance stated in said four policies. The interest of the insured in the property was not in said policies truly stated. The interest of the insured in the property, the subject of insurance, was other than unconditional and sole ownership. The building, the subject of insurance, was on ground not owned by the insured in fee simple.

The insured brought suits on each of said policies in the circuit court of Morgan county, Ala., claiming in each suit the full amount stated in the policy

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes

as for a total loss. The suit against the American Central Insurance Company of St. Louis was removed by it to the United States Circuit Court for the Northern District of Alabama. In that court it filed its bill, making the insured and the other insurance companies parties defendant, and praying, among other things, that said Scruggs & Echols be restrained from prosecuting any further the said original suits brought in the state court, or from undertaking to enforce their rights in any court, except in the United States Circuit Court for the Northern District of Alabama, and in that cause, and that they be enjoined from prosecuting the suit at law so removed to the United States Circuit Court, and that its said policy be set aside, and declared to be null and void; but that if said insurance companies, or any of them, should be held to be liable in any amount to said Scruggs & Echols, that the liability be decreed to be one calling for contribution and apportionment upon the part of each company so liable, in the proportion which the insurance it may have upon the property insured bears to the total insurance upon such property, whether valid or not; and that an accounting be had to ascertain the actual value of the property destroyed by fire, and the amount, if any, for which the several insurance companies are liable, and the amount of the insurance upon said property.

On the filing of the bill an order was made restraining the defendants, Scruggs & Echols, from the further prosecution of the suits against the insurance companies, pending the hearing of a rule to show cause why an injunction should not issue. Subsequently a motion to dissolve the temporary restraining order was overruled, and a temporary injunction was granted, enjoining the appellant from the prosecution of the suits on the policies until the further order of the court.

The defendants Scruggs & Echols demurred to the bill, and assigned as grounds of demurrer the following:

"(1) The bill does not state any sufficient cause for equitable cognizance or relief in favor of the plaintiff against this defendant.

"(2) The bill shows that the plaintiff has a plain, adequate and complete remedy at law, in this: It is provided in the policy of insurance issued by the plaintiff to this defendant, that the policy should be void if the interest of the insured in the property be not truly stated, or if the subject of insurance be a building on ground not owned by the insured in fee simple, and it appears from the bill that the interest of the insured was not truly stated in said policy, and that the subject of the insurance was a building that was on ground not owned by the insured in fee simple.

"(3) The bill shows that plaintiff had a plain, adequate, and complete remedy at law.

"(4) The bill shows that the policies of insurance issued by the defendant insurance companies to this defendant, upon which suit has been instituted in the circuit court of Morgan county, Alabama, are void, and that said defendants are under no liability to this defendant in respect thereto, in this: It is provided in each of said policies that the entire policy shall be void if the interest of the insured in the property be not truly stated, and it appears from the bill that the interest of the insured in the property was not in said policies truly stated.

"(5) The bill is inconsistent, in that it denies any liability to this defendant on account of the insurance policies described therein, and seeks an accounting between this defendant and the plaintiff, and between this defendant and defendant insurance companies, and an apportionment of the liability from the plaintiff to the defendant and from the defendant insurance companies to this defendant, between the plaintiff and the defendant insurance companies.

"(6) The bill does not disclose any privity between the plaintiff and the defendant insurance companies, and it affirmatively appears that there is no right of contribution among them."

The court overruled the demurrer. The defendants Scruggs & Echols declining to answer further, final decree was entered making the injunction perpetual as to all the suits on the policies, and annulling and declaring void the policy issued by the complainant.

It is assigned by appellants that the Circuit Court erred in overruling each ground of demurrer, and, with proper specification, that the court erred in the final decree.

E. W. Godbey and W. W. Callahan, for appellants.
Victor Lamar Smith, Theodore A. Hammond, and Richard W. Walker, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge (after stating the facts as above). The policy issued by the complainant, and each policy issued by the three insurance companies which are made defendants, contain this clause:

"This company shall not be liable under this policy for a greater proportion of any loss on the described property or for loss by and expense of removal from premises endangered by fire than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property."

It is alleged in the bill "that by virtue of said contracts of insurance each insurer is interested in the liability of the other." And it is urged in argument here that "this clause makes the contracts interdependent." Whether the contracts are interdependent, or separate and independent, is an important, if not the controlling, question presented. By the terms of the clause quoted, if one of the policies was held to be void, it would in no way affect the liability of the other insurers. The complainant's liability would not be affected if all three of the other policies issued by the defendant insurers should turn out to be void; nor would it be affected by one or all of the three defendant companies becoming insolvent. The policy issued by complainant would be in no way affected by the result of the enjoined suits on the other three policies. Whether the companies won or lost in these suits would not affect the insurer or insured so far as the policy issued by the complainant is concerned.

In *Lucas v. Jefferson Insurance Co.*, 6 Cow. (N. Y.) 635, the policies construed contained this clause:

"In case of any other insurance upon the property hereby insured, whether prior or subsequent to the date of this policy, the insured shall not, in case of loss or damage, be entitled to demand or recover on this policy any greater portion of the loss or damage sustained than the amount insured shall bear to the whole amount insured on the said property."

The court held that, where there are several policies containing this clause, they are all, and each, liable to pay the ratable portion mentioned in the clause, though it happen that some have voluntarily paid more than their share, and that there is no contribution between policies containing this clause.

In *Hanover Fire Insurance Co. v. Brown*, 77 Md. 64, 73, 25 Atl. 989, 27 Atl. 314, 39 Am. St. Rep. 386, the court was called on to construe a similar clause. The court said:

"In this case the defendant contracts to pay the proportion of the loss which the amount insured by it bears to the whole sum insured on the property in all the policies; and it is stated in the evidence that the other policies had substantially the same stipulation. The contracts are entirely separate and independent of each other."

In *Liverpool, London & Globe Ins. Co. v. Verdier*, 35 Mich. 395, 398, Cooley, Chief Justice, speaking of a similar clause in a policy, said that the plain purpose was "to protect the company against the necessity of

contesting with the insured any question of the validity or invalidity of other existing policies." Certainly the effect of the clause is to individualize the risks of the several insurers, making their respective liabilities depend, not on the amount of insurance that may be recovered from another, nor on the validity or solvency of another policy, but solely on the aggregate amount of the policies; the amount of the loss being ascertained.

It seems to us to follow logically and clearly that neither policy in any way depends on the other, but, to use the language of the Maryland Supreme Court, that "the contracts are entirely separate and independent of each other."

It is true that the amount of the loss must be ascertained before the extent of complainant's liability is fixed. That being ascertained, no other factor is needed on which to base a judgment, except the aggregate amount of insurance shown by the several policies. It is urged that, in the four actions on the separate policies, the several juries trying the different cases might find different verdicts as to the value of the property lost by the fire, and that this fact affords ground for equitable interference. That contention must be looked at from the position of the complainant.

If the policy issued by the complainant was the only one involved, no one would claim that it had the right to go into chancery to have the lost property valued. All would agree that, as between the complainant and Scruggs & Echols, a jury could value it in the suit at law on the policy. Do the actions at law on the other policies against other companies make it different? Certainly not, if the appellee cannot be in any way affected by the suits on the other policies.

The appellee is sued at law on a policy for \$2,500; the other defendant companies being sued at law on other policies for different and smaller sums. If the juries trying the cases against the other insurers should place too high a value on the property lost, it would in no way affect the liability of the complainant on the policy which it issued; nor would it be affected if the value was fixed at too small a sum. The complainant has no interest whatever in the question of the value fixed in the suits against the other insurers. The verdict and judgment in the other suits will have no effect on the suit at law against the complainant. The complainant is only concerned about the amount of the other policies, whether valid or not, and in the value of the property destroyed by the fire as it may be fixed by the verdict in the suit on the policy it issued, and on that issue it can present evidence and be fully heard in the suit at law. As it has no interest in the other suits pending in the state court, we see no reason why the Circuit Court should perpetually enjoin the prosecution of those suits at the instance of the complainant.

The fact that juries in the different suits may value the property destroyed at different sums is immaterial to the complainant. The clause was not intended to prevent this possibility. Such variations as to estimated value are to be expected, for the administration of the law cannot be made perfect. The fact that such variations may occur does not seem to us a ground of equity jurisdiction at the instance of a party not affected by it. The complainant is only interested pecuniarily in the

value that may be placed on the property by the jury in the suit against it. That value is as apt to be correct and just as the value fixed by a master in chancery.

The very question we are considering here has been recently passed on by the Circuit Court of Appeals for the Eighth Circuit. That court said:

"It is asked that a court of equity take jurisdiction of the case for the purpose of ascertaining this value, for the reason that different juries in actions at law might return different verdicts as to the value of this property, and thus the amount to be paid by one insurance company might be greater or less than that of some other company. If the peculiar and special duty of juries to pass upon property values in matters at law may be taken away and given to a chancellor, merely because different juries may render different verdicts upon like or similar facts, then trial by jury in civil actions no longer exists. The idea of handling these cases through a master in chancery, when the only question at issue is the value of the property destroyed, because there is no adequate remedy at law, shocks the legal mind." *Mechanics' Insurance Co. v. C. A. Hoover Distilling Co.*, 173 Fed. 888, 891.

Our attention is called to the case of *Home Insurance Co. v. Virginia-Carolina Chemical Co.* (C. C.) 109 Fed. 681. It is true that that case, in some of its features, seems to sustain the contentions of the appellee; but there are expressions in the opinion which indicate that the learned Circuit Court might have construed the bill in that case as one to reform a policy. That case was affirmed by the Circuit Court of Appeals for the Fourth Circuit. 113 Fed. 1, 51 C. C. A. 21. The appellate court seemed to find the chief equity of the bill by viewing it as one to prevent a multiplicity of suits. The court said:

"The main object and purpose of this bill is to prevent a multiplicity of suits, all involving the same legal questions, founded upon similar issues of fact." *Id.*, page 3 of 113 Fed., page 24 of 51 C. C. A.

Without considering that opinion further, it seems to us clear that the bill under consideration in the instant case cannot be sustained as one to prevent a multiplicity of suits. There was only one suit at law pending against the complainant, and it was not threatened with any other. The fact that the insured, Scruggs & Echols, were required to bring several suits—one against each of the insurers—was no reason to authorize the complainant to appeal to equity to prevent a multiplicity of suits. *Scottish Union, etc., Ins. Co. v. J. H. Mohlman Co.* (C. C.) 73 Fed. 66; *Thomas v. Council Bluffs Canning Co.*, 92 Fed. 422, 34 C. C. A. 428; *Turner v. City of Mobile*, 135 Ala. 73, 119, 120, 33 South. 132. It does not rest with the complainant to urge as a foundation for its suit that the defendants may thereby be saved a multiplicity of suits. *Equitable Life Assurance Society v. Brown*, 213 U. S. 25, 51, 29 Sup. Ct. 404, 53 L. Ed. 682.

Our attention is also called to the case of *Tisdale v. Insurance Company*, 84 Miss. 709, 36 South. 568, where the Supreme Court of Mississippi affirmed the decision of the court below, which had taken jurisdiction in equity on facts somewhat similar to the case at bar. The question was not there given elaborate consideration by that learned court, probably because of a constitutional provision in that state that no decree in chancery shall be reversed on the ground of a want of jurisdiction to render the decree from an error or mistake as to wheth-

er the cause in which it was rendered was of equity or common-law jurisdiction. Const. Miss. 1890, § 147; *Hancock v. Dodge*, 85 Miss. 228, 233, 37 South. 711. See, also, 1 High on Injunctions (4th Ed.) p. 80, § 63a.

Several other grounds of demurrer to the bill are urged on our attention, but the views we have expressed as to those considered makes it unnecessary to decide others.

The decree of the Circuit Court is reversed, and the cause remanded, with instructions to sustain the demurrer to the bill, and for further proceedings consistent with the opinion of this court.

SCOTT v. FABACHER et al.

(Circuit Court of Appeals, Fifth Circuit. February 15, 1910.)

No. 1,796.

1. USURY (§ 2*)—WHAT LAW GOVERNS—PLACE OF CONTRACT—CONTRACT FOR CONTINGENT BENEFIT BEYOND LEGAL RATE OF INTEREST.

Defendant lent complainant \$15,000 to be used in the purchase of a tract of land which complainant expected to resell to a corporation at a profit. The transaction took place in Texas, and a note was there given for the money, payable there, and at the same time a contract was entered into signed by both parties and reciting that in consideration of the loan complainant agreed to pay to defendant three-fifths of \$10,000 profit realized from the sale of the land, and if such profit was not made to pay 10 per cent. interest on the loan, and also to execute a deed of trust on Texas property to secure performance of the entire contract, which deed was given. Complainant having made the expected profit executed his note to defendant in New Orleans for \$6,000. The original note was paid but the second note not having been paid, defendant foreclosed the trust deed and bought in the property, whereupon complainant brought suit to have the foreclosure and sale adjudged void and his title quieted to the property sold. *Held*, that the giving of the \$6,000 note was a part of the original transaction, as recognized by defendant by foreclosing the mortgage for its nonpayment; that it was a Texas contract, and under Rev. St. Tex. 1895, art. 3104 et seq., providing that contracts stipulating for a greater rate of interest than 10 per cent. should be void for the amount of the interest, the note was void and afforded no foundation for the foreclosure proceedings, which were also void.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 2-15; Dec. Dig. § 2.*]

2. USURY (§ 18*)—USURIOUS CONTRACTS—STIPULATION FOR CONTINGENT BENEFIT BEYOND LEGAL RATE OF INTEREST.

Where a lender has the right to demand the repayment of his loan with legal interest in any event, a stipulation for a contingent benefit beyond the legal rate renders the contract usurious.

[Ed. Note.—For other cases, see Usury, Cent. Dig. § 31; Dec. Dig. § 18.*]

Appeal from the Circuit Court of the United States for the Eastern District of Texas.

In Equity. Suit by S. M. Scott against Lawrence Fabacher and others. Decree for defendants, and complainant appeals. Reversed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Geo. C. Greer, F. D. Minor, and W. E. Miller, for appellant.
E. E. Townes, L. A. Carlton, and R. E. Milling, for appellees.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge. The appellant, S. M. Scott, in the spring of 1901, was a citizen of the county of Lyons and state of Kansas, but was engaged at Beaumont in the state of Texas in dealing in oil lands and other oil properties, in which there was at that time phenomenal activity in that locality. The appellee, Lawrence Fabacher, was then a citizen of New Orleans and state of Louisiana. He testifies:

"I became acquainted with Mr. Scott in Beaumont, Texas, in the year 1901. I first became acquainted with him before this deal was entered into when I went to Beaumont with a committee to organize the Beaumont Land Company. I met Mr. Scott as stated above in Beaumont, and on that occasion when I was up there with a committee to form a company by the name of the New Orleans & Beaumont Land Company. At that time Mr. Scott stated that he had a deal on hand in which he would need a certain amount of money, and that he would make a large sum thereby. He stated that if he could get \$15,000 he would be willing to give me \$3,000 profit on the deal that was contemplated. I didn't pay much attention to it, and later on he telegraphed me that the deal was being consummated, and that I should come up there and investigate. I afterwards went up with Judge Skinner, and also one T. P. Thompson, and after investigating the matter and finding that he wanted to give me security for the \$15,000 as well as the amount that might be earned from the deal that he was then contemplating, I then entered into a contract in writing with him."

This contract is evidenced by three papers signed and passed at the same instant, and, so far as necessary to recite at this time, are here marked "I," "II," and "III," and given as follows:

"I.

"\$15,000.00.

May 10, 1901.

"Sixty days after date, I promise to pay to the order of Lawrence Fabacher fifteen thousand dollars at Beaumont Natl. Bank, Beaumont, Texas. Value received.

S. M. Scott."

"II.

"Beaumont, Texas, 5/10/1901.

"State of Texas, County of Jefferson.

"This agreement between S. M. Scott, of Beaumont, Texas, and Lawrence Fabacher, of New Orleans, La., witnesseth:

"That, whereas, the said Lawrence Fabacher has loaned to the party of the first part the sum of \$15,000.00 for a period of sixty (60) days, now the said Scott does hereby agree to hypothecate unto the said Lawrence Fabacher lots, A, B, C and D of block No. 21; lots A, B, C and D of block No. 27, and lots A and B of block No. 28, as designated in the recorded plat of the Hefebower and Scott subdivision of 2057¹/₁₀ acres in the south half of the J. W. Bullock league, Jefferson county, state of Texas.

"In consideration of which the said S. M. Scott agrees to pay to the said Lawrence Fabacher the sum of three-fifths (³/₅) of \$10,000 profit on a sale of 150 acres of land in the J. S. Johnson survey contracted at this time and to be transferred to an oil company which the said S. M. Scott is at this time organizing. The said \$10,000 profit is to be divided as stated above with the said Lawrence Fabacher in consideration of his loan of \$15,000 to the said S. M. Scott; provided that in any case if the organization of said oil company should for any reason fail to take the land that is now contracted, then, in that case, the said S. M. Scott shall pay at the rate of 10 per cent. interest to the said Lawrence Fabacher on the \$15,000 in lieu of the profit and share mentioned

above, and the above and foregoing property to be mortgaged or hypothecated in order to secure the payment of the loan and the fulfillment of this entire agreement by deed of trust of general form of State of Texas. Said \$15,000 is evidenced by a promissory note, which is to be paid according to its terms.

"Witnesses:

S. M. Scott,

"Lawrence Fabacher."

Of the third paper it is not necessary to recite here more than the following provision:

"III.

"And, whereas, it is contemplated that said S. M. Scott may hereafter become indebted unto said party of the third part in further sum or sums, which said indebtedness now accrued, or to accrue in future, it is agreed shall all be payable at Beaumont, Texas, and bear interest at the rate of 10 per cent. per annum from date of accrual until paid, by whatever means the same shall accrue; and this conveyance is made for the security and enforcement of the payment of the said present and future indebtedness."

The \$15,000, for which the note was given, was at the same time furnished to S. M. Scott, and the land referred to which he wanted to purchase, was purchased by him and sold to the corporation to which he expected to sell it, and at a profit acknowledged by him to have been of the value of \$10,000. On July 2, 1901, the appellee, from New Orleans, wrote the appellant at Beaumont, Texas, as follows:

"Dear Sir: I beg to inform you that I have this day placed with my bank for collection your note for \$15,000.00 due July 8th, 1901, also a draft on you for \$6,000.00, due July 5th, 1901, said draft is in accordance with our agreement dated May 10th, 1901."

The appellant did not answer this demand by prompt payment. The next communication between the parties shown by the record is a telegram from the appellant dated at Philadelphia, Pa., July 22d, to the appellee at New Orleans, which says:

"Negotiations here practically completed, delayed by hot weather, under circumstances need extension on ten thousand of note thirty days, wire if satisfactory, will send five thousand."

And the next day, July 23d, appellant wired again from Philadelphia:

"Wire us name your New Orleans bank, will have draft sent there direct from Beaumont."

Which appellee answered by wire:

"Must have five thousand before twelve tomorrow."

This \$5,000 was sent probably on the 24th of July, being the first payment made on the \$15,000 loan.

The appellees, defendants below, in their answer to complainant's bill, averred that after the consummation of the purchase and sale of the land contemplated, the said Scott did, on July 30, 1901, and at other times, confess and agree with the defendant Fabacher, that he (Scott) had bought the land and sold it to the corporation at a profit of \$10,000, and thereupon executed to the said Fabacher his certain promissory note to cover said \$6,000, same being in the form of a note payable to Scott himself and by him indorsed and delivered to Fabacher, which note is in words and figures as follows:

"\$6,000.00.

New Orleans, July 30th, 1901.

"Ninety days after date I promise to pay to the order of myself six thousand dollars. Value received. S. M. Scott."

The appellee, in his testimony, says:

"This note was given to me to satisfy me in the payment of six thousand dollars that came out of a transaction of a certain tract of land that was sold by Scott to an oil company. This note was executed in the office of the Jackson Brewing Company in New Orleans on the 30th day of July, 1901. This note was drawn in my presence in the handwriting of Judge Skinner, and was signed by Scott and endorsed by him."

On November 5, 1901, the appellee's agent wrote from New Orleans to the appellant at Beaumont, as follows:

"Mr. Fabacher wishes to notify you that his bank has returned to him your \$6,000 (note?) as unpaid, and he also desires to call your attention to the fact that you have not remitted to him the \$1,000 balance due on your first note."

To which the appellant replied from Beaumont on the 12th, saying:

"I have just returned. Will remit as soon as draft arrives from home. Perhaps the last of the week."

On the 30th appellee's agent again wrote appellant:

"Mr. Fabacher begs to call your attention to the promise made him in your letter of the 12th inst., wherein you stated that you would probably remit to him in the latter part of that week ending 16th inst. So far you have failed to keep your promise. * * * He asks an early settlement of the amounts due him by you. He expects to hear from you by December 2d, in reference to this settlement."

And appellant answered on December 9, 1901:

"In reply to yours of the 30th ult., I desire to say that I have just received the same upon my return from the north, and desire you to say to Mr. Fabacher that 30 days ago, when I sent you the communication that I did at that time, that the parties who had represented me to have mailed the draft which was to be sent you failed to do so, although their letter to me was positive and I so wrote you. That does not excuse delay in the matter which Mr. Fabacher is interested in. I desire to thank him for his disposition in this matter and will undoubtedly satisfy him in the near future that this delay was not intentional upon my part, and that I will send him a draft in a short time now that I find that he has not received it."

On January 29th, appellant wrote:

"Please find enclosed a draft for \$500.00, which you will please apply on the note that is due Mr. Fabacher, which is secured by a trust deed. This is the last payment upon that note. You will please forward to me the note and also the trust deed securing the note. I have this day written to Mr. E. K. Skinner requesting him to see Mr. Fabacher for me."

In the letter to Skinner he said:

"I have no disposition whatever to see Mr. Fabacher get any less than he claims, but as you know I never looked at this matter in the same light that Mr. Fabacher has. I think he is entirely sincere, but I very readily see how he can differ in regard to the real meaning of our contract. This payment that I make to-day fully pays the trust deed, and I am ready to deliver to him an order on Export Oil & Pipe Line Company for his amount of the stock that is due him, and I hope that he can see his way clear to accept it."

On March 28, 1902, appellant wrote from Chicago to the appellee's attorneys:

"I cannot reach New Orleans for a few days, and when I come I expect to be in position to settle with Mr. Fabacher. I am very desirous of settling this according to our agreement without any expense of a lawsuit. Of course I hope you can defer any action until I arrive there. I will reach Beaumont about Wednesday of next week, and will reach New Orleans as soon as possible after that."

There is in their correspondence no reference to usury. More correspondence followed, but resulted in no settlement; and on the 12th day of July, 1902, the trustee in the trust deed gave due notice of the sale of the mortgaged premises to take place on the 5th of August, 1902, in front of the courthouse of Jefferson county, Tex., between the hours of 10 o'clock a. m. and 4 o'clock p. m., to the highest bidder for cash; said property to be sold to satisfy said debt (\$6,000 note), and the cost of sale as provided in said instrument. On that day (5th of August) and before the hour of sale, appellant brought suit in the proper state court, attacking the claimed debt and deed of trust for usury, seeking to have the same canceled, and to remove the cloud from his property therein described because of said deed of trust; of which due and timely notice was given before and at the sale. The sale proceeded and the property described in the deed of trust was adjudicated to Fabacher as the purchaser, and a formal conveyance was made to him by the trustee. The suit, which was begun in the state court, was duly removed to the Circuit Court of the United States for the Eastern District of Texas. The plaintiff amended his pleadings, the defendants answered, and the defendant Fabacher (appellee) filed a cross-bill, stating at large his case on the \$6,000 note, and praying that upon a hearing he have judgment against the plaintiff fixing and establishing his title in and to the land so purchased by him under the deed of trust as described in plaintiff's bill as well as in the cross-bill; that he have a writ of possession for the land; that he be given judgment for the balance due him, principal and interest, on the \$6,000 note hereinbefore described, etc. And such proceedings were thereafter had that on the 17th day of December, 1907, that court rendered judgment denying to the plaintiff any part of the relief prayed for by him, and rendered judgment in favor of the defendant Fabacher on his cross-bill for the amount of his debt, interest, and cost, and quieting his title to the land sold under the deed of trust as described in the amended bill. From that judgment this appeal is taken.

The assignment of errors is substantially that the contract was usurious; that the principal of the debt was fully paid before the appellee undertook to foreclose the deed of trust; that the court erred, therefore, in denying to plaintiff the cancellation of the trustee's deed, and in refusing to remove the cloud thereby cast on the appellant's title to the land mortgaged, and in rendering judgment against plaintiff in favor of Fabacher for usurious interest on the sum loaned, and in not decreeing that the \$6,000 note, which was wholly for usurious interest, be delivered up and canceled. The state of Texas, by an amendment to her Constitution adopted September 22, 1891 (Const. art. 16, § 11), which is still in force, provided that a rate of interest greater than 10 per cent. per annum shall be deemed usurious, and required the Legislature to provide appropriate pains and penalties to prevent the offense

of usury; and the Legislature did promptly provide that all written contracts stipulating for a greater rate of interest than 10 per cent. per annum shall be void and of no effect for the amount or value of the interest only; that the principal sum of the contract may be received and recovered; and that where usurious interest is received or collected, the person paying the same may, by action of debt within two years after such payment, recover from the receiver double the amount of interest so received and collected. As a defense, usury must be set up by a verified plea. Articles 3104, 3106, 3107, Rev. St. Tex. 1895. The courts of Texas have exercised jealous vigilance in discovering and rebuking usury whenever and in whatever disguise it may have been shown to exist. The learned counselor for the appellee in this case contends that the real issue is not whether the contract made on the 10th day of May, 1901, was usurious, but whether or not the \$6,000 note made and delivered in New Orleans on the 30th day of July, 1901, is valid as against a plea of usury. This suggestion treats the \$6,000 note as a new and separate transaction made at a different time and in a different state where the Texas law of usury has not force. But is it a different transaction? We have attempted to recite fully the dealings of these parties with one another as represented by the writings that passed between them not only on May 10, 1901, but all along the track of their dealings up to the attempt to execute the deed of trust. From this recital of the evidence it seems clear to us that the \$6,000 note does expressly relate to the provision of the deed of trust which we have recited. In addition to the language of the writing signed by both the parties on May 10, 1901, which we have copied in full and designated as "Part II" of the contract, the action of the appellees in their attempt to execute the deed of trust to enforce payment of this note seems to unite these two papers so vitally that as to this litigation they can only stand or fall together. That paper, signed by both parties, to which we have just referred, shows that Fabacher has loaned Scott the sum of \$15,000 for a period of 60 days; that Scott agrees to secure the same by deed of trust on the property therein described, and agrees to pay to Fabacher the sum of three-fifths of \$10,000 profit on the sale of 150 acres of land therein mentioned; and provides that in any case, if he fails to make the profit which he expects, Scott shall pay, at the rate of 10 per cent. per annum, interest to Fabacher on the \$15,000 in lieu of the profit; and that the property to be hypothecated in order to secure the fulfillment of the loan is mortgaged to secure the fulfillment of the entire agreement; and the deed of trust shows that the parties contracted that the indebtedness accruing on the 10th day of May, 1901, by the loan of the \$15,000 and described as now accrued, and the indebtedness to accrue in the future under the contract between the parties, shall all be payable at Beaumont, Tex., and bear interest at the rate of 10 per cent. per annum from date of accrual until paid, by whatever means the same shall accrue. It would be difficult to show more plainly than these provisions do that the parties were contracting with regard to the laws of the state of Texas because the conventional rate of interest in Texas is a rate not to exceed 10 per cent., both parties were in that state when the contract was made, and contracted that it should be performed at Beau-

mont, Tex. It is said in *Browne v. Vredenburg*, 4 Hand (N. Y.) 197, that when a lender stipulates for a contingent benefit beyond the legal rate of interest, and has the right to demand the repayment of the principal sum with the legal interest thereon, in any event the contract is in violation of the statute prohibiting usury, and void.

We are referred to *Scudder v. National Bank*, 91 U. S. 406, 23 L. Ed. 245, and to *De Wolf v. Johnson*, 10 Wheat. 367, 6 L. Ed. 343. The first of these cases is so different from the one we are considering that the language of the opinion touching on matters bearing on the execution, interpretation, and validity of a contract, which is relied on, can have no application here. In the other case we find this language:

"The contract of 1817, in which this mortgage originated, was executed in Kentucky, and had its inception in an intimation from Prentiss of a design to avail himself of the plea of usury. Upon this, De Wolf repaired to Kentucky, and there instituted a new negotiation with Prentiss personally, having for its object to clear the contract from all usurious incidents, and to take security for the sum loaned, at the legal rate of interest of Kentucky, which, as well as that of Rhode Island, is six per cent. Accordingly, all the instruments of writing which appertained to the old contract were surrendered mutually, and a new mortgage given to secure the balance now sued for, the original sum having been reduced, by large actual payments, to the sum for which this mortgage was given, and which includes the same premises conveyed under the prior contract."

From this language of the opinion it appears clear to us that the language quoted by counsel, viz., "It is not very easy to discover how the taint of Rhode Island usury can infuse itself into the veins of a Kentucky contract," does not reach the contract we are considering.

We are also referred to *Sheldon v. Haxtun*, 91 N. Y. 124. In the controlling opinion in that case we find this paragraph:

"If this note for \$1,000 had been given in this state (New York), even with the lawful rate of interest mentioned therein, in renewal of or in substitution for the prior usurious note, it would also have been tainted with usury and void. A substituted or renewal note thus given is held void for one or both of these reasons: The new note in such a case is given in renewal or continuance of the usurious contract, and is therefore void for the same reason that condemns that contract; or it is a new security for a usurious debt or contract and void on that account. But a usurious contract can be purged of the taint of usury and money loaned upon a usurious contract can furnish a valid consideration for a promise to pay the money actually loaned. If the usurious contract be mutually abandoned by the parties, and the securities be canceled or destroyed so that they can never be made the foundation of an action, and the borrower subsequently makes a contract to pay the amount actually received by him, this last contract will not be tainted by the original usury and can be enforced."

Counsel, towards the close of his printed brief, asks this question: "Now would this contract be usurious under the laws of the state of Texas?" and refers to the case of *Huddleston v. Kempner*, 1 Tex. Civ. App. 211, 21 S. W. 946. In this case it was shown by the evidence that plaintiff used his capital in connection with his business in making advancements to cotton shippers, and to pay drafts drawn on cotton, in order to induce shipments of cotton, and not as a money lender; that he gave his personal attention to his business as a cotton factor, and had an office, sample room, several clerks, and had provided every

facility for carrying on his business. The evidence showed conclusively that the advancement was made in connection with Kempner's business for the purpose of promoting the consignments of cotton to him as a cotton factor and commission merchant, and Kempner was allowed to recover on the authority of *Mills v. Johnston*, 23 Tex. 309-324.

In *Mills v. Johnston*, we find the opinion opens with this paragraph:

"The commission business is the creature of agriculture and commerce, and has grown up in all the great centers of trade throughout the United States. The commission merchant finds his proper and necessary place between the farmer or planter, who tills the soil and produces crops, and those by whom the productions of the earth are manufactured or consumed. To state that this kind of business is necessary to agriculture and commerce, is at the same time to state that the laws of the country extend their protection to it. The most enlightened courts of the Union have adjudged that the commission business is a lawful business, and that the commission merchant is as much entitled to a reasonable compensation for services that he may render to those with whom he transacts business, as any other person is entitled to be paid for any other service. Embarrassing questions, growing out of the local usages of commission merchants, have sometimes been presented to the courts. But these questions are all solved by the application of a few plain and intelligible principles. The question whether or not a commission merchant is entitled to charge a certain commission in a given case, is answered by ascertaining whether or not the commission charged is a fair and reasonable compensation for a service rendered. If it be fair and reasonable, then it may be charged and recovered by law. If it be unreasonable or exorbitant, then, in the absence of such a special contract as would preclude inquiry into its fairness and reasonableness, it cannot be recovered by law. Again, if the name of commission be used as a disguise for some other thing, which the law does not permit, the courts will have no regard for the mere name, but will strip the unlawful thing of its borrowed name, and condemn it by its true name."

It seems clear to us that Fabacher can get no help from either of these cases.

We have examined to some extent all of the cases cited in the very able brief of counsel, but decline to review them further, because, in the view we have taken of the facts of the case we are passing on, they do not apply.

We conclude that the original sum loaned having been paid before any action was taken under the deed of trust, and the other indebtedness claimed by the appellee being wholly for usurious interest, the deed of trust was satisfied, and the sale made by the trustee on the 5th of August, 1902, was void, and the deed executed by him to the purchaser was void, and the \$6,000 note was void, and the Circuit Court erred in not so finding and decreeing. Therefore the decree of that court is hereby reversed in all respects, and a proper decree will be here and now rendered canceling the deed executed by Skinner, trustee, to Fabacher, and removing the cloud thereby cast on appellant's title to the land mortgaged, and canceling and declaring null and void the \$6,000 note.

And it is so ordered.

CHICAGO GREAT WESTERN RY. CO. v. MINNEAPOLIS, ST. P. &
S. S. M. RY. CO.

(Circuit Court of Appeals, Eighth Circuit. February 21, 1910.)

No. 3,085.

*(Syllabus by the Court.)***1. NEGLIGENCE (§ 1*)—NATURE AND ELEMENTS—TEST.**

An act or omission may be in itself clearly negligent, or clearly free of negligence, so that no evidence can change its character.

But if its character is doubtful the best test of actionable negligence, where available, is the degree of care which persons of ordinary intelligence and prudence commonly exercise in the same circumstances. If the care exercised in such a case rises to or above that standard, there is no actionable negligence; if it falls below that standard, there is such negligence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 1; Dec. Dig. § 1.*

For other definitions, see Words and Phrases, vol. 5, pp. 4743-4763; vol. 8, pp. 7729-7731.]

2. NEGLIGENCE (§ 124*)—EVIDENCE—PRACTICE OF ORDINARILY PRUDENT PERSONS.

In the case of a doubtful act, the evidence of the ordinary practice and of the usual custom, if any, of ordinarily prudent and intelligent persons in the performance under the same or like circumstances of the same or like acts, is ordinarily competent upon the issue of negligence in the performance or omission of the act.

[Ed. Note.—For other cases, see Negligence, Dec. Dig. § 124.*]

3. RAILROADS (§ 240*)—STATUTORY REGULATIONS—"JUNCTION"—CROSSING.

Section 2033, Rev. Laws Minn. 1905, which requires railroad companies to stop their trains before reaching junctions with or crossings by railroads, imposes no duty upon them to stop such trains before reaching connections of their own tracks with double tracks and connections of such tracks with side tracks which are all parts of one line of railroad, directed by the same management or controlled by the same operator. Such connections are not "junctions" within the meaning of this statute.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 240.*

For other definitions, see Words and Phrases, vol. 4, pp. 3872, 3873.]

4. RAILROADS (§ 287*)—STATUTORY REGULATIONS—CROSSINGS.

This statute imposes no duty on a railroad company in favor of those injured in a head-end collision between trains upon the same line of railroad who suffered neither danger nor injury from crossing trains, and such parties can maintain no action against it on the ground that the trains which collided did not stop at some crossing.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 287.*]

5. APPEAL AND ERROR (§ 1008*)—REVIEW—FINDINGS BY COURT.

A trial and finding by a court without a jury in an action at law is reviewable to the same extent and by the same procedure and not otherwise as a trial and verdict by a jury, with the single exception that when the finding is special the question, whether or not the facts found sustain the judgment, is open to consideration in the appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3969; Dec. Dig. § 1008.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

6. APPEAL AND ERROR (§ 1010*)—RAILROADS (§ 297*)—COLLISION—EVIDENCE—SUFFICIENCY OF EVIDENCE NOT REVIEWABLE.

On a motion for judgment at the close of a trial of an action at law by the court, the only question reviewable is the question of law: Was there any substantial evidence to sustain the finding of the court? The question of fact whether or not the finding is supported by the weight of the evidence, or by sufficient evidence, is not open to consideration in the appellate court.

There was substantial evidence in this case that the plaintiff was not guilty of negligence which directly contributed to cause the accident, and a motion to dismiss the action upon the ground that it was properly denied.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982; Dec. Dig. § 1010; * Railroads, Dec. Dig. § 297.*]

In Error to the Circuit Court of the United States for the District of Minnesota.

Action between the Chicago Great Western Railway Company against the Minneapolis, St. Paul & Sault Ste. Marie Railway Company. From the judgment the Chicago Great Western Railway Company brings error. Affirmed.

H. Loomis (A. G. Briggs, on the brief), for plaintiff in error.
Alfred H. Bright, for defendant in error.

Before SANBORN, Circuit Judge, and RINER and WILLIAM H. MUNGER, District Judges.

SANBORN, Circuit Judge. On October 1, 1905, in the railroad yards at St. Paul and on a single track of the Northern Pacific Railway Company about 450 feet long, which both parties were entitled to use, and over which the passenger train of the Minneapolis, St. Paul & Sault Ste. Marie Railway Company going north to Minneapolis had the right of way, there was a collision between that train and a stock train of the Chicago Great Western Railway Company which was coming south toward South St. Paul. Thereupon the companies entered into a written agreement that the question of liability for the collision and for all losses and expenses growing out of it should be settled by an action in the court below which should be tried by Judge Charles F. Amidon without a jury. The action was brought, it was tried by Judge Amidon, who made a special finding of facts the legal effect of which was that the Great Western Company alone was guilty of negligence which caused the collision, that the "Soo" Company was guilty of no negligence which contributed to cause it, and that the former company was liable for the losses and expenses which resulted from it. The judgment against the Great Western Company founded upon this finding is questioned by this writ of error.

The first specification of error is that the court permitted the witness McGuire to answer the following question:

"Q. What was the fact as to how the Chicago Great Western passenger trains were handled out of the Union Depot for the period of your service prior to this accident, as compared with the way the 'Soo' trains were handled this morning?

"(That is objected to as immaterial.)

"A. The Great Western the same as the 'Soo' line."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Third street in St. Paul runs east and west, and the Union Depot is some distance south of it. The "Soo" train was going from the Union Depot to Minneapolis. It ran east on the southerly one of the double tracks of the Depot Company assigned to this service in a straight line about 1,000 feet and then along a curve to the north to a point about 100 feet south of a viaduct over the railroad tracks where the double track of the Depot Company connected with a single track of the Northern Pacific Company which ran north about 450 feet upon an ascending grade of 1.6 per cent. under the viaduct, across a single track of the Burlington Railroad Company which lay just north of the viaduct to a connection with the double tracks of the Northern Pacific Company which extended to Minneapolis. The "Soo" train was a heavy passenger train which had the right of way up this grade over the single track of the Northern Pacific Company, and it proceeded north until its engine entered upon the easterly one of the double tracks of the Northern Pacific Company, when a stock train of the Great Western Company which was coming south on the westerly one of these double tracks, ran into the "Soo" train. The rule of operation was that north-bound trains should go up the hill upon the east and south-bound trains should come down the hill on the west one of the double tracks of the Northern Pacific Company, and that all trains coming down on the west track should stop and wait until they received a signal from the switchman who was stationed at the north end of the single track before they entered upon that track. But the operators of the Great Western train, by their negligence, had lost control of it so that it did not stop until it ran upon the single track and into the side of the "Soo" train as it was passing to the double track. McGuire was the switchman stationed at the south end of the single track where it connected with the double track of the Depot Company. He testified that during the two years he had been employed there the trains of the Wisconsin Central, Minneapolis & St. Louis, Great Western, the "Soo," and the Northern Pacific Companies were operated over the same track that this "Soo" train passed over on the occasion of the collision; that there was a uniform custom of handling the passenger trains coming out of the Union Depot over these tracks; that they were handled by hand signals; that there was another switchman stationed between him and the depot who, when a train was ready to pull out over this Northern Pacific track, gave him a signal to that effect; that he then examined the Burlington track and crossing, the situation at Third street, and the switches at both ends of the single track to see that the crossing was free and the switches were properly set for the train to pass over the single track upon the easterly one of the double tracks of the Northern Pacific at its north end and then signaled back to the switchman between him and the depot to let the train come, and that as the engineer pulled up past that switchman he gave him a signal to come on. He testified that on the occasion of the collision this course was pursued, and he gave to the engineer of that train the signal to come on through his fireman, that ordinarily or frequently the firemen on trains of this character started to make their fires in the engines after this last signal was given, and that the firemen on the heavy passenger trains of the

Great Western Company pursued that course. It was in this state of the case and after this testimony had been received that the court admitted the answer to the question of which complaint is here made.

The question whether or not the "Soo" Company was guilty of negligence which directly contributed to the injury was an important issue in this case. There are cases in which an act or omission is in itself so clearly negligent that the fact that other persons in the same or like circumstances have been guilty of a similar act or omission is insufficient to modify its character or its effect. *Dawson v. Chicago, Rock Island & Pacific Ry. Co.*, 52 C. C. A. 286, 288, 114 Fed. 870, 872; *Gilbert v. Burlington, etc., Ry. Co.*, 128 Fed. 529, 534, 63 C. C. A. 27, 32. The act or omission of the "Soo" Company in this case, however, did not appear at the time this evidence was challenged to be of that character, and, where the nature of the act or omission is doubtful, the best test of actionable negligence, where available, is the degree of care which persons of ordinary intelligence and prudence commonly exercise under the same or like circumstances. If the care exercised in such a case rises to or above that standard, there is no such negligence, if it falls below it there is. The legal presumption was that the servants of the Great Western Company who had been operating its passenger trains upon the tracks leading out of St. Paul which were used by the "Soo" Company on the day of the accident were men of ordinary intelligence and prudence, and hence the fact that it had been their uniform practice to handle their trains under like circumstances in the same way that the "Soo" Company operated this train on that occasion was both competent and material evidence that it conducted it with reasonable care. *Lake v. Shenango Furnace Company*, 160 Fed. 887, 895, 88 C. C. A. 69, 77.

The second complaint is that the court permitted McGuire to testify that those operating the Great Western passenger trains and other passenger trains over this single Northern Pacific track had not been and were not in the habit of stopping for the crossing of the Burlington track which lay just north of Third street as they ran up the grade unless there was something extraordinary, unless they were stopped. There was a statute of the state of Minnesota which required every company operating a railroad to cause its trains to come to a full stop not less than 10 nor more than 60 rods before they reached any railroad junction or crossing at grade (Rev. Laws Minn. 1905, § 2033), and counsel contend that the admission of this evidence was erroneous because the violation of the statute was negligence per se, so that evidence of reasonable care in its violation was immaterial, and because testimony of the habit or custom of operating trains over these tracks was generally inadmissible.

But this statute was inapplicable to the case here presented and imposed no duty to the Great Western Company or to the operators of its stock train upon the "Soo" Company, or upon the crew upon its passenger train. The connection of the double track of the Great Northern Company with the north end of its single track was no "junction" within the meaning of this law. The junction to which this statute refers and to which it is limited is a junction of two or more railroads owned by different proprietors, or a junction of two or more

main lines, or of a main line and a branch line of the same company with each other. The Legislature never intended to apply it to, and it has no application to, every connection upon a continuous line of railroad in a single direction of its single track with its double tracks, or of those tracks with its side tracks, when all are directed by the same management and controlled by the same operator. *United States v. Oregon & California Railway Co.*, 164 U. S. 526, 540, 17 Sup. Ct. 165, 41 L. Ed. 541.

It is neither decided nor admitted that this statute imposes any duty upon a railroad company to stop its engines or trains at every crossing of another railroad in the yards of railroad companies where switchmen or flagmen are stationed to notify enginemen of danger and of safety in making such crossings and where trains are handled by the signals of such switchmen or flagmen. But for the purposes of this case let it be conceded that this statute applied to the Burlington crossing, and that it was negligence per se for the "Soo" Company to cross the track of that company without stopping. "Negligence" is a breach of a duty. Those only to whom that duty is due and who have sustained injuries of the character its discharge was designed to prevent can maintain actions upon it. This statute imposed no duty to stop at this crossing in favor of all the world upon the "Soo" Company, nor in favor of any party for whose protection it was not enacted. Now it was passed to protect those riding upon railroad trains from injuries resulting from collisions with crossing trains. To parties thus injured, and to those in danger of injury so caused, and to them alone, the "Soo" Company owed the duty to stop before crossing the Burlington track. But it did not owe this duty to the Great Western Company, or to its operators on the stock train, or to any of the thousands of persons who were riding upon the line of the Northern Pacific Railroad between St. Paul and the Pacific coast, but were not crossing nor intending to cross this Burlington railroad. It is said that it owed this duty to its own passengers. Let the proposition be conceded. It owed this duty to its passengers to prevent injuries to them by a collision with crossing trains. It did not owe any such duty to them to protect them from collisions with trains which were not crossing the Northern Pacific Railroad, and the injury sustained in this case did not arise from such a crossing train. The incidental fact that the "Soo" train reached the north end of the Northern Pacific single track a few seconds earlier than it would have arrived if it had stopped for the Burlington crossing is too remote and inconsequential to make its failure to stop there a cause directly contributing to the actual collision with a train coming from the north. Every collision of a through train with persons, trains, and animals, on its way from St. Paul to the Pacific Coast over the connected rails of the Northern Pacific Company certainly could not be attributed lawfully to the fact that it failed to stop at some crossing in St. Paul on the ground that, if it had done so, it would not have arrived at the points of collision at the times when they occurred. And the failure of the "Soo" train to stop at the Burlington crossing in this case cannot be more reasonably held to be one of the direct causes of this accident. The statute invoked therefore was irrelevant to the issues in this case, it did not render evidence of the rea-

sonable care of the enginemen of the "Soo" Company inadmissible, and it must be laid aside.

Was the evidence of the habit or custom of the operators of similar Great Western trains over the same tracks under like circumstances competent testimony upon the issue of the reasonable care of the operators of the "Soo" train? The presumption was, as has already been said, that these operators were of ordinary intelligence and prudence. The best test of reasonable care in a given case is evidence of the degree of care which such persons commonly exercise under similar circumstances where such evidence is available. Hence, upon the question of negligence or none, evidence of the ordinary practice and of the uniform custom, if any, of such persons in the performance under similar circumstances of acts like those which are alleged to have been done negligently, is generally competent evidence, because it presents to the jury a correct standard for the determination of the issue. *Lake v. Shenango Furnace Company*, 160 Fed. 887, 895, 88 C. C. A. 69, 77; *Grand Trunk Railway Co. v. Ives*, 144 U. S. 408, 416, 417, 12 Sup. Ct. 679, 36 L. Ed. 485; *Union Pacific Ry. Co. v. Daniels*, 152 U. S. 684, 691, 14 Sup. Ct. 756, 38 L. Ed. 597; *Washington, etc., Ry. Co. v. McDade*, 135 U. S. 554, 569, 10 Sup. Ct. 1044, 34 L. Ed. 235; *Texas & Pacific R. Co. v. Barrett*, 166 U. S. 617, 619, 620, 17 Sup. Ct. 707, 41 L. Ed. 1136; *Choctaw, etc., R. Co. v. McDade*, 191 U. S. 64, 67, 24 Sup. Ct. 24, 48 L. Ed. 96; *Charnock v. Texas & Pacific R. Co.*, 194 U. S. 432, 437, 24 Sup. Ct. 671, 48 L. Ed. 1057; *Chicago Great Western Railway Co. v. Egan*, 86 C. C. A. 230, 159 Fed. 40. There was no error in the admission of the testimony relative to the habit, the practice, or the custom of the Great Western operators while taking like trains under similar circumstances over the tracks here used by the "Soo" Company.

A single question remains. It is assigned as error that the court below denied the motion of the defendant at the close of the trial to dismiss the action on the ground that the evidence conclusively proved that the plaintiff was guilty of negligence which directly contributed to cause the collision and the losses. The question which this specification presents is not the issue of fact whether or not the finding of the court below that the "Soo" Company was not thus guilty was sustained by a fair preponderance of the evidence. It is this question of law: Was there conclusive proof that the "Soo" Company was guilty of causal negligence, and no substantial evidence that it was not so guilty, so that no issue of fact regarding this matter remained for determination? When an action at law has been tried by the court without a jury, its findings may not be reversed for any error of fact. *Rev. St. U. S. §§ 649, 700, 1011* (*U. S. Comp. St. 1901*, pp. 525, 570, 715); *Hall v. Houghton & Upp Mercantile Co.*, 60 Fed. 350, 8 C. C. A. 661. A finding of a court without a jury in an action at law has the same effect and is reviewable to the same extent and by the same course of procedure as the verdict of a jury, with the single exception that when the finding is special the question whether or not the facts found sustain the judgment is open to determination by the appellate court. *United States Fidelity & G. Co. v. Board of Com'rs*, 145 Fed. 144, 150, 151, 76 C. C. A. 114, and cases there cited; *Hall v. Western Union Tele-*

graph Co., 162 Fed. 657, 660, 89 C. C. A. 449; Hill v. Walker, 167 Fed. 241, 256, 92 C. C. A. 633.

The evidence which conditions the issue thus presented consists of the testimony of more than a dozen witnesses, and no good purpose would be served by a recital of it here. There was, it is true, testimony which, if it stood alone, would have sustained a finding of a failure of the fireman upon the "Soo" engine to exercise reasonable care to look out for signals and obstructions as he passed up the single track of the Northern Pacific Company. But there was also substantial evidence of these facts: There was a single track of the Chicago, St. Paul, Minneapolis & Omaha Railroad Company which crossed the double tracks of the Union Depot Company south of Third street, and there was an Omaha stopboard by the side of this double track about 700 feet southwest of the Third street viaduct at the point where the double tracks leading from the Union Depot began to curve from east to north. From that point to a point very near the passageway under the Third street viaduct the view of the engineer of the "Soo" train to the north was completely cut off by the embankment which supported Third street. There was a point just before his engine went under the viaduct where he could have seen to the north through that passageway; but as the engine passed under the bridge the smoke from it circled down and obscured his vision, and thereafter his view of the approaching Great Western train and of other objects to the northwest was obstructed by the boiler and the front end of the engine so that his opportunity to see that train and the situation in front of him north of Third street was practically open to him for an instant only, just before he passed beneath the viaduct. It is clear from the evidence here that no court could hold as a matter of law that the engineer was conclusively proved to have been guilty of causal negligence. The fireman could have seen the Great Western train as he approached it from a point near Third street and could have also seen the stop signals which the evidence shows Maloney, the switchman at the north end of the single track, was giving, if he had been looking out of his side of the engine. But it was the custom to run these trains over this single track upon the signals of the stationary switchman. McGuire had examined and seen that the switches at both ends of the single track were lined up for the passage of this train onto the double track of the Northern Pacific Company, and his signal to come on which these enginemen had received was authoritative notice to them that these tracks were ready for them and free from obstruction so that their train could pass safely over the single track. The fireman had received this signal at the Omaha stopboard 700 feet from the Third street bridge, and had given it to his engineer who drove his engine around the curve and up the hill. It was necessary and customary for the fireman on an engine drawing a heavy passenger train like that of the "Soo" Company around this curve and up this grade to get down from his seat in the engine, and feed, tend, and promote his fire immediately after the train started from the Omaha stopboard, so that steam sufficient might be produced to enable the engine to take the train up the hill. While he was discharging this necessary duty, he could not look out in front of the engine. As soon as the train started around the

curve, this fireman got down from his position in the cab, fed and tended his fire until the engine was about entering upon the double track at the north end of the single track, when his attention was first called by a visiting engineer, who was riding on the engine to learn the road, to the fact that the Great Western train was coming down the west one of the double tracks and was not likely to stop, and it was then too late for the engineer of the "Soo" Company to avoid the collision. There was evidence on the other hand that other firemen had completed their necessary firing and had been able to get up into the cab where they could look ahead by the time they arrived at Third street. But there was also evidence that the time and work required here varied with the weight of the trains and the condition of the fires in the engines, and the fireman upon this engine testified that he was engaged in attending to his fire until it was too late to avoid the collision.

It is only when the evidence upon the issue of negligence or of contributory negligence is so clear and conclusive that a finding but one way can be sustained upon it, that the question in issue becomes one of law and the duty devolves upon the court to effectuate that conclusion without weighing the evidence upon the issue. This case was tried by the judge whom the parties selected and whom they agreed should try it before the action was commenced. He saw and heard the witnesses and decided, upon consideration of the weight of all the evidence, that the enginemen of the "Soo" Company were not guilty of any negligence which directly contributed to the accident, and a review of the printed testimony has failed to convince that there was no substantial evidence to sustain his finding, or that it was his duty to disregard the question of fact upon a consideration of the sufficiency of the evidence and to direct a judgment for the defendant on the ground that there was no substantial conflict in the evidence upon this issue. There was, therefore, no error in the denial of the motion of the defendant to that effect.

Finally, counsel for the Great Western Company contend that the court below erred in including in its judgment against that company upon the facts found the amounts paid out on account of injuries to the passengers of the "Soo" Company. They support this contention by the argument that the "Soo" Company was guilty of some causal negligence, that if it was guilty of any negligence the passengers could have recovered their damages from it, and that after it had paid those damages it could not have recovered them of the Great Western Company, because the two companies were joint tort-feasors. But the court below found that the negligence of the Great Western Company was the sole proximate cause of the collision and of the injuries and damages which resulted from it, and that the "Soo" Company was not guilty of any negligence whatever which directly contributed to cause them. If those findings were right, and our review of the record has convinced that there was no error in the trial which can disturb them, the "Soo" Company was not liable to its passengers for the injuries and damages they sustained by this collision, and the contention of counsel here is without foundation.

The judgment below must be affirmed, and it is so ordered.

ILLINOIS CENT. R. CO. V. HART.

(Circuit Court of Appeals, Sixth Circuit. February 8, 1910.)

No. 1,987.

1. COURTS (§ 372*)—FEDERAL COURTS—AUTHORITY OF STATE DECISIONS—QUESTIONS OF GENERAL LAW.

In the absence of a state statute governing the subject, the question of the liability of an employer for an injury to an employé is one of general law, as to which the federal courts are not bound by the decisions of the state courts.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 372.*]

State laws as rules of decisions in federal courts, see notes to *Wilson v. Perrin*, 11 C. C. A. 71; *Hill v. Hite*, 29 C. C. A. 553.]

2. MASTER AND SERVANT (§ 191*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—NEGLIGENCE OF FELLOW SERVANT.

It is the settled rule in the federal courts that an employer is not liable for an injury to an employé occasioned by the negligence of another employé engaged in the same general undertaking, and it is not necessary to the application of this rule that an employé should be engaged in the same operation or particular work; but it is sufficient if the two are in the employment of the same master and engaged in the same common enterprise, both performing duties tending to accomplish the same general purpose, although they may be in different departments.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 475-479; Dec. Dig. § 191.*]

Who are fellow servants, see notes to *Northern Pac. R. Co. v. Smith*, 8 C. C. A. 668; *Flippin v. Kimball*, 31 C. C. A. 286.]

3. MASTER AND SERVANT (§ 185*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—CUSTOM OF DOING WORK.

In order that a custom of railroad employes to do work in a particular manner should be binding on the company, and render it liable for an injury resulting to another employé, the custom must have been known to it, or have been so general that its knowledge must be presumed.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 185.*]

4. MASTER AND SERVANT (§ 185*)—DUTY OF RAILROAD COMPANY—OPERATION OF ROAD.

While a railroad company owes a positive and nondelegable duty to its employes with respect to the construction and maintenance in proper repair of its cars, tracks, and other appliances, yet with respect to the operation of its road its duty extends no further than to exercise ordinary care to provide a sufficient number of reasonably competent employes, make proper rules for their government, and exercise proper supervision over them, and when that has been done it is not liable for an injury to an employé in the operation of the road through the negligence of other employes in the operating department or their failure to observe the rules, notwithstanding such negligence makes the place unsafe to work in.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 385-421; Dec. Dig. § 185.*]

5. MASTER AND SERVANT (§ 198*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—FELLOW SERVANTS—RAILROAD EMPLOYÉS.

Plaintiff was employed by defendant railroad company as signalman; his duty being to keep the boxes and appliances used in connection with its block signal system in good condition and repair. While working at such employment, at a place on the outside of one of the tracks of defendant's double-track road, the baggageman on a rapidly moving train on the opposite track kicked a block of ice from the car, and its momentum caused it to slide across the tracks and strike and injure plaintiff. The

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ice was furnished by defendant for the use of a section crew, and was put on the car by a station agent, who directed that it be kicked off at the crossing, as it was. *Held*, that plaintiff and the baggageman were fellow servants, and that, in the absence of evidence that the station agent had authority from defendant to give the directions he did, or of a custom to so deliver the ice from the moving car so general as to be presumed to have been known to defendant, it was not liable for the injury.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 198.*]

In Error to the Circuit Court of the United States for the Western District of Tennessee.

Action by Robert Lee Hart against the Illinois Central Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

The defendant in error (plaintiff below, and hereafter called the plaintiff) recovered verdict and judgment against the plaintiff in error, as defendant below, on account of personal injuries suffered by the plaintiff. The case was heard upon the following statement of facts, agreed upon between counsel at the trial:

"On the 17th of September, 1907, Robert Lee Hart, the plaintiff, was employed by the Illinois Central Railroad Company as a signalman. His duties were to keep the boxes and appliances used with the electric signal service of the company in repair, and he was at that time assigned to a certain section of the railroad. At the place where he was assigned, the block signal service was in operation on the line of the defendant, Illinois Central Railroad Company, and its railroad at that place consisted of a double track, one track for the use of its north-bound trains, and one track for the use of its south-bound trains. The trains operated by the defendant, Illinois Central Railroad Company, were operated by means of electric block signals. These signals are in the form of a high pole with a semaphore, and work automatically by means of electric batteries and wires; the semaphore being connected with the rails of the track, so that a train, in passing over the rails by one of the signals will cause the same to work automatically, and to display a signal which will indicate to any other train approaching on the same track that the block, which is the portion of the track between signals, is occupied by another train, and, under the rules of the company, no train is permitted to enter a block which is so occupied. When the train passes out of the block, the signal is automatically displayed so as to indicate that the block is empty and not occupied by a train; and all of the trains upon the road are operated in this manner, and proceed in accordance with the signals from the semaphores of the various blocks. On the above date, to wit, September 17, 1907, Hart was engaged in the discharge of his duties as a signalman, and in the act of repairing one of the batteries in connection with the block signal service, near the town of East Cairo, and so engaged on the west side of the west or south-bound track, when a passenger train of the defendant company approached, running on the east track, at the rate of some 50 or 60 miles an hour, and just before the train reached the place where Hart was at work, and at the crossing of a road, the baggage master of the train threw or kicked from the baggage car, a bag of ice, weighing about 100 pounds, and which bag, owing to the momentum of the train, when it struck the ground, skidded across the south-bound track, and out more than 20 feet from the north-bound track, to the place where Hart was standing, and struck and broke his leg, and otherwise injured him. The bag of ice was put upon the train south of East Cairo, for the purpose of being thrown or kicked off at this place. It was company ice; that is, ice which the railroad company furnished to its section men in warm weather, and was thrown off at this place for the use of those employes. That this was done without the knowledge of this man, and that he, at the time, was a stranger on that part of the work, had simply been put there a few days in interchange with another employe of the company, who had been sick at that time; that this bag of ice was directed by the depot agent at the town of Wickliffe to be so kicked off of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

that fast running train, and when it was placed upon the train by the agent, or by his orders, it was known that the train would not stop at that place, and it was indicated that it should be kicked off from the train when running at this high rate of speed."

It was agreed that, if the defendant should be held liable, the amount of the verdict for plaintiff should be \$3,500. At the conclusion of the statement (no other evidence being introduced) the defendant moved for the direction of a verdict in its favor, upon the ground that the men engaged in the operation of the train, including the baggage master, were fellow servants of the plaintiff. This motion was overruled, and the jury instructed to return a verdict in favor of the plaintiff, for \$3,500. The writ of error brings up for review the action of the court, not only in refusing to direct a verdict for the defendant, but also in directing a verdict for the plaintiff.

C. N. Burch, for plaintiff in error.

K. D. McKellar, for defendant in error.

Before SEVERENS and WARRINGTON, Circuit Judges, and KNAPPEN, District Judge.

KNAPPEN, District Judge (after stating the facts as above). It is contended on plaintiff's behalf that the court rightly directed a verdict for the plaintiff, upon the ground, first, that the baggageman, in so throwing or kicking the ice off the train, was acting, not in the performance of his duties as baggageman, but "merely doing what the master himself had planned and directed him to do," it being shown, as insisted, that it was the custom of the railroad company to have this ice so distributed by putting the same off rapidly moving trains, and that the act in question was thus "in accordance with a fixed purpose and plan"; and, second, because the act of so throwing off the ice was a breach of the employer's duty to provide the employé with a safe place to work.

It is clear that unless this method of putting the ice off the moving train is shown to have been either expressly or impliedly authorized by the railroad company, or permitted by it, with knowledge of the existence of the alleged custom (or unless it shall be held that the act in question constituted a breach of the employer's duty to provide plaintiff a safe place to work), the act of the baggageman was the act of a fellow servant of the plaintiff. There being no Tennessee statute governing the relations in question, it is unnecessary to look to the decisions of the Supreme Court of that state; the question being one of common-law liability of the employer, and thus one of general law. *B. & O. R. R. Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772; *Newport News & M. V. Co. v. Howe* (C. C. A., 6th Circuit) 52 Fed. 362, 3 C. C. A. 121; *Kinnear Mfg. Co. v. Carlisle* (C. C. A., 6th Circuit) 152 Fed. 933, 936, 82 C. C. A. 81.

The rule is well settled in the courts of the United States that an employer is not liable for an injury to an employé occasioned by the negligence of another employé engaged in the same general undertaking; that it is not necessary to the application of this rule that an employé should be engaged in the same operation or particular work; that it is enough to bring the case within the general rule of exemption if they are in the employment of the same master and engaged in the same common enterprise, both employed to perform duties tending to accomplish the same general purpose; or, in other words,

if the services of each in his particular sphere or department are directed to the accomplishment of the same general end. Among the cases which declare this rule the following decisions of the Supreme Court and of this court may be cited: *B. & O. R. Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772; *Oakes v. Mase*, 165 U. S. 363, 17 Sup. Ct. 345, 41 L. Ed. 746; *No. Pacific R. R. Co. v. Poirier*, 167 U. S. 48, 17 Sup. Ct. 741, 42 L. Ed. 72; *New England R. R. Co. v. Conroy*, 175 U. S. 323, 20 Sup. Ct. 85, 44 L. Ed. 181; *Grady v. Southern Ry. Co.*, 92 Fed. 491, 494, 34 C. C. A. 491; *Thomas v. C. N. O. & T. P. R. Co. (C. C.)* 97 Fed. 245; *Kinnear Manf'g Co. v. Carlisle*, 152 Fed. 933, 82 C. C. A. 81.

The cases thus far referred to involve the relation between employes in the same department of labor, including engineer and fireman and conductor and brakeman of the same train, engineer on one train and conductor on another, brakeman on regular train and conductor of wild train, foreman and employe in repair or manufacturing shops, and yardmaster and fireman of switchyard. The authorities are equally express that the relation of fellow servant is not taken away by the fact of their employment in different departments of the same general service. In *Quebec S. S. Co. v. Merchant*, 133 U. S. 375, 10 Sup. Ct. 397, 33 L. Ed. 656, a ship's carpenter in the deck department was held a fellow servant of the porter in the steward's department. In *Northern Pacific R. R. Co. v. Hambly*, 154 U. S. 349, 14 Sup. Ct. 983, 38 L. Ed. 1009, a common day laborer in the employ of the railroad company, working under the direction of a foreman on a culvert on the line of the railroad was held a fellow servant with the engineer and conductor engaged in operating a passenger train upon the same road; the court saying (page 357 of 154 U. S., page 984 of 14 Sup. Ct. [38 L. Ed. 1009]):

"As a laborer upon the railroad track, either in switching trains or repairing track, is constantly exposed to the danger of passing trains, and bound to look out for them, any negligence in the management of such train is a risk which may or should be contemplated by him in entering upon the service of the company."

In *Texas & Pacific Ry. Co. v. Burman*, 212 U. S. 536, 29 Sup. Ct. 319, 53 L. Ed. 641, both the engineer of an express train and the section foreman were held fellow servants of a section hand. In *Louisville & Nashville R. R. Co. v. Stuber*, 108 Fed. 934, 48 C. C. A. 149, 54 L. R. A. 696, this court, speaking through Judge (now Mr. Justice) Lurton, held that a foreman of water supply, whose business was to supervise and repair tanks and pumping machinery at the water stations, is a fellow servant of the engineer of a passenger train with whom he was riding from station to station in the performance of his duties. In *Morgan v. Vale of Neath Ry. Co.*, L. R. 1 Q. B. 149, the reason for the rule which treats those employed in operating the road as fellow employes with those engaged in keeping it in condition is thus tersely stated by Erle, C. J.:

"Whenever the employment is such as necessarily to bring the person accepting it into contact with the traffic of the line of a railway, risk of injury from the carelessness of those managing that traffic is one of the risks necessarily and naturally incident to such an employment, and within the rule."

It will be noted that in the Hambly, Burman, Stuber, and Morgan Cases the injured employé was not engaged in the work of operating trains, but in keeping in order the roadbed or structures used in such operation. They were held, however, to be engaged in the general work of railroad operation, and so within the fellow servant rule. Their relations to the operation of the road are of the same class as those of the plaintiff here. The cases we have cited are sufficient authority for the proposition that the plaintiff and the baggageman in question were fellow servants, as being both engaged in the general work of operation.

The question thus arises whether the record shows without dispute either that the method used by the baggageman of kicking or throwing the ice off the rapidly moving train was in accordance with a fixed purpose and plan adopted by the company, or that there existed a custom on the part of the railroad company to make deliveries of the ice in the manner stated. It may be conceded, at least for the purposes of this opinion, that if the record does show beyond dispute that the defendant company, by the action of any one authorized to represent it in that regard, had adopted such practice, or if the general custom has been proven so long continued as that defendant would be presumed to have known it, or to be negligent in not so knowing it, it would be liable. Plaintiff's counsel has contended, by brief and oral argument, that the adoption of such practice by the defendant is shown by the stipulation of facts. We do not so construe the stipulation. The language goes no farther in this regard than to state that:

"The bag of ice was put upon the train for the purpose of being thrown or kicked off at this place. It was company ice; that is, ice which the railroad company furnished to its section men in warm weather, and was thrown off at this place for the use of its employés."

And that:

"This bag of ice was directed by the depot agent at the town of Wickliffe to be so kicked off of that fast-running train, and when it was placed upon the train by the agent, or by his orders, it was known that the train would not stop at that place, and it was indicated that it should be kicked off from the train when running at this high rate of speed."

Beyond the statement that the ice in question was "ice which the railroad company furnished to its section men in warm weather," there is nothing in the stipulation of facts necessarily connecting the defendant company with the adoption of the method of delivery in question, viz., the kicking or throwing of the ice from the rapidly moving train, unless by the statement that the ice was so delivered with the knowledge, under the direction, and according to the intent of the station agent at Wickliffe. Unless, therefore, it appears that the station agent at Wickliffe had authority to represent the defendant in adopting the method of delivery of the ice in question, and so was clothed with a superior or controlling duty to the plaintiff in that regard, it is clear no action to that effect on the part of the defendant company appears. But the record is entirely silent as to the authority of the station agent, and, to say the least, such controlling or superior authority and duty on his part cannot be presumed. As said by Judge

Taft in *Grady v. Southern Railway Company*, 92 Fed., at page 494, 34 C. C. A., at page 497:

"The Baugh Case has set such limits to the vice principal doctrine that it is exceedingly difficult to suggest a position, outside of the superintendent or acting superintendent of the various great departments of the road, which will not be filled by fellow servants of all the other employes."

And in *Thomas v. Cincinnati, N. O. & T. P. Ry. Co.*, *supra*, the same eminent jurist, commenting upon the duties of the yardmaster, which were held not to be of such superior nature as that he represented the railroad company, as between himself and the switchman, used this language:

"The nature of his duties was not at all unlike that of a station agent, only that he had more men under him. He was subject to the orders of the superintendent."

We are not to be understood as holding that the station agent could not, or in fact did not, have authority, express or implied, to represent the company to the extent of directing the method of the delivery of the ice in question, but only that we cannot presume that the powers of the station agent embraced the authority to promulgate, as a superior or superintendent, the order in question.

As to the alleged custom: If the stipulation can be construed as covering any custom to this effect, it falls short of stating a custom so general that it will be presumed to have been known to the defendant. We need not go outside the decisions of this court for authority that such notice is necessary in order to bind the defendant. *B. & O. Ry. Co. v. Doty*, 133 Fed. 866, 67 C. C. A. 38; *Carnegie Steel Co. v. Byers*, 149 Fed. 667, 82 C. C. A. 115, 8 L. R. A. (N. S.) 677; *Morgan Construction Co. v. Frank*, 158 Fed. 964, 86 C. C. A. 168. It is true that these decisions are in cases involving defects in machinery or appliances; but the reason for the rule is no different with respect to the existence of a custom. In *Southern Ry. Co. v. Rhodes*, 86 Fed. 422, 30 C. C. A. 157, where it was sought to hold a railroad company liable for an injury to a passenger, through being hit by a mail pouch thrown by the post office employes from a moving train, it was held by this court, speaking through Judge Severens, that the duty to notify passengers of such danger and to take such steps as might be necessary to prevent a continuance of the practice did not arise until the railroad company had notice of such practice, either express or implied, from its long continuance. The facts that in the *Rhodes Case* the negligent act of throwing the pouch was done by a post office employé rather than a railway employé, and that the person hit was a passenger rather than an employé, do not affect the principle involved, as to the requirement of notice.

Do the agreed facts show a breach of duty on the part of the defendant in respect to providing the plaintiff a safe place to work? In our opinion, such breach of duty is not shown. There is no claim that at the place where the injury occurred there was any defect in the railroad track, structures, or appliances. Of itself it was a safe place to work. It was made unsafe only because of the negligent acts of those engaged in the operation of the road; for it is clear that the delivery

of ice to workmen engaged in the work of keeping the road and track in order is a part of the operation of the road. The rule is well settled that, while the railroad company owes a positive and nondelegable duty to its employes with respect to the construction and maintenance in proper repair of its cars, tracks, and other appliances, yet with respect to the operation of the road its duty extends no further than to exercise ordinary care to provide a sufficient number of reasonably competent employes, make proper rules for their government, and to exercise proper supervision over them. When that has been done, it is not liable for an injury to an employe in the operation of the road through the negligence of other employes in the operating department, or their failure to observe the rules, notwithstanding such negligence makes the place unsafe to work in. In *Martin v. Atchison, T. & S. F. Ry. Co.*, 166 U. S. 399, 17 Sup. Ct. 603, 41 L. Ed. 1051, the plaintiff, a laborer in the employ of the railroad company, while on a hand car proceeding to his work was run into by a train. It was argued that the defendant violated its duty to see that the plaintiff had a reasonably safe place in which to perform his work, through the negligence of the foreman in failing to warn the plaintiff of the danger, as he had agreed to do. It was held that the doctrine as to the duty of the master to furnish a safe place for the servant to work in had no application. In *Pennsylvania Co. v. Fishack*, 123 Fed. 465, 59 C. C. A. 269, the negligence of a switch yardmaster, in directing a train to take a certain track, with information that it was open when it was not, caused a collision. It was held that the act of the switch yardmaster was not a breach of the duty to provide a safe place to work, but that the act complained of was one of operation. In that case Judge Cochran, who wrote the opinion of this court, reviewed a large number of cases sustaining the undoubted rule above stated. The following cases, in addition to those cited in *Penn. Co. v. Fishack*, support the rule there stated: *American Bridge Co. v. Seeds* (C. C. A., 8th Circuit), 144 Fed. 605, 75 C. C. A. 407, 11 L. R. A. (N. S.) 1041; *Kinnear Mfg. Co. v. Carlisle*, supra; *Portland Gold Min. Co. v. Duke* (C. C. A., 8th Circuit), 164 Fed. 180, 182, 90 C. C. A. 166. See, also, *Neagle v. Syracuse, etc., Ry. Co.*, 185 N. Y. 270, 77 N. E. 1064.

None of the cases cited on plaintiff's behalf, in our judgment, conflict with the rule we have stated. Thus, in *Choctaw, Okla. & Gulf Ry. Co. v. McDade*, 191 U. S. 64, 24 Sup. Ct. 24, 48 L. Ed. 96, the negligence, which was held to be that of the railroad company, consisted in so maintaining a water tank spout as to collide with a brakeman at his post of duty upon a freight train. This was clearly a breach of a nondelegable duty to provide the employe with a safe place to work. Such construction was no part of the operation of the railroad. In *Kentucky Block Cannel Coal Co. v. Nance*, 165 Fed. 44, 91 C. C. A. 82, decided by this court, the plaintiff, while doing mining work, was injured by the fall of a drain pipe in course of removal from a worked-out portion of the mine, through the negligence of those engaged in the removal of the pipe. It was held that the plaintiff and the workmen whose negligence caused the fall of the pipe and resulting injury were not fellow servants, for the reason that plaintiff was en-

gaged in the work of operating the mine, while the negligent servants were engaged in the dismantling of a place provided for the work of operation, and so represented the master in a duty to the servant equally nondelegable as the work of original construction. In *Northwestern Fuel Co. v. Danielson* (C. C. A., 8th Circuit), 57 Fed. 915, 6 C. C. A. 636, plaintiff was employed by defendant to shovel and remove coal from a burning dock. While plaintiff was so at work under two bents which formed a part of the trestlework upon the dock, he was injured by the falling of the bents, occasioned by the negligence of two foremen engaged in the work of tearing down the trestle, and that of the superintendent under whose direction the foremen were so engaged, in failing to notify the plaintiff that the trestle was being taken down. It was held (so far as material to this case), not only that the superintendent was the representative of the master, but that the foremen engaged in the work of demolition were not the fellow servants of the plaintiff, because they represented the defendant in the nondelegable duty of keeping the place in which plaintiff was at work reasonably safe. In *McCabe & Steen Const. Co. v. Wilson*, 209 U. S. 275, 280, 28 Sup. Ct. 558, 52 L. Ed. 788, it was held that the superintendent of construction and foremen of the bridge gang engaged in supervising and directing the work on a bridge represented the principal with respect to the duty to provide a safe and suitable place and structures for its employes to work in, and so were not fellow servants as to a fireman engaged in the movement of a train over the bridge, viz., engaged in the operation of the road as expressly distinguished from the work of construction. In *Santa Fé & Pacific R. R. Co. v. Holmes*, 202 U. S. 438, 26 Sup. Ct. 676, 50 L. Ed. 1094, it was held that a train dispatcher represented the company in the promulgation of orders for the operation of the train, and was thus not a fellow servant of the trainmen. The decision in the *Holmes Case* is in accordance with the decided weight of authority previous thereto. This court has more than once asserted the same proposition (*B. & O. Ry. Co. v. Camp*, 65 Fed. 952, 13 C. C. A. 233; *Felton v. Harbeson*, 104 Fed. 737, 44 C. C. A. 188), and this proposition was recognized in *Pennsylvania Co. v. Fishack*, *supra*. We see nothing in the cases of *Fletcher v. Baltimore & Potomac R. R. Co.*, 168 U. S. 135, 18 Sup. Ct. 35, 42 L. Ed. 411, and *Peters v. George*, 154 Fed. 634, 83 C. C. A. 408, opposed to the views we have expressed.

The conclusion reached is that the agreed facts did not justify a direction of verdict for the plaintiff. But while, under the facts on which the case was submitted, it would have been proper to direct a verdict for the defendant, yet such facts are not inconsistent with the existence of other facts, not embraced in the stipulation, upon which a liability might be established; and, as the agreement was made upon the trial, it must be held made for the purposes of, and limited to, that trial, and so cannot, under the practice which contemplates the production of proofs in open court, be held to preclude further or different proofs upon another trial.

The judgment must accordingly be reversed, and a new trial ordered.

In re RUSSELL.

(Circuit Court of Appeals, Second Circuit. February 8, 1910.)

No. 141.

1. RELEASE (§ 25*)—CONSTRUCTION—INTENTION OF PARTIES.

Releases are to be construed according to the intent of the parties, as it may be gathered, if it can be gathered, from the instrument itself.

[Ed. Note.—For other cases, see Release, Cent. Dig. § 48; Dec. Dig. § 25.*]

2. BANKRUPTCY (§ 407*)—GROUNDS FOR REFUSAL OF DISCHARGE—FALSE STATEMENTS—RELEASE.

An agreement by a creditor based on a valuable consideration, which recites that one of its purposes is to cancel and surrender certain written statements made by a debtor on which he obtained credit, the truthfulness of which was in controversy between the parties and by which the creditor expressly cancels and "agrees to surrender up the same, and concedes that any inaccuracies therein * * * were inadvertent and without wrongful intent," debars the creditor from using such statements as a ground of objection to the debtor's discharge in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 407.*]

3. BANKRUPTCY (§ 407*)—GROUNDS FOR REFUSAL OF DISCHARGE—FALSE STATEMENTS.

A financial statement delivered to a commercial agency for general circulation among its inquiring subscribers is not within Bankr. Act July 1, 1898, c. 541, § 14b, 80 Stat. 550 (U. S. Comp. St. 1901, p. 3427), as amended by Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 (U. S. Comp. St. Supp. 1909, p. 1310), which makes it a ground for refusing a discharge that the bankrupt has "obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit."

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 407.*]

Appeal from the District Court of the United States for the Southern District of New York.

In the matter of Walter Russell, bankrupt. On appeal by the Commercial Trust Company of New York from an order granting a discharge. Affirmed.

The following is the opinion of the trial court:

I think that the contract of March 2, 1906, between Mr. Russell, Mrs. Russell, and the Commercial Trust Company bars the Trust Company from taking legal proceedings of any kind to the disadvantage of the bankrupt based on the financial statements made to the Trust Company and the Bradstreet Company. There was ample consideration in Mrs. Russell's indorsement for \$17,500 and her transfer of her collateral. The Trust Company, by that contract, agreed to cancel and surrender the said statements, conceded the inadvertency of any misstatements therein, and waived and released any claim in that regard. The effect of that agreement, in my opinion, was to leave the parties to it subsequently in the same condition in which they would have been if no such financial statements had ever been made. This conclusion makes it unnecessary to consider the question elaborately argued by the bankrupt's counsel whether the statements were in fact untrue.

My conclusion is that the referee's report should not be confirmed, and that a discharge should be granted to the bankrupt.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Campbell & Moore (William J. Wallace, of counsel), for appellant.
Charles A. Boston, for appellee.

Before LACOMBE and WARD, Circuit Judges, and HAND, District Judge.

LACOMBE, Circuit Judge. On April 14, 1908, Russell filed his petition and was adjudged a bankrupt. On June 8, 1908, he applied for his discharge. The creditors were duly cited to appear; the Commercial Trust Company, a creditor in the sum of \$40,000, duly appeared and opposed the discharge, filing written specifications of objection. These specifications set out two statements in writing by the bankrupt, which the objecting creditor claimed were materially false and were made to the Trust Company for the purpose of obtaining property from it on credit, such property being obtained from the creditor upon said statements. The bankrupt vigorously denies the falsity of such statements, which are dated respectively January 26, 1907, and April 26, 1907. The case was sent to a referee as special master for examination and report. Testimony was taken, and he reported (February 24, 1909) that both statements were false, that the bankrupt obtained property from the creditor on the strength of each of them, and recommended that discharge be denied. The District Judge overruled the report and granted discharge, basing his decision on a certain agreement between the bankrupt and the creditor (dated March 2, 1908) which will be hereinafter referred to. The order granting discharge is now here on appeal. The opinion of the District Judge will be found above. The facts detailed in the record are as follows:

Russell is an artist who engaged in various business ventures connected with real estate and the erection of buildings thereon. In May, 1905, he made a statement to a reporter of Bradstreet's Commercial Agency giving an estimate of his financial condition. This statement is not specified and was not considered by the special master. On January 12, 1907, Russell wrote a letter to the Trust Company in respect to opening accounts for two corporations, and upon receiving a reply called (January 14th) and made himself known, had a conversation with its president, and referred the latter to four individuals as to his honesty, integrity, and general standing. The company wrote to these individuals the same day and received favorable replies. It also applied to the Bradstreet Company for a report, and on the same day—January 14th—received a copy of the statement of May, 1905. Thereupon on January 29, 1907, the Trust Company loaned Russell \$20,000 on his demand note with collateral. On January 26, 1907, Russell made a statement in writing to the Bradstreet Company giving an estimate of his financial condition on a printed form furnished by the company signed by him. This is one of the statements enumerated in the specifications. Whether or not it is false has been hotly contested, but we do not find it necessary to decide that question. The Bradstreet Company kept this statement on its own files, but on February 2, 1907, it sent to the Trust Company a copy of its contents, adding that, while "well regarded personally and believed to possess

considerable means, no definite estimate of same is obtained." On February 13, 1907, the Trust Company made a further loan to Russell on his demand note for \$5,000. Subsequently on April 15, 1907, the Trust Company called on Russell for a statement as to his financial condition; he sent them such written statement signed by himself on April 26th. This is the other statement set out in the specifications of objections, and it will not be necessary to decide whether or not the special master erred in finding that it was false. On May 4, 1907, the Trust Company loaned to the Dayton Construction Company (in which Russell was interested) on its note due August 5th, with collateral, \$12,500. The president of the Trust Company asserts that Russell indorsed this note, the latter asserts that he did not; the question might readily have been determined by producing the note. This was not done, and upon examining all the evidence bearing on this branch of the case we are inclined to the opinion that his indorsement was not on it. Inasmuch, however, as a note of one Dorrance (\$15,000), to the Dayton Company which was indorsed by Russell was substituted for the Dayton Company note when it came due, the question becomes unimportant; Russell was of course liable on this Dorrance note whether the proceeds of the prior note went to the Dayton Company or to himself.

Some months later, the panic of 1907 having intervened and in January or February, 1908, differences having arisen, the matter of the truthfulness or falsity of these two statements was taken up in an interview or interviews between counsel for the Trust Company and Russell. Counsel insisted that there were several false representations in the written statements, that they could have Russell arrested and put in jail in a civil action on a charge of fraud, that his reputation would suffer, that Russell was up against a very grave proposition. Counsel asked if Russell's wife had property, and if she would not give up some of it to help him out of this fix. These interviews resulted in the agreement, above referred to between Helen A. Russell, the wife, of the first part, Walter Russell of the second part and the Trust Company of the third part, which was executed March 2, 1908. It recites that "the party of the second part has heretofore borrowed certain moneys from the party of the third part aggregating \$40,000 and has delivered written statements to the party of the third part as to his assets and liabilities, and has transferred to the party of the first part certain properties included in said statements." The indebtedness stated is the \$25,000 loaned to Russell and the \$15,000 due on the Dorrance note indorsed by him, which was substituted for the original Dayton Company note for \$12,500. It further recites that "the party of the first part (the wife) desires to secure the withdrawal and cancellation of any such filed statements and to avoid any contention regarding the validity of any such transfer of property to her, and to obtain from the party of the third part forbearance of its claim against the party of the second part and to that end has agreed to assume responsibility for a portion of said indebtedness, to wit, the sum of \$17,500, and to secure the payment thereof by the assignment as collateral security" of certain property and securities specifically enumerated.

It further recites that:

"The party of the third part in consideration of such assumption and giving of security by the party of the first part as aforesaid has agreed to forbear as herein provided in respect to its claim against the party of the second part and has agreed to cancel and surrender any statements delivered to it by him and to concede the inadvertency of any misstatements therein, and to waive and release any claim in that regard, and in respect to any transfer of properties from said party of the second part to said party of the first part and to waive and release any claim or right against them or either of them or against any such properties on account of any such transfer."

The parties mutually covenant and agree that Mrs. Russell shall indorse and deliver a note of her husband for \$17,500 securing the payment thereof by certain specified collateral, that Russell shall also sign and deliver two other notes for \$11,250 each, and that the Dorrance note and any and all renewals thereof or securities, if any be obtained from Dorrance, shall be retained as security. Then follows the covenant of the Trust Company in the following language:

"Fourth. The party of the third part agrees that any statements filed with it by Walter Russell in respect to his property or assets or resources, be and the same are hereby in all respects canceled and agrees to surrender up the same, and concedes that any inaccuracies therein, especially in a certain statement dated April 26th, 1907, were inadvertent and without wrongful intent, and agrees to and does herein waive and release said Walter Russell from any claim on account of such statement or statements, and further agrees to and does hereby release Mrs. Russell, Walter Russell and any properties mentioned in said statement or statements which have been transferred by him to her, from any claim or right it has or might have to attack or otherwise question any such transfer."

The District Judge held that this contract bars the Trust Company from taking legal proceedings of any kind to the disadvantage of the bankrupt based on the financial statements made to the Trust Company and the Bradstreet Company, and the correctness of that decision is challenged by this appeal.

The appellant relies on the well-settled rule of construction that releases, though containing the broadest and most general terms, are to be limited to the particular claims which from the recitals appear to have been in the immediate contemplation of the parties. This rule is well illustrated in two of the cases cited on the brief. In *Jackson v. Stackhouse*, 1 Cow. (N. Y.) 122, 13 Am. Dec. 514, the document acknowledged receipt of a valuable consideration, in full of a specified judgment alleged to be for two years' interest on a specified bond, and "also in full of all debts, demands, judgments, executions and accounts of whatsoever nature to this date." It was held not to release the obligee's rights under the mortgage given to secure the bond. In *Union Pac. Ry. Co. v. Artist*, 60 Fed. 365, 9 C. C. A. 14, 23 L. R. A. 581, the document acknowledged the receipt of \$150 in full payment for "injuries received at McCammon on Oregon Short Line while assisting in switching a burning baggage car from main track to side track" and ended with usual form of general release of all suits, debts, dues, claims and demands. It was held not to bar an action for personal injuries resulting from malpractice of the surgeons in defendant's hospital in Denver who treated him for the injuries recited, but carelessly left a drainage tube in his leg as the wound healed and when he was

discharged. The construction of releases, however, is according to the intent of the parties as it may be gathered, if it can be gathered, from the instrument itself; and, since the language to be construed varies in the different cases, a decision in one is not always controlling of the construction in another.

Looking at the contract now before us we think it would be altogether too narrow a construction to hold that it was intended merely to save Mrs. Russell from litigation regarding the validity of certain transfers to her and to release Mr. Russell from any right of action based upon his false statements. The recitals themselves show that the Trust Company was not only to "forbear" in respect to its claim against Russell for having borrowed money upon alleged false statements; it was also to concede that any misstatements in the written statements were "inadvertent and without wrongful intent" to surrender such statements, and to "cancel" the same. The language seems well chosen to express the intention that as between Russell and the Trust Company these alleged false statements were to be completely wiped out, and the situation be as if they had never been made. This comprehensive language is not found merely in a covenant following recitals of less scope; it is in the recitals themselves, in the particular recital which undertakes to express what the Trust Company is willing to do in order to obtain \$17,500 of presumably good security. There is nothing inherently improbable about such a transaction. Although it had a cause of action against Mrs. Russell to set aside a transfer and one against Russell for obtaining money on false representations, the value of these causes of action could be determined only by their trial. That there would be a vigorous defense which might make the result uncertain is manifest from the brief which the appellee has filed here. The evidence indicates that, except for the hold which it had on him by reason of the alleged false statements, the company did not expect to get much, if anything, from him in payment of his notes. How much property Mrs. Russell had does not appear, and we may fairly assume that the agreement was considered by the Trust Company to be beneficial to itself, or it would not have entered into it. It is fair also to assume that the Trust Company entered into it with full appreciation of the existing situation and of what it might become in the natural course of events with an insolvent debtor. The suggestion that it could not have been within the contemplation of the parties that Russell would go into bankruptcy is gratuitous. The counsel for the company in the interview with Russell which led up to the agreement expressly told him that they did not intend to let him go into bankruptcy until he had made good with them.

We concur, therefore, with the District Judge in the conclusion that having for a valuable consideration agreed with Russell to expunge the statements covered by the agreement the Trust Company cannot be allowed to present such statements as an objection to his discharge. Other creditors might be free to make such use of them (*In re A. B. Carton* [D. C.] 148 Fed. 63), but this creditor by canceling the statement has prevented itself from presenting it.

By reference to the agreement it will appear that the recitals refer

to "any statements delivered to (the Trust Company) by (Russell)" and the covenant of the Trust Company is to cancel and surrender "any statements filed with it by Walter Russell." The signed statement of January 26, 1907, was made by Russell to the Bradstreet Company, was filed with it, and was never delivered to the Trust Company or apparently seen by them before the trial. It is contended, therefore, that this statement is not within the language of the agreement. In considering this suggestion it will be useful to refer to the statute. Act July 1, 1898, c. 541, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3427).

Section 14b provides for the refusal of a discharge when the bankrupt has "(3) obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit." This provision was incorporated by amendment in 1903. Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 (U. S. Comp. St. Supp. 1909, p. 1310). Its language is precise and evidently chosen to restrict the scope of the provision, so that no loose construction might extend it beyond what Congress intended to enact when it added an objection, the like of which appears in no previous bankruptcy law. This is apparent not only from the choice of words, but also from the history of the amendment. As it left the house it contained the clause "or of being communicated to the trade"; that clause was struck out in the Senate, and the House concurred in thus restricting it. Collier on Bankruptcy (7th Ed.) p. 287. It would seem from this that the ordinary statement of financial condition made to a mercantile agency for general circulation among its inquiring subscribers would not be within the statute. Three cases are cited in appellant's brief. In *Re Dresser*, 146 Fed. 393, 76 C. C. A. 655, this court held that when the bankrupt had prepared a written statement, false in material facts, and delivered it to a broker whom he employed to obtain property on credit for the bankrupt, with the intent that the broker should exhibit it to the creditor, such transaction was in all respects the same as if the bankrupt had himself exhibited the statement. In *Re Pincus* (D. C.) 147 Fed. 623, the manager of a mercantile agency, at the request of one of its subscribers, made an inquiry of the bankrupt as to a certain loan contained in a statement which he had filed with the agency, and which the manager showed him. The bankrupt wrote a false statement upon the document, and thereafter the manager "communicated the result of this visit" to the subscriber, who thereupon extended credit to the bankrupt on the faith of the statement. Discharge was refused. In *Re Carton & Co.* (D. C.) 148 Fed. 63, the same judge held that "the usual commercial agency report obtained by an agency, in order that it may give the new merchant a 'rating' and for general distribution among its customers, cannot be made the basis of successful action by an objecting creditor." But that "when an agency applies to a merchant for a specially signed report on his condition he must know that such report is for the special purpose of enabling those who vend him goods to decide upon his financial responsibility." The case went off on another ground, but the court intimated that in its opinion such special reports when false were to be treated as within the statute, whether or not it was disclosed to

the bankrupt that some particular person with whom he was about to deal had asked for the information.

We do not express any opinion as to the correctness of these last two decisions; it is not necessary to do so. If the statement of January 26th which Russell gave to the reporter, sent to him by the Bradstreet Company, is to be considered as merely the usual commercial agency report filed with such agency to secure a rating, then not having been made to the Trust Company for the purpose of obtaining the property or credit, it is not within the language of the act. If, however, it be held that the circumstances were such that it should be assumed that Russell knew the Trust Company was making inquiries about him at the agency, then, when he filed a false report with the agency he gave it authority, as his agent, to repeat his statement to the Trust Company, and, although the latter company never saw the original statement the copy which was sent to it by the agency was as effective to bind the bankrupt as if he had signed it with his own hand and delivered it personally to the president of the Trust Company. But, in such event, the "materially false statement in writing" would be the one which was delivered to that company, upon which alone it relied, which was placed in its files and which upon the execution of the agreement it transferred to Mrs. Russell. Such statement, however, is covered by the agreement and may not be availed of by the Trust Company as a bar to discharge.

In the foregoing we do not mean to be understood as deciding whether or not the Commercial Trust Company had in any case any standing in court under a specification alleging that its property had been obtained through fraudulent misrepresentations, which facts, if true, would have excepted its debt under section 17 (2) from the bar of a discharge. Here we only determine that, if it had such a standing its case was not made out on the facts.

The order is affirmed.

HOBBS MFG. CO. v. GOODING et al.

(Circuit Court of Appeals, First Circuit. February 3, 1910.)

No. 835.

1. EQUITY (§ 150*)—PLEADING—MULTIFARIOUSNESS—ANCILLARY BILL.

An ancillary bill in equity intended to serve the purpose of an equitable execution may be broad in scope, and is flexible in character to meet the necessities of the case. Where, in a suit for infringement of a patent against four defendants, joint and several judgments were entered against all of the defendants for profits during a portion of the time, and against two of them only for profits during another portion, an ancillary bill filed by complainant to reach and subject property alleged to have been fraudulently conveyed by one of the defendants against whom both judgments run is not multifarious because it joins as defendants all of the judgment defendants, and also seeks to make available equitable assets of one or more of the others.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 342, 371-379; Dec. Dig. § 150.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. EQUITY (§ 401*)—PLEADING—INSUFFICIENCY OF ALLEGATIONS—POWER TO REFER.

Where a bill in equity in a federal court fails to conform to the standard rules of equity pleading, and especially to equity rule 28, in not containing specific allegations necessary to limit the scope of the inquiry within definite and proper bounds, it is within the general powers of the court, when it becomes necessary for its own protection to do so, on its own motion to send the bill to a master to be purged of everything found not to conform to the rules.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 401.*]

Appeal from the Circuit Court of the United States for the District of Massachusetts.

Suit in equity by the Hobbs Manufacturing Company against George E. Gooding and others. Complainant appeals from a decree dismissing an ancillary bill. Reversed.

For opinion below, see (C. C.) 166 Fed. 933. See, also (C. C.) 164 Fed. 91.

Edward S. Beach, for appellant.

Raymond T. Parke, for appellees Gooding and another.

William A. Copeland (William A. Macleod, on the brief), for appellee Dike.

Charles Warren, for appellee John T. Robinson Co.

Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

PUTNAM, Circuit Judge. This is a bill in equity with reference to which there were motions to dismiss and demurrers. A careful examination of the demurrers shows that, so far as this appeal is concerned, they are to be taken simply as general demurrers. The motions to dismiss were not accepted by the Circuit Court as efficient, and they do not appear to us to be so. Nevertheless, we have not carefully sifted out all the questions which they raise, and, if we are mistaken about them, the judgment which we will enter will prevent any injurious results therefrom. The bill was dismissed on the demurrers substantially on the single question of multifariousness, and this question is the particular matter brought to our attention. The other difficulties which arise on the face of the bill are numerous; and, while we may discuss some of them, we will ultimately decide only the question of multifariousness, reserving the rest for the primary consideration of the Circuit Court.

The history of the litigation, so far as it is necessary to state it, is as follows: A bill was filed alleging infringements of sundry patents by the respondents Glazier, Metcalf, Taylor, and Gooding. Two judgments were entered in a single decree for very considerable amounts in the way of profits, one against Glazier and Metcalf, jointly and severally, alleging infringements from April, 1893, and one against all four—that is, Glazier, Metcalf, Taylor, and Gooding—jointly and severally, alleging infringements from December, 1894. The original bill was filed on December 2, 1896, and judgment was entered on January 27, 1908. There is some minor confusion of dates which we have no occasion to reconcile. Execution issued in the original suit. While

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the present bill alleges that the execution was returned unsatisfied, the return on the execution, which is in some way made an exhibit, states that the marshal made search for property in Lynn, Salem, and Hyde Park, and was unable to find any. It concludes:

"Therefore I return this execution into court unsatisfied."

The allegations of the bill override the form of return shown by the exhibit until it is properly offered in evidence. We observe on this because this perhaps is not a sufficient return, and the law on this point is technical. It goes so far that the analogy to the statute of limitations, as applied in equity, prevents the commencement of the running of the period of limitation until the formal return by the officer that the execution is unsatisfied has been made. *Bowker v. Hill* (C. C.) 115 Fed. 528; affirmed in *Taylor v. Bowker*, 111 U. S. 110, 4 Sup. Ct. 397, 28 L. Ed. 368. Whether the return will be sufficient as it stands when offered in proof, or whether it can be amended so as to be sufficient, if not now sufficient, are matters which are left for primary consideration and action by the Circuit Court.

The bill before us is in substance an equitable execution, ordinarily known as an ancillary bill, intended to obtain satisfaction of the original judgment. It would be wearisome to attempt to point out in detail how far the Supreme Court has gone with regard to ancillary bills; but we will make brief references thereto for the purpose of showing that the bill before us is strictly and properly of that nature, is amenable as such, and is in no sense subject to the strict rules as to parties or to jurisdictional questions applicable to original suits. We make our references without discrimination between equity and law, because the fundamental principles of ancillary proceedings apply equally to both. The most striking illustrations of the reaching out power of the federal courts through the use of ancillary proceedings are found in the scope given by the Supreme Court to suits by receivers, especially in winding up cases and in creditors' bills, and to writs of mandamus when availed of for the purpose of securing payment of judgments by the taxing officers of quasi corporations. The extent of the ancillary powers of the federal courts was never well understood until the leading case of *Freeman v. Howe*, 24 How. 450, 460, 16 L. Ed. 749, which is now so familiar that we need not develop it, and which is among those cited in *White v. Ewing*, 159 U. S. 36, 39, 15 Sup. Ct. 1018, 40 L. Ed. 67, with reference to this general topic. The extent and flexibility of these ancillary powers were pointed out in *Pullman's Palace Car Co. v. Washburn*, decided in this circuit on March 8, 1895, 66 Fed. 790, affirmed by the Circuit Court of Appeals, 76 Fed. 1005, 21 C. C. A. 598. The bill before us is clearly within the principles applicable to ancillary proceedings, of a class to be regarded as flexible in accordance with the varying details necessary to make them efficient under differing circumstances.

We have had at bar a very considerable discussion with reference to the citizenship of the parties to this bill. In a general sense this is a matter of no consequence in an ancillary suit. This was strikingly exhibited in *Root v. Woolworth*, 150 U. S. 401, 14 Sup. Ct. 136, 37 L. Ed. 1123. While the question of citizenship is of no importance, the

question of residence, or inhabitancy, may be; but this bill for the most part undertakes to apply for the benefit of the complainant specific properties which it is claimed are located within the district of Massachusetts, where all the proceedings have taken place. So far as this is justified, jurisdiction is, of course, in some way maintainable under section 738 of the Revised Statutes, amended, or re-enacted, in section 8 of the Act of March 3, 1875, c. 137, 18 Stat. 472, 473 (U. S. Comp. St. 1901, p. 513), as most lately pointed out in *Ingersoll v. Coram*, 211 U. S. 335, 29 Sup. Ct. 92, 53 L. Ed. 208. However, so far as such jurisdictional questions may arise, we reserve them also for the primary consideration and determination of the Circuit Court.

Coming, therefore, to the substantial question before us, we take up the relations of Glazier to these proceedings. Without going into details, and without reference to other allegations of insufficient character to which we will come later, the bill seeks to reach certain real estate located in the district of Massachusetts, fully described, which it alleges Glazier has fraudulently conveyed to persons who still hold it for his equitable benefit and who are made parties. In view of the fact that the demurrers we are dealing with are general and to the whole bill, there may be enough here to sustain the bill, so far as they are concerned, even if all the allegations as to the other parties against whom the judgments run were insufficient. We can therefore test the question of multifariousness by having for that purpose specific regard to Glazier, and to none other of the respondents in the original suit.

As we have shown, Glazier is one of the four parties against whom decree was entered in part, jointly and severally, and also one of the two parties against whom alone decree was entered in part, jointly and severally; so that, so far as he is concerned, one portion of the judgment overlaps the other, and he and his interests, and the remedies against him, permeate every aspect brought to our attention. We are therefore not called on to deal with a condition which might exist, where one part of a judgment might be against two of the original respondents only, and the other part against the other two only, in which event there would be no overlapping. Under such supposed circumstances, no advantage could apparently come from any attempt to enforce that part of the original decree which lay against two of the original respondents, in connection with an attempt to enforce the other part thereof which lay against the other two original respondents; and the refusal of the Circuit Court to attempt the same might well fail of being reviewed by the appellate tribunal. Here, however, so far as Glazier is concerned, we have necessarily an apportioning of all the property which he has fraudulently conveyed in accordance with the terms of the bill, or of the proceeds thereof. The whole of it could not in equity go to that portion of the judgment which ran against two respondents only, or to that portion which ran against all four. Therefore, there must be an apportionment as between these two portions of the judgment. If the decree here were in *solido* against all four of the original respondents for one and the same amount, it would not be questioned, and could not be questioned, that an ancillary bill of the character before us would not be multifarious although it joined all

four, and although it sought to make available equitable assets of only one, two, or three of them, or several properties fraudulently conveyed by only one, two, or three. This is clear on general equitable principles, because, whatever the form or purpose of an ancillary proceeding having in view securing payment of an original decree, marshaling between all the respondents is an essential element in the view of the Chancellor. Therefore, all the respondents would necessarily be joined in order that the equities of marshaling might be worked out. Story's Equity Pleadings, § 286. Pollard v. Bailey, 20 Wall. 520, 22 L. Ed. 376, and other cases of that class, illustrate the broad necessity of bringing in all respondents for the proper application of the equities of apportionment and marshaling. Here we have, as we have shown, apportionment necessarily preceding the same marshaling on the same principles as though there had been but one decree in solido against all four respondents. Therefore, it follows that, on the mere question of multifariousness, there must be a reversal.

But, as we have already said, the difficulties of this case do not stop there. We have said that the bill apparently states in proper form sufficient matter to establish a remedy so far as concerns Glazier; and therefore, on account of the necessity of apportionment, it is sufficient to require all other original respondents as parties. We have also said that there may be sufficient on these demurrers to sustain the bill; but we must add that we are doubtful whether the bill contains sufficient, properly alleged, to reach any assets said to have been fraudulently conveyed by any respondent other than Glazier. Many allegations are in the alternative without being in such form as to enable the complainant to assert a double aspect. Of course, such allegations are insufficient, and, in some circumstances fatal on general demurrer. Moreover, the bill contains allegations substantially as follows:

"Your orator further avers, on information and belief, that said defendants, George W. Glazier, John C. Metcalf, Eugene H. Taylor, and George E. Gooding, each has large property interests and rights in said Consolidated Box Machine Company, which neither of them intends to apply to the payment of your orator's claim."

Also as follows:

"On information and belief your orator further avers that said John C. Metcalf has large property interests and rights, and is a stockholder, either in his own name or in the names of others for his use and benefit, in and of said John T. Robinson Company."

With reference to these extracts, it may be that the complex allegations of this bill contain particulars which we have overlooked. But there are allegations of this character where there are no particulars stated. These are not only invalid in accordance with the rules of equity pleading, but, if allowed to stand, might involve the court in an amount of investigation as to which no limits or boundaries have been put by the bill, accomplishing in the end no practical result. Therefore, in view of the insufficient allegations of the character to which we have referred, and others insufficient for other reasons, it is necessary that the court should protect itself of its own motion if the parties fail to do so. Some of these matters are mere surplusage, and some are of

a character which are available only on special demurrer, but would unnecessarily open out a field without limits or bounds, as we have said, if allowed to remain in the bill. Therefore, before proceeding with such a bill the Circuit Court should send it to a master to be purged of everything which is found not to conform to the standard rules of equity pleading. Equity rule 27 may not be sufficiently broad to reach this case; but, so long as any bill fails to comply with the standard maxims of pleading to which we have referred, and especially fails to comply with equity rule 26, it is within the general powers of the court, when it becomes necessary for its own protection so to do, to proceed of its own motion in the way we have pointed out. Dewhurst's Rules of the United States Courts (1907) 350, 351; Kelley v. Boettcher, 85 Fed. 55-61, 29 C. C. A. 14, decided by the Circuit Court of Appeals for the Eighth Circuit on February 14, 1898.

One of the respondent corporations, the John T. Robinson Company, filed a motion to dismiss. Its brief does not refer us to any demurrer, and we have not found any in the record. This corporation was organized in Massachusetts, and therefore it is subject to service; and we find nothing in the motion to dismiss which requires our attention. The same corporation also answered, but the record does not bring that before us at the present time. Therefore, we cannot take authoritative cognizance of anything peculiar to the John T. Robinson Company; but, in line with what we have said as to the general frame of the bill, and the duty of the Circuit Court in reference thereto, we call attention to certain allegations supposed to affect this corporation. We may add that we believe there are like conditions of pleadings with reference to other corporations brought in as parties respondent. The bill alleges that Taylor owns one share of its capital stock which stands in his own name. It proceeds further as follows: "That if only one share of the stock of said John T. Robinson Company stands in the name of said Eugene H. Taylor, then there are a large number of other shares of the stock of said company standing in the names of other persons for the use and benefit of said Taylor." The "other persons" are not named.

It is part of the A B C of the law that in equity the title of corporate stocks, standing apparently in the name of an adverse party, cannot be litigated between the complainant and the corporation in question without bringing in the adverse claimant, so that an issue may be properly made. Apparently this rule was disregarded with reference not only to shares of corporation stocks, but to other properties which the bill seeks to reach. From such examination as we have been able to give, it is probable that it may be found that, with the allegations as they stand with reference to the John T. Robinson Company, the bill should be dismissed as to it, and that other parties may go out for the same reason. However, we leave this also primarily for the Circuit Court.

With reference to the real estate alleged to have been fraudulently conveyed, one or more of the respondents rely on the first section of chapter 178 of the Revised Laws of Massachusetts, to the effect that creditors may bring an action at common law for the possession of the lands of debtors fraudulently conveyed. This, of course, does not affect proceedings in the federal courts, and does not drive their suitors

to actions at common law in lieu of bills in equity, which latter not only give a nominal recovery, but clear the title. Moreover, in this respect, the statutes are not different at all from the common law, regarding the Statutes of Elizabeth as a part thereof; for at common law it has always been a rule that a writ of entry would lie under the circumstances stated. Nevertheless, the equity courts, especially the federal courts, have given a more efficient concurrent remedy of the character attempted in the bill now before us.

Under all the circumstances, the decree appealed against must be reversed, with the understanding that we have ruled conclusively only against the defence of multifariousness, as the record now stands. The Circuit Court is left to initiate and primarily conclude all investigations as to all other topics, the duty resting upon it to purge in some way the pleadings as we have pointed out, or, if the complainant refuses to assist in so doing, to dismiss the bill.

This record is a striking illustration of the necessity of adhering to the standard rules of pleading, and especially to the directions of the twenty-sixth equity rule, that every bill should be expressed in as brief and succinct terms as it reasonably can be; and it is an especially striking illustration of the fact that loose pleadings may involve the court in an unlimited mass of investigations which may in the end prove entirely worthless. Not only do we look to the proponent of this bill, but we look also to the respondents for seasonable objections by exceptions and otherwise with reference to the state of its allegations. The failure of each in these particulars has already thrown so much unnecessary labor on the court that neither is entitled to any costs at the present time.

The decree of the Circuit Court is reversed; the case is remanded to that court for proceedings in accordance with the opinion of this court passed down on the 3d day of February, 1910; and neither party will recover any costs accruing before the filing in the Circuit Court of the mandate conforming to this judgment, either in that court or on this appeal.

LOESER v. ALEXANDER.

(Circuit Court of Appeals, Sixth Circuit. February 8, 1910.)

No. 1,955.

1. COUNTIES (§ 101*)—COUNTY TREASURER—BONDS TAKEN FROM DEPUTIES—OHIO STATUTES.

Rev. St. Ohio, § 1080, requires a county treasurer to give bond conditioned that he shall pay over according to law all public money which shall come into his hands. Section 1089 authorizes him to appoint one or more deputies, and provides that he "shall in all cases be liable and accountable for the proceedings and misconduct in office of his deputies." There is no provision requiring bonds from deputies. *Held*, that a bond required by a county treasurer from a "deputy collector of taxes" appointed by him, who was in legal effect a deputy treasurer, was not a public bond, but that the treasurer was personally the obligee, although the bond in terms ran to him as treasurer, and was entitled to sue or oth-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

erwise proceed thereon in his own name, either before or after the expiration of his term of office, and without regard to whether or not he had made good to the county the defalcation of the deputy for which he sued for which he and his sureties on his own bond were liable.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 101.*]

2. BANKRUPTCY (§ 316*)—PROVABLE DEBTS—FIXED LIABILITY.

Bankrupt was surety on the bond given by a deputy collector of taxes in Ohio to the county treasurer for his individual protection, he being accountable and liable on his own bond for the taxes collected by his deputy. Prior to the bankruptcy, the deputy had become a defaulter by reason of the failure of a bank in which he deposited his collections. *Held*, that the liability of the bankrupt on the bond was not contingent, but was a fixed liability, provable against his estate, having been liquidated; that the right of the treasurer as obligee in the bond to prove the claim was not affected by the pendency of an action at law on the bond, nor the fact that the public authorities had recovered a portion of the shortage from the receiver of the bank in which the fund was deposited, which went only in reduction of the claim.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 316.*]

3. COUNTIES (§ 98*)—COUNTY TREASURER—BOND TAKEN FROM DEPUTY—BREACH OF CONDITION.

A county treasurer who was responsible on his bond for all taxes collected by himself or deputies and required by law to keep all public money in his office, appointed the cashier of a bank in a town at some distance from the county seat, deputy collector of taxes for such town and the surrounding township, taking a bond from him conditioned that he should faithfully pay over to the treasurer all money collected by him, according to law. As collected, the tax money was deposited by the deputy in his bank in an account standing in the name of the treasurer, but with which he had nothing to do, having no passbook and making no checks thereon. In his own books he kept an account with the deputy, and on each settlement received payment from the deputy in cash and treasurer's warrants taken up by the deputy or the bank. The appointment of such deputy collector was in accordance with a custom in existence before he became treasurer, and was apparently for the accommodation of taxpayers. *Held*, that the deposit of the money in the bank by the deputy was not a payment of the same to the treasurer within the meaning of the bond, but that it remained in the custody of the deputy, and he continued liable therefor on his bond until it was actually paid over.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 98.*]

Appeal from the District Court of the United States for the Northern District of Ohio.

In the matter of Otho L. Hays, bankrupt. Appeal by Nathan Loeser, trustee, from an order allowing the claim of William L. Alexander. Affirmed.

W. J. Geer and J. N. Van Deman, for appellant.

H. M. Roberts, for appellee.

Before SEVERENS and WARRINGTON, Circuit Judges, and KNAPPEN, District Judge.

KNAPPEN, District Judge. This appeal brings up for review the order of the District Court, which affirmed the order of the referee allowing the claim of appellee, former treasurer of Crawford county, Ohio, against the estate of the bankrupt Hays, by reason of the lat-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ter's suretyship upon a bond given appellee by L. W. Blyth, as deputy collector of taxes. The facts necessary to an understanding of the case are these:

Appellee was elected treasurer of Crawford county in the year 1900, and re-elected in 1902. Bucyrus is the county seat. Galion is 12 miles distant therefrom, and in Polk township. For several years previous to appellee's election as county treasurer, it had been the practice of the treasurers of Crawford county to collect the taxes, which were payable semiannually on or before December 20th and June 20th of each year, against the residents of the city of Galion and Polk township through the Galion National Bank, by sending, semiannually, to the bank a tax duplicate for that city and township, for the guidance of the person collecting the taxes and the information of the taxpayers, together with blank tax receipts to be delivered upon payment of the taxes, and to appoint L. W. Blyth, who was cashier of the Galion National Bank, as deputy for the purposes of such collection, and accordingly styling him "deputy tax collector." The county treasurers were in the habit of making settlements on February 15th and (as stated in the record) August 15th of each year for the taxes collected by the bank, the latter paying over to the treasurer the amount collected, less warrants or vouchers on the treasurer which had been taken up by the bank, the same being in such settlement treated as cash. The date above given as August 15th is doubtless meant for August 10th. This arrangement was convenient for the taxpayers, and was attractive to the bank because it was thought to draw customers to the bank. In fact, a small percentage was charged by Blyth against the taxpayers after the expiration of the tax-paying period. Upon appellee's election as treasurer, the Galion National Bank, as well as another bank at that place, desired to make the tax collections. The Galion National Bank was preferred by appellee by reason of its familiarity with the work, and at the commencement of appellee's first term Blyth was made deputy collector; appellee exacting an indemnity bond to be executed by Blyth and all the officers of the bank. At the commencement of appellee's second term the former arrangement was continued, and the bond in question, dated December 17, 1902, given. This bond is in the penalty of \$50,000, runs to "William L. Alexander, as treasurer of the county of Crawford, state of Ohio, his executors or administrators"; recites Blyth's appointment by Alexander as deputy tax collector for Polk township, Galion school district, and the city of Galion, for the collection of taxes charged upon the tax duplicates for 1902 and 1903, and delinquent personal taxes for the year 1900, etc., and is upon condition that Blyth shall "faithfully, honestly, and impartially discharge all and singular the duties enjoined on him by law, as such deputy collector, and honestly and faithfully pay over to the said William L. Alexander, treasurer as aforesaid, all moneys by him collected as such deputy collector in the manner directed by law." The sureties (other than the bankrupt Hays, who was president of the bank) were three directors thereof. After the giving of the bond in question, the taxes were collected and paid in the same way as for several years before appellee's election as treasurer. During appellee's incumbency, at least, the county commissioners knew that the taxes in question were

being collected at the Galion National Bank. During the entire time of appellee's treasurership, the taxes collected at the bank were credited on its books to the county treasurer, whether merely in his name of office or by the addition of his individual name does not appear. Appellee knew that such collections were deposited in the bank, and doubtless expected and intended that such deposits should be made. He did not, however, understand that the account was a regular open or check account. He had no passbook and no checkbook. He kept a book account with Blyth personally, charging him with the amounts collected. Previous to the collections on account of which the claim in question is presented, two checks had been drawn by appellee upon the bank, but they were drawn under special arrangement therefor. During appellee's incumbency the only settlements made between him and Blyth were the semiannual settlements in February and August of each year, at which time whatever remained of the taxes collected, after deducting the amount of auditor's warrants issued to city and township treasurers which had been taken up by Blyth, was turned over to the appellee in cash, either by Blyth or Hays. The collections up to October 5, 1903, were duly accounted for to appellee. From the last-named date to February 2, 1904, the taxes collected amounted to \$48,289.17, all of which had been deposited in the bank to the credit of the county treasurer, against which amount no checks or warrants had been drawn. No part of this amount has ever been paid to appellee, either individually or as treasurer, unless such deposit in the bank shall be held to be a payment to him. The bank closed its doors on February 15, 1904, nothing having been collected since February 2d. In *Board of Commissioners v. Strawn*, 157 Fed. 49, 84 C. C. A. 553, 15 L. R. A. (N. S.) 1100, this court sustained a lien in favor of the county against the funds in the hands of the bank's receiver to the amount of \$11,697.61 on account of the taxes so collected and deposited from October 5, 1903, to February 2, 1904, upon the ground that the county treasurer had no authority to deposit taxes collected as a general deposit in the bank; that the ordinary relation of debtor and creditor, therefore, did not exist between the bank and the county treasurer; and that the public funds so deposited were accordingly trust funds recoverable by the beneficiary to the extent to which they were identified in the hands of the receiver. For the balance of \$36,591.56, the commissioners have proved a claim against the bank's receivership estate, on which claim dividends amounting to 47 per cent. have been or are to be paid, leaving a balance of \$19,393.54 unprovided for. For this amount Alexander presented his individual claim against the estate of the bankrupt Hays, which was allowed at the amount stated. Before the claim was presented, appellee's successor as county treasurer had been elected and had qualified, and since that time appellee has held no office in Crawford county.

The meritorious question presented here is whether the deposit in the Galion National Bank of the taxes collected was in and of itself a payment of the same to Alexander, and thus a compliance with the condition of the bond. Before proceeding, however, to the consideration of this question, it is necessary to notice certain preliminary objections which are raised against the provability of the claim.

The first of these objections is that the bond in question is a public bond; that it runs to the county treasurer as such, and is for the benefit of the county; and that Alexander individually had thus no interest as obligee in the bond, and so could not recover upon it. In our judgment, Alexander is the party in interest as obligee in the bond. By section 1080 of the Revised Statutes of Ohio, the county treasurer is required to give a bond approved by the county commissioners, payable to the state, and conditioned for "paying over, according to law, all moneys which come into his hands for state, county, township or other purposes." This bond is suable only in the name of the state. *Hunter v. Commissioners*, 10 Ohio St. 515. The Ohio statutes contain no express authority for appointing deputy collectors under that name; but, as was held by this court in *Board of Commissioners v. Strawn*, supra, the treasurer had the undoubted power to appoint Blyth a deputy for the purposes of making the collections in question. By section 1089 of the Revised Statutes of Ohio, express authority is given the county treasurer to appoint "one or more deputies," and it is expressly provided that the treasurer himself "shall, in all cases, be liable and accountable for the proceedings and misconduct in office of his deputies." The position of Blyth was, in a very proper sense, that of a deputy of the county treasurer, at least for the purposes of the collections in question. Section 1090 makes express provision for the receiving of and receipting for taxes by the deputy treasurer. The statute providing for the appointment by the treasurer of deputies makes no provision for the giving of a bond; and in *State v. Meyers*, 56 Ohio St., at page 348, 47 N. E. 139, reference is made to the relation between a county treasurer and his deputies in this language:

"The law goes no further than to authorize the treasurer, at his pleasure, to appoint one or more deputies, who hold their appointment only during the pleasure of the principal, who is answerable for the proceedings and misconduct of the deputy, and may, for his own protection, take a bond with sureties for the faithful performance of the services required of the deputy; but the latter takes no oath of office, nor gives bond to any public authority, and is in no sense a public officer, but a mere agent of the treasurer."

In our opinion, the view above expressed of the relations between the county treasurer and his deputy is the correct one; and, in our judgment, those considerations pertain equally to Blyth's relation toward his principal. We have no hesitation in holding that the bond in question was a valid common-law bond; that it was not a public bond, but was given for the sole benefit of claimant, and that he is the real obligee in interest therein. The fact that it runs to claimant "as county treasurer" is not inconsistent with such construction.

The objection is also urged that it does not appear that appellee has paid into the treasury the amount of Blyth's defalcation. This objection is not tenable. It overlooks the actual relations between appellee and the public authorities, as well as the personal nature of the collector's bond in question. By section 1115 of the Revised Statutes of Ohio, the county treasurer is required to make settlement with the county auditor on or before the 15th day of February and the 10th day of August in each year. By section 1120, the county treasurer is

required, immediately upon such semiannual settlement with the county auditor, to pay into the state treasury all amounts found due by the Auditor of State to belong to the state; and, by section 1122, to immediately pay to local treasurers all moneys belonging to local treasuries. By sections 1122 and 1125 penalties are imposed for failure to make such payments to the local treasurers and to the State Treasurer respectively; and by section 1126, in case of failure to make any settlement or payment required by law, at the time and in the manner prescribed thereby, suit is required to be instituted against the treasurer and the sureties upon his official bond, for the amount due from him, with 10 per cent. penalty thereon, under a provision that such suit "shall have precedence of all other civil business, and be prosecuted with all convenient speed." Under the law of Ohio, the county treasurer is an insurer of the safe-keeping of the public moneys, and his bond is security therefor. Even the fact that public moneys have been stolen from him is no defense to an action upon his bond for failure to account for and pay over such moneys. *State v. Harper*, 6 Ohio St. 608, 67 Am. Dec. 363. By the very failure, therefore, of the county treasurer to account for and pay over the amount of the defalcation in question, he and the sureties upon his official bond became, by operation of law, directly liable therefor. Under the facts above stated, liability upon the treasurer's official bond is presumed. If such liability has been in any way avoided or relieved against, the burden was upon the trustee to show it. The collector's bond being taken for the sole and direct benefit of the county treasurer, there is no reason why he should not be permitted to recover thereon for the very purpose of enabling him to meet his own and his sureties' direct liability by reason of the collector's defalcation, which, so far as pecuniary liability is concerned, is that of the county treasurer.

The objection that appellee has not been subrogated to the rights of the county, through payment of the amount of Blyth's defalcation, rests upon the erroneous conception that the bond in question is a public bond, and for the benefit of the county, and is answered by the conclusion we have reached that the bond is a private obligation for the direct and personal benefit of appellee.

The further objection is made against the provability of appellee's claim that the liability upon the bond is merely contingent, and that it is, moreover, unliquidated. Section 63a of the bankrupt act (Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3447]) provides that "debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability as evidenced by * * * an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not," with provision for allowance or rebate of interest. Under the view we have taken of the bond in question, the liability of the obligors thereon became fixed upon the failure of Blyth to make payment to appellee of the moneys collected. The claim is thus not contingent, nor is the amount thereof unliquidated. The record expressly determines the amount which Blyth has collected and failed to pay over, the amount recovered or recoverable through sources other than the bond, and contains the express concession that "should the court find that this is a valid, provable and al-

lowable claim against the estate of the bankrupt, O. L. Hays, the amount to be allowed would be nineteen thousand three hundred ninety-three and $\frac{54}{100}$ (\$19,393.54) dollars." The fact that the suit at law brought by appellee upon the bond has not been determined is thus not material. Nor did the action of the county authorities in enforcing the lien against the assets of the bank for the public funds identified as in the hands of the receiver, or in procuring the allowance of the remainder of its claim against the bank's receivership, and the collection of dividends thereon, relieve the obligors upon the collector's bond in question from liability to the appellee. The latter was not a party to such proceedings on the part of the county authorities; and unless the public authorities have, by novation or otherwise (of which there is no claim), released appellee from liability for his official omissions, the obligors upon the deputy's bond in question are not concerned in such action.

This brings us to the substantial question whether the condition of the bond has been performed by the payment to appellee of the moneys collected by Blyth. The record is express that such payment has not been made in whole or in part, unless by the mere deposit of collections in the Galion National Bank. It is the contention of the trustee, that such deposit, in view of the circumstances in which it was made, constituted payment to the appellee. This proposition is one of fact, and thus turns upon the question of the intention of the parties—that is to say, what they intended the bond to secure, whether the security afforded by it should be confined to the mere collection of the taxes and their deposit in the bank, or whether it should extend to an assurance that the money should eventually find its way into the personal hands of the treasurer. In considering this question of intent, the actual relations between Blyth, the bank and the county treasurer are naturally important.

The contention on the part of the trustee seems, in its effect, to be this: that Blyth's personal relation to the subject-matter extended only to the collection of the taxes and their deposit in the bank; that beyond this the arrangement was between the bank and the county treasurer; that by this arrangement it was intended that the relation of debtor and creditor should, from the time of the deposit, exist between the bank and the county treasurer; and that this arrangement was made in violation of and with the intent to evade the statute which requires the county treasurer to keep public moneys in his office at the county seat, "which shall constitute the county treasury"; and in support of this contention it is argued that appellee was moved to make the arrangement in question through considerations of his own personal benefit, either in payment of a political obligation or otherwise. In our opinion the trustee's contention is not justified by the record, the conclusion reached being that the parties intended that the money should be regarded as in the custody of Blyth, as between the latter and the county treasurer, until the funds should be actually paid over to the county treasurer upon the semiannual settlements provided by law. Among the considerations which have induced this conclusion are these: The record does not justify the inference that

the deposit of the tax moneys in the Galion National Bank was made or maintained for the personal benefit of appellee. There is nothing satisfactorily indicating that he received or expected to receive any benefit therefrom, either in the way of interest or other compensation, or that the arrangement was made through any motive other than the accommodation of the taxpayers in the city of Galion and in Polk township. The fact that appellee expected or intended or even stipulated that the collector should keep the moneys on deposit in the bank of which he was the cashier is not inconsistent with the conception of the collector's continued custody of the funds as between him and the county treasurer. Such requirement would be a natural safeguard. It was certainly to the interest of the county treasurer to preclude, so far as possible, the danger of loss of the moneys, and to prevent, so far as possible, the necessity of reliance upon the personal responsibility of the collector or his bondsmen. The method followed by appellee with respect to collections and settlements was identically the same as was practiced for several years before his treasurership. There was nothing secret about it. Nor is the fact that the bank credited the taxes upon its books to the county treasurer by any means decisive that the relation of debtor and creditor, as between the bank and the treasurer, was thereby created or intended to be created. Such method of designating the account does not necessarily amount to more than identification. While it is true that the failure to furnish appellee with a passbook and checkbook is not conclusive of the treasurer's relation to the deposit, the facts that settlements were not, even as between Blyth and the county treasurer, accomplished by such deposits; that, on settlements being made, the amount payable thereunder was paid directly to the appellee in cash, and not upon his draft or check; that appellee kept no book account with the bank, but did keep one with Blyth individually previous to the making of settlements; and that after such settlements the money was entirely drawn out, even including that belonging to the county treasury—are, especially when considered in connection with the lack of evidence that the transaction was attended with actual fraud or wrong intention of any kind on the part of appellee, strongly persuasive against the trustee's contention. The circumstances disclosed by the record justify the conclusion that the object of the bond was not merely to insure the deposit of the taxes in the bank, but that its object was (as shown by its condition that Blyth should "honestly and faithfully pay over to the said William L. Alexander, treasurer as aforesaid, all moneys by him collected, as such deputy collector, in the manner directed by law") to bind all parties involved to see that the money got eventually into the hands of the treasurer; thus indemnifying not only against Blyth's direct defalcation either before or after the deposit, but also against the insolvency of the bank in which the deposit was expected to be made.

It follows from these views that the judgment of the District Court is right, and should be affirmed.

WOOD v. BROWNING et al.

(Circuit Court of Appeals, Fourth Circuit. November 4, 1909.)

No. 879.

JUDICIAL SALES (§ 47*)—COLLATERAL ATTACK.

In a creditors' suit in a state court of competent jurisdiction to subject certain lands to judgments, plaintiff was joined as a defendant on an allegation that the judgment debtor had previously granted to him coal rights in certain of the lands, and appeared by counsel. On the report of a commissioner to whom the matter was referred, the court found that the lands were subject to the judgments sued on, and by its decree they were sold without any reservation. The sale was confirmed and deeds executed purporting to convey the lands in fee simple. *Held*, that the decree, unappealed from, was conclusive on plaintiff, and the sale cut off any right he may have had in the lands or the coal thereunder, and that he could not attack the same collaterally by an action against the purchasers.

[Ed. Note.—For other cases, see Judicial Sales, Dec. Dig. § 47.*]

In Error to the Circuit Court of the United States for the Southern District of West Virginia, at Charleston.

Action by Stuart Wood and others against Ballard Preston Browning and others. Judgment for defendants, and plaintiff Wood brings error. Affirmed.

This action was instituted in the Circuit Court of the United States for the Southern District of West Virginia. The declaration contains three counts, in which Stuart Wood was the sole plaintiff in the first count, and George L. Harrison, Jr., and Martin Luther Kohler, trustees, and the said Stuart Wood were the plaintiffs in the other two counts. The said trustees suffered a nonsuit, and the case was tried on the first count only. Of the original 12 defendants, the case was dismissed as to David Thomas Browning, Ballard Preston Browning, Jesse Van Buren Browning, John Lee Browning, Phoebe Browning, La Fayette Marshall Browning, and Sarah B. Browning; John L. Stafford filed a disclaimer as to any lands described in the declaration, except as to four tracts containing, respectively, 251 acres, 288 acres, 335½ acres, and 127½ acres; and Edgar P. Rucker, W. W. Hughes, and L. C. Anderson filed disclaimers as to any lands described in the declaration, except as to 5 tracts containing, respectively, 153 acres, 127½ acres, 288 acres, 251 acres, and 100 acres. Edgar P. Rucker died, and the case was revived in the name of his sole devisee, Maude A. Rucker.

The case was tried at the June term, 1908, of the court, and the jury found a verdict for the plaintiff (Stuart Wood) on the first count of the declaration against the defendant Mary F. Chafin, and found a verdict in favor of the other 10 defendants, to wit: Ballard Preston Browning, Jesse Van Buren Browning, John L. Browning, Phoebe Browning, L. M. Browning, Sarah B. Browning, Maude A. Rucker, J. L. Stafford, W. W. Hughes, and L. C. Anderson. To this judgment in favor of said defendants the plaintiff (Stuart Wood) sued out a writ of error. The verdict of the jury in favor of the above-named 10 defendants involved the 4 tracts of land above mentioned, containing, respectively, 251 acres, 288 acres, 335½ acres, and 127½ acres, which were conveyed by two deeds from J. Cary Alderson, special commissioner, one dated July 21, 1900, to the defendant Ballard Preston Browning, and the other dated July 23, 1900, to the defendant John Lee Browning. The plaintiff in the lower court took the position that both he and the defendants claim title to these four tracts of land under a common source, and in support of this contention offered in evidence a deed dated October 27, 1887, from John R. Browning and wife to John F. Keator, which deed

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 176 F.—18

was recorded in the county clerk's office of Logan county, W. Va., on October 29, 1887, a deed dated March 23, 1888, from the said Keator and wife to the said Wood, and recorded in the said clerk's office on April 2, 1888, a deed dated July 7, 1888, from the said John R. Browning and wife to Stuart Wood, recorded in said clerk's office in Deed Book K, p. 175, and to further support this contention the plaintiff introduced part of a record in a chancery cause in the name of U. B. Buskirk v. John R. Browning et al., which was instituted in the circuit court of Logan county, W. Va., in 1893. The defendants also introduced certain portions of the record in said chancery cause in addition to those introduced by the plaintiff. From an inspection of those portions of the record in said chancery cause which were introduced by both the plaintiff and defendants and made a part of the record in this case it appears that it was a suit instituted by U. B. Buskirk, a judgment creditor of the said John R. Browning, and was conducted as a general creditors' suit for the purpose of subjecting all the lands owned by the said John R. Browning to the payment of various liens thereon set up in said suit. The record in this case shows that the second amended bill in the said chancery cause was filed in 1896, and in this second amended bill it was alleged that John R. Browning was the owner of 2,240 acres of land and attempted to convey to John F. Keator the coal and minerals under a part of this land by deed dated the 27th of October, 1887, and that the said John F. Keator attempted to convey the same to Stuart Wood, and that the said Browning and wife attempted to convey it to Stuart Wood by deed dated July 7, 1888. To this second amended bill John F. Keator and Stuart Wood were made defendants, and it is insisted by defendants that Keator and Wood were made defendants to this suit because of their claim to an interest in the lands of the said John R. Browning, which were sought to be sold to satisfy the liens against the said John R. Browning. It appears that both John F. Keator and Stuart Wood were represented in said suit by counsel who accepted service of process for them.

It appearing that the object and scope of this suit was to ascertain the real estate then or formerly belonging to the said John R. Browning upon which the judgments against him were liens, and to subject the same to the payment of said liens, and it appearing from the pleadings that John R. Browning then owned and had formerly owned a large amount of real estate, upon which the judgments set up in the pleadings were liens, to the payment of which the lien creditors were entitled to subject the said lands, and it further appearing that the defendant, Stuart Wood, and John F. Keator, as well as other defendants, might assert claims to part of said lands or interests therein, in conflict with the contention of the lien creditors, it was necessary to refer the cause to a commissioner to enable the court to pass upon these various questions; and accordingly by decree entered in said cause on the 6th day of May, 1906, said cause was referred to J. M. Chafin, one of the commissioners in chancery in said court, and he was directed to ascertain and report:

"First. The amount of real estate owned by the said John R. Browning, its location, and his title thereto, and also the amount of real estate formerly owned by him, subject to the lien in the bill set forth.

"Second. All the liens on said real estate, or any part thereof, the holders of such liens, the amount due each, and the priorities thereof.

"Third. Such other matters and things as may be required by any party in interest and deemed pertinent by said commissioner."

In accordance with the requirements of this decree, the commissioner reported as follows: "That, after a careful examination of the papers in said cause, and other evidence before him, he finds the following facts which he now represents to your honor, in the order required by said decree."

The commissioner then reported that John R. Browning "is the owner in fee simple of a tract of 251 acres, * * * and also a tract of 288 acres," and that the said J. R. Browning on the 10th day of December, 1890, conveyed the 335½-acre tract to his daughter, Eliza Browning, and the 127½-acre tract to his son, John Lee Browning, and that the commissioner is unadvised as

to whether or not the last two mentioned tracts of land are subject to the liens in the bill set forth."

On this report is the following indorsement: "Retained in my office for ten days for exceptions and none taken. J. M. Chafin, Commissioner."

These are the four tracts in controversy in this action.

The commissioner's report was filed in the clerk's office on July 21, 1896, and on May 3, 1897, the report was confirmed as to the first two mentioned tracts and the court held that the last two said mentioned tracts were also subject to said liens, and directed all four of these tracts, together with certain other lands, to be sold by a commissioner of the court to be appointed for the purpose. The report of J. Cary Alderson, the commissioner who was appointed to make such sale, shows that the said lands were sold in accordance with the directions of said decree, and that B. P. Browning, being the highest bidder, became the purchaser of the 251 acres, 288 acres, and 335½ acres, and that John Lee Browning, being the highest bidder, became the purchaser of the 127½ acres. B. P. Browning was not a party to said chancery suit. By a decree entered October 29, 1897, the said report of sale was confirmed, and the said J. Cary Alderson, who was appointed commissioner of the court for the purpose, was directed to execute and deliver proper deeds conveying the said lands to the said purchasers; and, in accordance with said decree, the 251 acres, the 288 acres, and the 335½ acres were conveyed by said commissioner to B. P. Browning by deed dated July 21, 1900, and the 127½ acres to John Lee Browning by deed dated July 23, 1900.

Malcolm Jackson and C. W. Campbell (Brown, Jackson & Knight and Campbell, Heffly & Davis, on the brief), for plaintiff in error.

L. C. Anderson and Barnes Gillespie (W. W. Hughes, M. O. Litz, and Greever & Gillespie, on the brief), for defendants in error.

Before GOFF and PRITCHARD, Circuit Judges, and BOYD, District Judge.

PRITCHARD, Circuit Judge (after stating the facts as above). The real controversy in this case centers around the action of the court below in instructing the jury as follows:

"The court instructs the jury that as it appears from the evidence that Stuart Wood, the sole plaintiff herein, was made a party to the chancery suit of U. B. Buskirk v. John R. Browning et al., in the circuit court of Logan county, W. Va., and that service of process in said suit was duly accepted by his attorney, the decree of sale made in said suit, the sales made thereunder, the decree of confirmation of such sales and the deeds made pursuant thereto cannot be attacked collaterally in this proceeding, and as it further appears from the evidence introduced in the case that no exception or reservation as to title to any part of the lands decreed to be sold was made either in the decree of the court directing such sale or in the deeds made in pursuance of the sales made thereupon, you are instructed that said deeds, in so far as they purport to convey lands embraced in this suit, present a legal defense to the same, and the plaintiff is not entitled in this action to recover the possession of the minerals thereupon from any defendant claiming title to any portion of the lands in suit under the deeds so made in said chancery suit."

The submission of this issue sharply defines the question involved herein. That the plaintiff may have a remedy in another forum, or in another proceeding is not for this court to determine at this time, and the only question which we can consider is as to whether the court below, under the pleadings in this case, and in view of the evidence presented, was justified in submitting the instruction in question.

It is sought by the plaintiff in error to attack collaterally the proceedings of a court of general jurisdiction, to which cause plaintiff

in error was a party. That the circuit court of Logan county, W. Va., had jurisdiction of the parties and subject-matter in controversy in the case of *U. B. Buskirk v. John R. Browning et al.*, does not seem to be seriously controverted. An inspection of the record shows that plaintiff in error was made a party to the suit instituted in the state court, and was represented by counsel.

In the case of *Lee v. Smith*, 54 W. Va. 98, 46 S. E. 352, the court quoted with approval Black on Judgments, § 245, which reads as follows:

"Where the court has jurisdiction of the parties and the subject-matter in the particular case, its judgment, unless reversed or annulled in some proper proceeding, is not open to attack or impeachment by parties or privies in any collateral action or proceeding whatever. 'The doctrine of this court, and of all the courts of this country, is firmly established that, if the court in which the proceedings took place had jurisdiction to render the judgment which it did, no error in its proceedings which did not affect the jurisdiction will render the proceedings void, nor can such errors be considered, when the judgment is brought collaterally into question.' This principle is not merely an arbitrary rule of law established by the courts, but it is a doctrine which is founded upon reason and the soundest principles of public policy."

Also in the case of *Lemmon v. Herbert*, 92 Va. 653, 24 S. E. 249, the court said:

"The court here had the power to decide whether the case made by the bill was within the jurisdiction of a court of equity; and, having proceeded in the case to a final decree, must necessarily have determined that question in favor of its jurisdiction. It may have erred in its decision, but such error would not avoid its decree. The decree would merely be erroneous, but conclusive until reversed or vacated. This court could not determine whether the case was one of equitable jurisdiction or not without an inquiry into the facts, and, where inquiry is necessary, the decree, however erroneous, is not void. *Fisher v. Bassett*, 9 Leigh (Va.) 119, 131, 33 Am. Dec. 227; *Cox v. Thomas*, 9 Grat. (Va.) 323, 328; *Gibson v. Beckham*, 16 Grat. (Va.) 321, 326; and *Cordoba, Sheriff, v. Epps, Sergeant, etc.* (decided at last term) 23 S. E. 296."

In the case of *Quesenberry v. Barbour*, 31 Grat. (Va.) 499, 500, the court said:

"The subject was undoubtedly within the jurisdiction of the court which rendered the decree. It was the sale of a trust estate, and one, too, in which infants were interested, in each of which cases the statute law existing at the time of the rendition of the decree authorized the court to make the same. The judgment or decree of a court of competent jurisdiction over the subject-matter thereof is conclusive against the parties thereto until it is set aside or reversed by some proceeding in the case in the same or an appellate court. It cannot be set aside or annulled in any collateral proceedings."

The case of *Zollman v. Moore et al.*, 21 Grat. (Va.) 313, is very much in point. There Mrs. Moore and her adult children filed a bill in chancery against her infant children, in which it is stated that the father of Mrs. Moore conveyed to her and her husband, the father of her children, jointly a tract of land; that they were desirous of partitioning the land, but that the same was not susceptible to partition in kind, and asked that the land be sold for the purpose of partition. Pursuant to the decree obtained in the case, the land was sold and conveyed to Zollman (who paid the purchase money), and the proceeds from the sale divided among the parties to the suit. Mrs. Moore, however, took only a dower interest of the proceeds, and the children the

balance. Afterward it was discovered that Mrs. Moore was the sole owner of the tract of land at the time the sale was made, and thereupon she filed a bill in equity, setting up the facts, claiming that a mistake was made, and asked that the sale be set aside. The court said:

"It is true that in Virginia the maxim caveat emptor strongly applies in judicial sales; but it only applies as between the purchaser and third persons who are not parties to the suit. Their interests are not affected by any proceedings that may be had, and the purchaser must always incur the risk of losing the estate by some superior title. But the court does undertake to sell the title of the parties to the suit. Whatever that may be, the purchaser acquires it. * * * It was argued, however, that, as the suit proceeded on the assumption of a right of property in the children, the effect of the decree and sale is simply to vest in the purchaser such title as they had, leaving the rights of Mrs. Moore unaffected. This view is based on an entire misconception of the effect of the sale, its confirmation, and the operation of the deed made under the order of the court. The prayer of the bill was for the sale of the tract of land. The decree directed a sale accordingly. The commissioner reported that he had sold the tract; and this sale was confirmed, and the commissioner directed to convey the tract to the purchaser, and this was done by the deed executed January 4, 1864. It is therefore too clear for argument that the effect of these proceedings was to convey the land to the purchaser, and to clothe him with the title of all the parties to the suit. If this were not so, it is obvious that Mrs. Moore would not encounter the slightest difficulty in maintaining her action of ejectment against the purchaser, and consequently she could have no claim to relief in equity."

In *Van Fleet's Collateral Attack*, § 749, it is said:

"A bill in equity for partition against husband and wife alleged that the wife owned the undivided one-third. On these allegations, without any cross-bill between the defendants, a decree was entered that the husband and wife owned the undivided one-third, and it was set off to them. Afterwards the wife alone brought an action to recover the lands so set off, on the theory that the decree, so far as the husband was concerned, was outside of the issues and void, but the court held that it was not void and was binding on her collaterally; citing *Allie v. Schmitz*, 17 Wis. 169, 173."

This proposition does not seem to be controverted by the plaintiff in error, but it insists that:

"It is not enough for a court to have jurisdiction of the parties and general subject-matter of the suit. Its jurisdiction must also rest upon the pleadings and the issues."

Unfortunately the entire record in the suit of *Buskirk v. Browning*, *supra*, is not before us; but on inspection of the portion of the record of that suit, which is made a part of the record in this case, it is apparent that the title of *Browning* to the lands sought to be subjected to the liens in that proceeding was put in issue, inasmuch as it was necessary for the court to ascertain and determine what real estate or interests in real estate, then owned or formerly owned by *Browning*, could be subjected to the liens of the judgments upon which the suit in that instance was instituted. The fact that plaintiff in error (*Wood*) was made a party to that proceeding can only be accounted for upon the theory that the plaintiff in that proceeding was of opinion that the said *Wood* was asserting, or might assert, an interest in a part of the real estate which was sought to be subjected to the liens of said judgments.

In the second amended bill filed in the cause of *Buskirk v. Browning et al.*, among other things, it is alleged:

"That on the 27th day of October, 1887, by deed of that date, and recorded in Logan county court clerk's office, in Deed Book J, p. 302, the said John R. Browning and wife attempted to convey to the defendant John F. Keator the minerals, etc., in, upon, and under 470½ acres of land, part of the above tracts of land, as well as the minerals, etc., in, upon and under certain other tracts of land, and other lands in fee, and that on the 7th day of July, 1888, by a supplemental deed of that date, and recorded in said clerk's office in Deed Book K, p. 175, the said John R. Browning and wife likewise attempted to convey the minerals, etc., in, upon, and under said 470½ acres of land, as well as certain other minerals, to the defendant, Stuart Wood, transferee of the said Keator.

"Plaintiff charges that at said times the said John R. Browning had only an equitable interest, and that a small one, in the said 470½ acres of land and in 300 acres attempted to be conveyed in fee, that the payments made by said Browning to Nighbert and Lawson on their said judgment were all after the date of said deed to Keator, that said pretended deeds to Keator and Wood passed no legal title as to the 770½ acres of land above mentioned, and that the said Wood is only entitled to a conveyance of the legal title there-to subject to the liens, still unpaid, which have in the meanwhile attached to the real estate of the said John R. Browning.

"Plaintiff, further complaining, says that on the 1st day of December, 1890, the said defendant John R. Browning, in addition to the equitable interest in the lands above mentioned, was the owner in fee simple of the surface of 50 acres of land surveyed for him June 17, 1875, part of a 600-acre tract surveyed October 28, 1875, part of a 500-acre tract surveyed September 3, 1874, 418 acres and 165 acres conveyed to him from Hugh Toney by deed dated October 29, 1887, and recorded in Logan county court clerk's office in Deed Book J, p. 300, and part of a 489-acre tract conveyed to him from L. D. Chambers, commissioner of school lands, by deed dated October 2, 1887, and recorded in said clerk's office in Deed Book J, p. 312, all on Island creek, in Logan county, which said tracts and parcels of land, together with the 470½ acres of land above mentioned, aggregated by survey 2,240 acres of land. A copy of the attempted deed from John R. Browning and wife to Stuart Wood, containing the calls of said survey, is filed herewith as part of this bill, marked 'Exhibit No. 39.'"

While the bill in this respect is somewhat indefinite, yet it contains an allegation to the effect that the pretended deeds from Browning and wife to Keator and Wood passed no legal title to the 770½ acres of land mentioned. It is also stated that the said Browning and wife attempted to convey to the defendant, John F. Keator, the minerals in, upon, and under the said 470½ acres of land, etc., and we think these allegations sufficiently explicit to put defendant (Wood) on notice that any title he might have had to said lands was being then and there assailed; and this, taken in connection with the reference to the commissioner, which will be referred to later, unquestionably was sufficient to require Wood, if he desired so to do, to assert in that suit any right or title that he might have had to the premises in question. The court in that proceeding was evidently unable to determine, upon the reading of the bill and amended bill, as to what particular real estate was subject to said liens; hence it was that the court referred the case to the commissioner for the purpose of obtaining information on that subject. The decree of reference clearly and distinctly put in issue the title of Browning to all the tracts involved in this controversy. At that time Stuart Wood was a party to the proceeding, and

could (if he had so desired) by proper pleading and offer of proof, have informed the commissioner as to any claim he may have had in the mineral interests in any of the tracts in question. That the court had jurisdiction to make this order of reference cannot be seriously controverted; and, it appearing as it does that Wood was a party to the suit at the time the reference was made, it necessarily follows that he was bound by any findings that may have been made by the commissioner with respect to any interest which it was alleged that Browning had in the lands that were sought to be subjected to the liens as hereinbefore stated. Therefore, when the report of the commissioner (in which it was found that Browning was the owner of the lands therein described, and specifying the lands which were subject to the liens) was confirmed by the court, the decree of confirmation thus obtained was undoubtedly binding upon all the parties to the suit until modified or set aside by a proper proceeding in that case and in that court, or in an appellate court having jurisdiction to hear and determine on appeal the questions involved therein.

In the case of *Kirk v. Hamilton*, 102 U. S. 79, 26 L. Ed. 79, in referring to the conduct of Kirk, who sought to avoid the proceedings in the case of *Moore & Co. v. Kirk & Co.*, by which the property in controversy was conveyed to the defendant, the court said:

"* * * He knew, as we have seen, that the defendants claimed the property under a sale made in an equity suit to which he was an original party. The sale may have been a nullity, and it may be that he could have repudiated it as a valid transfer of his right of property. Instead of pursuing that course, he, with a knowledge of all the facts, appeared before the auditor and disputed the right of certain creditors to be paid out of the fund which had been raised by the sale of his property. He forebore to raise any question whatever as to the validity of the sale, and by his conduct indicated his purpose not to make any issue in reference to the proceedings in the equity suit. Knowing that the defendants' claim to the premises rested upon that sale, he remained silent while the latter expended large sums in their improvement, and, in effect, disclaimed title in himself. He was silent when good faith required him to put the purchaser on guard. He should not now be heard to say that that is not true which his conduct unmistakably declared was true and upon the faith of which others acted."

While this suit was instituted in the first instance by a single creditor, it appears from an inspection of the record that other creditors came into the suit at a later date, and it thereby became a general creditors' suit, upon the same being referred to a commissioner with instructions to report liens, etc. There was not only a proper reference to ascertain what real estate at that time belonging to Browning was subject to the liens of the judgments upon which the suit was based, but it appears that a petition was filed by R. W. Peck, a creditor, who adopted the allegations of the bill; that John R. Browning was the owner of 3,000 acres of land on Island creek, which, it appears, included the 2,240 acres of minerals which are claimed to be owned by Wood. There is nothing in the record to show that plaintiff in error (Wood) was denied an opportunity of appearing before the commissioner and offering in evidence any papers or documents which he may have had and upon which he relied to establish his claim; nor is it contended that he did not have the right to object and except to the commissioner's report. Suppose Wood had appeared be-

fore the commissioner and offered evidence as to his title, and the commissioner had made the report that he did, could it be reasonably contended that such report, when confirmed by the court, would not be res adjudicata in so far as Wood's title might be affected thereby? He certainly had the opportunity, as well as the right, to make any exception to such report; but, having failed to do so, he cannot now come into this court and by collateral attack accomplish that which he might have accomplished had he availed himself of the rights to which he was entitled by virtue of being a party to that proceeding.

We do not think that the facts and circumstances under which the sale of the property was made in pursuance of the decree of the chancery court in the suit of Buskirk v. Browning are such as to render said sale void.

In the case of Jones v. Coffey, 97 N. C. 347, 2 S. E. 165, Judge Merimon, in speaking for the court, said:

"The plaintiffs are the heirs at law of John T. Jones and Walter L. Jones, who died intestate long before this action began, and, as the plaintiffs allege, seised of the land described in the complaint, which in that case descended to them as such heirs. The defendants allege in their answer that the land in question belonged to Edmund P. Jones, who was the ancestor of the plaintiffs, and who died in 1878, leaving a will, which was duly proven; that afterwards the First National Bank of Charlotte and others brought action to the fall term 1897 of the superior court of Caldwell county against the executor of the will mentioned and the present defendants; that in the course of that action a receiver was appointed, and the land in question was sold under a proper decree made therein; that at that sale the defendants became the purchasers of the land, paid the purchase money therefor, the sale was duly confirmed, and the receiver, under the direction of the court, made a proper deed to them, under which they claim title to the land. On the trial in this action, a question arose as to whether the land in controversy was a part of the land sold as above stated and embraced by the decree and deed under which the defendants claim. It was identified as a part of the land so sold; but the plaintiffs contended that, if it was, it was so embraced by inadvertence, mistake, and misapprehension; that, in fact, it belonged to them as heirs at law of their brothers as first above stated, who died in 1863, the others in 1864.

"The defendants contended that the plaintiffs are estopped by the record in the action mentioned, which was put in evidence on the trial; but the court gave judgment for the plaintiffs. Whereupon the defendants, having excepted and assigned errors, appealed to this court. It appears that in the case of the First National Bank of Charlotte and others against the executor of the will of Edmund P. Jones, deceased, and the present plaintiffs, mentioned in the pleadings, the court had complete jurisdiction of the parties thereto, including the present plaintiffs, and as well of the subject-matter, the land embraced by it. The land now in controversy was embraced by it, although this was controverted, and sold under a valid decree so far as appears; the defendants being the purchasers. They paid the purchase money, the sale was confirmed by the court, and, under its direction, the receiver executed a proper deed of conveyance to the defendants. In that action the rights of the plaintiffs here contended for came directly in question, and they ought then to have set up their title to the land they now seek to recover. As they did not, they are concluded by the record made against them. They are bound by it so long as the judgments therein remain unreversed, and they cannot attack it collaterally in the present action. *Burke v. Elliott*, 26 N. C. 335, 42 Am. Dec. 142; *Armfield v. Moore*, 44 N. C. 157; *Gay v. Stancell*, 76 N. C. 369; *Morris v. Gentry*, 89 N. C. 248.

"The plaintiffs contend that, if the land they seek to recover by this action was embraced by and sold under the decree in the action mentioned, it was sold by mistake and misapprehension. It appears that that action is not

yet determined. If so, the plaintiffs ought to seek their remedy, if they have any, in it. If it is determined, then by an independent action. Long v. Jarrett, 94 N. C. 443, and the cases there cited.

"There is error. The judgment must be reversed, and judgment entered below for the defendants. To that end, let this opinion be certified to the superior court according to law. It is so ordered."

It is a fundamental principle of the law that one shall have his day in court, and it cannot be denied that the plaintiff in error in this case had his day in court, inasmuch as he was a party to the suit of Buskirk v. Browning. Once he became a party to that suit, it was incumbent upon him to examine every paper filed in the case and keep himself fully advised as to the procedure therein; and this he failed to do, it appearing from the record that no answer was filed by his counsel, nor was anything done in his behalf which indicated a purpose on his part to assert title to any interest in the lands that were sought to be sold in that proceeding.

It is insisted by counsel for plaintiff in error that this court should find from the record that the proceedings in the state court were void. As we have said, only a portion of the record in that cause is before us. There is nothing contained therein to show that all the pleadings or only a part of the pleadings, or all the evidence or only a part of the evidence, is included in the transcript; but it does affirmatively appear in that part of the record which we have that the land in controversy in this action was sold pursuant to the decree of a court of general jurisdiction; and, as such, having jurisdiction of the general subject-matter, in a suit wherein plaintiff in error was a party. In an action like the one at bar, the burden is on the plaintiff to show, by the whole record, that the proceedings sought to be attacked are void, and this cannot be accomplished by only offering a portion of the record.

In the second amended bill it is alleged that John R. Browning conveyed certain tracts of land to his daughter, without any reservation whatsoever contained in the deed, and this must be construed to mean that he conveyed to his children a fee-simple title, and cannot, by any rule of construction, be construed to mean that he only conveyed the surface.

The commissioner's report shows that John R. Browning was the owner of these tracts of land, and the decree entered in pursuance thereof provided that these tracts should be sold as the property of John R. Browning. The purchaser at the sale thereof had every reason to believe that the decree contemplated the sale of the whole tract, and that a fee-simple title for the same was to be made in pursuance thereof.

The commissioner's report, among other things, says:

"J. R. Browning is the owner in fee simple of a tract of 251 acres of land on Island creek, * * * also a tract of 288 acres of land on Island Creek."

In the report of sale the special commissioner says:

"The undersigned special commissioner would report that * * * he sold at public auction the following real estate in the bill and proceedings in said cause mentioned, to wit: 251 and 288 acres of land on Island creek, * * * and 335½ and 127½ acres on Island creek. That B. P. Browning,

being the highest bidder therefor, became the purchaser of the 251, 288, and 335½ acre tracts of land for the sum of \$955.00. * * * That John Lee Browning, being the highest bidder therefor, became the purchaser of the said 127½ acres of land for the sum of \$75.00."

The decree confirming said sales says:

"This day, Special Commissioner J. Cary Alderson rendered and filed his report of sale herein, and it appearing * * * that said commissioner * * * sold the following real estate in the bill and proceedings herein mentioned, to wit: 251 and 280 acres of land on Island creek * * * and 335½ and 127½ acres of land on Island creek, * * * that B. P. Browning, being the highest bidder therefor, became the purchaser of the said 251, 288 and 335½ acre tracts of land for the sum of \$955.00 * * * and that John Lee Browning, being the highest bidder therefor, became the purchaser of the said 127½ acre tract of land for the sum of \$75.00. * * * And, there being no exceptions or objections to the said report, the same, together with said sales, is in all things approved and confirmed."

By the last-mentioned decree J. Cary Alderson was appointed a special commissioner to convey said lands to the purchasers, and in his deed to B. P. Browning he conveys:

"First. 251 acres of land on Island creek (description by courses and distances following).

"Second. 288 acres of land on Island Creek (description by courses and distances following).

"Third. 335½ acres of land on Island Creek (description by courses and distances following).

"To have and to hold said real estate and premises with all the rights, title, and interest of the said J. R. Browning and the other parties to said suit, unto the said B. P. Browning, his heirs and assigns forever."

In his deed to John Lee Browning, Special Commissioner Alderson conveys:

"The following real estate, situated in the county of Logan, state of West Virginia, on Island creek (description by courses and distances following), containing 127½ acres * * * to have and to hold said real estate and premises, with all the right, title, and interest of the said John R. Browning and the other parties to said suit, unto the said John Lee Browning, his heirs and assigns forever."

In the consideration of this case it is important that we should bear in mind the distinction between an erroneous judgment and one that is void. In the first instance a judgment is held to be valid until it is set aside or reversed, if it appears that it is a judgment rendered by a court of competent jurisdiction, while, on the other hand, a void judgment is a nullity and may be assailed in any court whenever it is sought to assert a right or make a claim under it. Where one is a party to a suit and feels that his rights are prejudiced by any judgment or decree thereof, he may move in the court wherein such judgment or decree is obtained to vacate or set aside such decree or judgment, and has the right to file exceptions to any ruling that may be made by such court, and have the same considered on appeal and determined in the controversy then pending; and, under such circumstances, where one fails to avail himself of the opportunity thus afforded him to assert his rights, such failure on his part (unless it be an

exceptional case) must necessarily be attributed to a failure on his part to exercise that diligence which is required of a litigant. This is a wise rule, and without the enforcement of it there would be no end to litigation. It is the policy of the law to avoid multiplicity of suits and to secure a speedy and final determination of controversies, and this can only be accomplished by a strict observance of the well settled rule in this respect. Of course, where a judgment is rendered by a court without jurisdiction of the subject-matter, the parties affected thereby are, as we have said, permitted to attack such proceedings at any time upon the theory that such judgments are not binding in their character and may be disregarded.

In the case of *Lancaster v. Wilson*, 27 Grat. (Va.) 624, the court clearly defines the rule to be as follows:

"This is the settled doctrine of the courts. It is not merely an arbitrary rule of law, established by the courts, but it is a doctrine founded upon reason and the soundest principles of public policy. It is one which has been adopted in the interest of the peace of society, and the permanent security of titles. If after the rendition of a judgment by a court of competent jurisdiction, and after the period has elapsed when it becomes irreversible for error, another court may in another suit inquire into the irregularities or errors in such judgments, there would be no end to litigation and no fixed established rights. A judgment, though unreversed and irreversible, would no longer be a final adjudication of the rights of litigants, but the starting point from which a new litigation would spring up, acts of limitation would become useless and nugatory, purchasers upon the faith of judicial process would find no protection, every right established by a judgment would be insecure and uncertain, and a cloud would rest upon every title."

The foregoing is a clear and concise statement of the rule, as well as the reasons therefor. The plaintiff in error cannot be heard to say that he was not afforded an opportunity to assert his claim in the proceeding which he now seeks to avoid by a collateral attack. When he should have spoken, he remained silent, and thus, by his conduct, acquiesced in the sale of the property, which sale, in pursuance of legal proceedings, was unconditional, and the deeds made in pursuance thereof had the effect of vesting the purchaser with a fee-simple title to the premises in question.

In addition to the instructions given by the court, which we have quoted, the court refused to give certain instructions tendered by the plaintiff. We have carefully considered the various cases relied upon by the plaintiff in error, and are of opinion that they do not apply to the case at bar; and, in view of the facts, as well as the law pertaining to this controversy, we feel that the court committed no error in refusing to give the instructions asked for by the plaintiff below and that the instructions submitted by the court to the jury were eminently proper.

For the reasons herein stated, the judgment of the lower court is affirmed.

Affirmed.

WEST VIRGINIA PULP & PAPER CO. et al. v. MILLER.

(Circuit Court of Appeals, Fourth Circuit. November 5, 1909.)

No. 894.

1. CONVERSION (§ 15*)—RELIGIOUS SOCIETIES (§ 16*)—DIRECTIONS IN WILL—DEVISE IN TRUST FOR SALE AND DISPOSITION OF PROCEEDS.

A testator devised certain lands in West Virginia to a trustee "to have and to hold * * * in fee simple, upon trust nevertheless to sell and dispose of said lands at public or private sale * * * and pay over the proceeds of such sale * * * to the First Spiritualist Church of Baltimore City, a corporation created under the laws of Maryland." *Held*, that the will worked an equitable conversion of the land into money, and that the constitutional and statutory provisions of West Virginia, limiting the amount of land which a religious denomination could own or hold, did not affect its validity.

[Ed. Note.—For other cases, see Conversion, Cent. Dig. § 80; Dec. Dig. § 15;* Religious Societies, Cent. Dig. § 104; Dec. Dig. § 16.*]

2. RELIGIOUS SOCIETIES (§ 16*)—TRUST FOR BENEFIT OF RELIGIOUS CORPORATION—SCOPE OF STATE LAWS.

The constitutional and statutory provisions of West Virginia prohibiting the holding of land by any church or religious denomination were not intended to, and could not if they were so intended, affect the right of an owner of land in that state to convey or devise it in trust for sale for the benefit of a foreign religious corporation.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. § 104; Dec. Dig. § 16.*]

3. WILLS (§ 70*)—VALIDITY OF BEQUESTS—WHAT LAW GOVERNS.

The validity of a bequest of money or personal property, where the testator and the legatee are both citizens of the same state, is to be determined entirely by the laws of such state.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 184, 185; Dec. Dig. § 70.*]

4. CONVERSION (§ 21*)—ESTATES IN TRUST WITH POWER OF SALE—EFFECT OF EXECUTION OF POWER.

Where a testator devised lands to a trustee with directions to sell the same, after the trustee has exercised such power in good faith, a subsequent contestant of such devise cannot attack the validity of the sale, but can only pursue the proceeds.

[Ed. Note.—For other cases, see Conversion, Cent. Dig. § 56; Dec. Dig. § 21.*]

Appeal from the Circuit Court of the United States for the Northern District of West Virginia, at Parkersburg.

Suit in equity by Mary Virginia Miller against the West Virginia Pulp & Paper Company and the West Virginia Spruce Lumber Company. Decree for complainant, and defendants appeal. Reversed.

This is an appeal from a decree of the Circuit Court of the United States for the Northern District of West Virginia. The subject-matter of this suit is an undivided $\frac{1}{17}$ interest in 8,405 acres of timber land in Randolph county, W. Va. The appellants hold without dispute an undivided $\frac{1}{17}$ interest therein or in the timber thereon and claim the fee-simple title to the undivided $\frac{1}{17}$ here in controversy. The appellee filed her bill to cancel and annul the title of the appellants, to enjoin them from cutting timber upon any portion of the premises, and to compel an accounting for the timber already cut.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The court entered a decree granting the relief prayed for in the bill.

The material facts are as follows:

On the 21st day of February, 1899, Frederick Fickey, Jr., died in Baltimore City, the place of his residence, seised and possessed of the property in suit. His will was probated on the sixth day after his death, and clauses 4 and 6, which are material to the present controversy, are as follows:

"(4) I bequeath and will to my friend, Frank Woods of Baltimore City, trustee, upon the trust hereinafter set forth, the following three parcels of real estate, situate in the state of West Virginia, viz.: (a) A tract of 130 acres on Elm Run in Ritchie county, being part of a larger tract conveyed to me by Cyrus Hall and wife, by deed dated the 4th day of March, 1872, and duly recorded in the office of the clerk of the county court of Ritchie county, on 12 April, 1872, in Deed Book No. 15, pages 429 and 430, the residue of said larger tract having been conveyed by me to John R. Kelly, by deed dated 19th April, 1872, which was duly recorded in said office on the day of its date, in Deed Book No. 15, pages 502 and 503.

"(b) Also my one undivided half of a tract of 2,000 acres on Red creek, in Randolph county, the whole of which was granted to me and Edward L. Thomas, by patent bearing date 31st October, 1883.

"(c) Also my undivided eight-seventeenths interest ($\frac{8}{17}$) in a tract of 8,405 acres of land on Shafer's fork of Cheat river, in Randolph county, which was granted to me and the said Thomas as a tract of 8,000 acres by the state of West Virginia, by patent dated 22nd April, 1872, both of which patents are duly recorded in the said office, one undivided seventeenth of said land having been sold and conveyed to the said Walcott by me and said Thomas by deed dated 20 October, 1893.

"To have and to hold said three tracts of land situate in West Virginia unto Frank Woods, trustee, in fee simple, upon trust nevertheless to sell and dispose of said lands at public or private sale, upon the best possible terms, and for the best possible prices and pay over the proceeds of such sale, less taxes paid by him, and the expenses incident to such sale including a reasonable commission thereon to himself, to the First Spiritualist Church of Baltimore City, a corporation created under the laws of Maryland, and existing in Baltimore City, and I hereby authorize and empower my said trustee to convey said lands to the purchasers thereof by good and sufficient deeds by him duly acknowledged for record, such conveyances to have the same effect in all respects as if executed by me in person.

"(6) I give, devise and bequeath all the rest, residue and remainder of my estate, real and personal and wherever situate to my sister, Mrs. Anna R. Miller."

Woods, as trustee named in the fourth clause of the will, proceeded to sell the realty therein mentioned, and on the 26th day of September, 1899, negotiated a sale to John G. Luke of the undivided $\frac{8}{17}$ of the tract of 8,405 acres of land on Shafer's fork of Cheat river, in Randolph county, at the price of \$9 per acre. He filed his report of sale in the circuit court of Baltimore City, which had taken jurisdiction of the administration of his trust. The sale was confirmed and on the 10th day of November, 1899, by formal deed he conveyed this undivided $\frac{8}{17}$ to John G. Luke, who was acting as trustee for the West Virginia Pulp & Paper Company, and who conveyed to it the title so acquired and held in trust, by deed bearing date the 1st day of April, 1904. The aggregate purchase money was \$35,597.52; \$10,000 being paid to Woods, trustee, on the 10th day of November, 1899, and the residue evidenced by a note for \$25,597.52, due and payable one year from date, with interest, which note was promptly paid at maturity. All of this purchase money was paid by the West Virginia Pulp & Paper Company, passed into the hands of the trustee for the uses and purposes set out in the will, and was administered by the trustee under the direction of the circuit court of Baltimore City, Md.

It also appears that, prior to the above-mentioned sale, Woods had sold and disposed of the land in Ritchie county for the sum of \$7,000. The Ritchie county land was the property involved in the suit of Mary Virginia Miller v. George H. Ahrens (C. C.) 150 Fed. 644, and Id. (C. C.) 163 Fed. 870, reference to which is made in the decree now appealed from.

Frederick Fickey, Jr., left surviving him, as his next of kin and heirs at law, his sister, Ann Rebecca Miller, the mother of the present plaintiff, and appellee, and another sister, Sarah Elizabeth Hopkins, the former of whom was made residuary legatee under the sixth clause of the will, the latter of whom was entirely ignored.

On or about the 27th day of December, 1899, after the sales above mentioned had been made, Sarah Elizabeth Hopkins filed her caveat and petition in the orphan's court of Baltimore City, praying for the annulment of the probate of the will of the said Fickey upon the grounds of testamentary incapacity, fraud, undue influence, and improper execution. Frank Woods, the executor, answered this petition and caveat, and issues were framed thereon and sent for trial to the superior court of Baltimore City to be tried by a jury.

Pending a trial of these issues, Frank Woods, the executor, died, and Ann Rebecca Miller, the residuary legatee, Amos Musselman, her confidential friend and adviser, and Charles R. Schirm, then president of the First Spiritualist Church of Baltimore City, were, on the 13th day of March, 1901, appointed administrators d. b. n., c. t. a.

On the 20th day of May, 1901, the issues on the caveat came on to be tried; the case having been revived in the name of the administrators c. t. a. as defendants. While the trial was in progress a compromise was negotiated, and it was agreed that the trustee for the First Spiritualist Church should pay the caveator, Sarah Elizabeth Hopkins, \$17,500 out of the proceeds of the sale of the land in suit, and that thereupon the various issues upon the caveat should be determined by a verdict in favor of the defendants. The proceeds arising from the sale of this real estate were on deposit in the registry of the circuit court of Baltimore City, which had taken jurisdiction of the administration of the trust estate created by clause 4 of the will; and, in order that the \$17,500 might be withdrawn from these funds for the purpose of carrying out the compromise agreement, a petition was drawn and signed by the caveator, Sarah Elizabeth Hopkins, Louise Hopkins Hall, her daughter, Ann R. Miller, the residuary legatee, and Mary Virginia Miller, her daughter, the present appellee, and Charles R. Schirm, president of the First Spiritualist Church.

In this petition the devise to the First Spiritualist Church of Baltimore, a corporation, is recited, the filing of the caveat and the issues thereon, the relationship of Sarah Elizabeth Hopkins and Ann Rebecca Miller to the testator, and their desire that the will in its entirety and the devise to this church should be sustained, and the willingness of the church to pay to Sarah Elizabeth Hopkins the agreed sum of \$17,500. The prayer of the petition was that the clerk of the circuit court of Baltimore City might be directed to draw his check to Charles R. Schirm, attorney for the First Spiritualist Church of Baltimore City, for the sum of \$17,500.

Such an order was made, check was drawn, and the money delivered to Sarah Elizabeth Hopkins, the caveator, and the suit in that case was dismissed.

This attack upon the will involved the payment of counsel fees and other expenses in its defense, the effect of which was to diminish the residuary estate to Ann Rebecca Miller. It appears that, more than a year after the compromise, counsel for Ann Rebecca Miller approached the counsel for the First Spiritualist Church, and suggested, in view of the extent to which the church had profited under the will, it might see fit to reimburse Ann Rebecca Miller for the moneys paid out in its defense. This was agreed to, and on the 1st day of July, 1902, Charles R. Schirm, counsel for the church, drew his check to the order of Ann R. Miller for \$3,200, the same being part and parcel of the fund realized by the church from the sale of the lands in controversy, which was accepted and receipted for by her attorney in the following language:

"Baltimore, July 1, 1902.

"Received of Charles R. Schirm the sum of \$3,200.00, being the amount agreed to be paid to Mrs. Ann R. Miller on account of the expenses of defending the will of Frederick Fickey, Jr., and being in full settlement of all claims of every nature, character or description growing out of said estate."

In January, 1903, Ann Rebecca Miller departed this life leaving to survive her as her sole heir at law and likewise her sole legatee and devisee under her will this present plaintiff, her adult daughter, Mary Virginia Miller.

In April and May of that year she writes to the president of the church two letters, suggesting that:

"As the Spiritualist Church was so greatly benefited by my uncle's will, would it not be showing a high appreciation of the gift for the Spiritualist Church to erect a suitable mark to designate the last resting place of its benefactor?"

"My mother and I understood that the bequest to the church was to be a memorial."

On the 23d day of August, 1907, she brings the present suit, seeking, as above stated, to have the devise to the church, and the conveyance made in pursuance of the same, declared null and void, and the title to the land in question to be vested in her as the sole devisee of Ann Rebecca Miller. This was eight years and six months after the probate of the Fickey will; more than six years since the compromise agreement and the payment to Sarah Elizabeth Hopkins of \$17,500; more than five years since the payment to her mother by the church of the sum of \$3,200, all out of the proceeds of the sale of this real estate.

W. Calvin Chestnut, H. P. Camden, and John W. Davis (Gans & Haman, Davis & Davis, C. F. Moore, Talbott & Hoover, and George E. Nelson, on the brief), for appellants.

Maynard F. Stiles and J. Kemp Bartlett, for appellee.

Before PRITCHARD, Circuit Judge, and KELLER and McDOWELL, District Judges.

PRITCHARD, Circuit Judge. In disposing of the questions involved in this suit, it becomes necessary to determine as to whether the fourth clause of the will constitutes a devise of land. The court below held that it was a devise of land, that as such it was invalid, and, in passing upon the demurrer in the case of *Miller v. Ahrens* (C. C.) 150 Fed. 644, which raised the identical questions involved in this controversy, clearly states the contention of the plaintiff below as follows:

"On behalf of the plaintiff it is contended that this devise is void: First, because the beneficiary cannot be recognized as having a legal corporate existence by the laws of this state; second, because, aside from its corporate existence, the beneficiary is uncertain; third, because the tract of land sought to be devised exceeds the quantity that may be acquired for a church or religious denomination or body; fourth, because land cannot be taken for a church by trustees by devise; fifth, because the devise is contrary to the public policy of the state."

Notwithstanding the court below held that this was a devise of land to the church, and therefore invalid under the laws of West Virginia, as being against the public policy of that state, it is contended by counsel for appellants that, under the law, all that passed to the First Spiritualist Church by the will was personal property and not real estate; it being insisted that by the terms of the will there was an equitable conversion of the real estate whereby the original form of the property was changed from realty into personalty.

The fourth clause of the will is in the following language:

"I bequeath and devise to my friend Frank Woods, of Baltimore City, trustee, upon the trusts herein set forth, the following three parcels of real estate: * * * To have and to hold said three tracts of land, situate in West Virginia, unto Frank Woods, trustee, in fee simple; upon trust nevertheless to sell and dispose of said lands, at public or private sale, upon the best possible terms and for the best possible prices, and pay over the proceeds of sale, less taxes paid by him and expenses incident to such sale, including a reason-

able commission thereon to himself, to the First Spiritualist Church of Baltimore City, a corporation created under the laws of Maryland."

The rule invoked by the appellants is thus clearly stated in 3 Pomery's Equity Jurisprudence, § 1160:

"The rule is therefore firmly settled that, in order to work a conversion while the property is yet unchanged in form, there must be a clear, imperative direction in the will, deed, or settlement, or a clear imperative agreement in the contract, to convert the property; that is, to sell the land for money or, to lay out the money in the purchase of land. If the act of converting—that is, the act of selling the land, or laying out the money in land—is left to the option, discretion, or choice of the trustees or other parties, then no equitable conversion will take place, because no duty to make the change rests upon them. * * * If, by express language or by a reasonable construction of all of its terms, the instrument shows an intention that the original form of the property shall be changed, then a conversion necessarily takes place."

There was an express direction in this instance that the land should be sold in order that the proceeds of such sale might be applied to the purposes designated therein.

The case of *Brown et ux. v. Miller's Ex'rs et al.* (decided by the Court of Appeals of West Virginia) 45 W. Va. 211, 31 S. E. 956, is very much in point. In that case the husband, by his will, devised a tract of land to his wife for life, and directed that at her death it should be sold and the proceeds divided among the children. A daughter, Mary J. Brown, owning her tenth, and a share which she had purchased from another child, and her husband, who had purchased interests, so that they owned one-half, filed a bill asking that the tract be partitioned in kind, and not sold as directed in the will, and stated that two sons of the testator, who were executors, refused to allow a partition, and were going to sell the land, and prayed that they be enjoined from selling. The executors demurred to the bill, and upon consideration of the same the court held that the plaintiffs had no right to partition, refused the injunction, and dismissed the bill. The plaintiffs appealed. The Supreme Court, in disposing of the matter, said:

"This is a bill to enforce what is called an 'election.' Have the plaintiffs a right to an election? It is well known that where a will or deed directs land to be sold and converted into money, or money to be invested in land, it operates as a conversion, the land assuming the character of personality, and the money that of land, before actual conversion, and it passes to those taking under the will or deed as personality or realty, according as the conversion is from the one to the other. *Pratt v. Tallafarro*, 3 Leigh, 419. But the party entitled to the beneficial interest may frustrate actual conversion by the exercise of the right of election, under circumstances. Being entitled to the subject, he may take the land or money in its original shape. That excellent late work, *American & English Decisions in Equity*, in volume 2, in the case of *Ingersoll's Estate*, at page 76, and elaborate note, fully discusses the subject. * * * The will having thus directed a sale and conversion into money, every child had a right to have a sale, and no one could exercise this right of election without the affirmative consent of all the others. *Harcum's Adm'rs v. Hudnall*, point 2, 14 Grat. 369, 376; 2 Am. & Eng. Dec. Eq. 95; 2 Lom. Ex'rs, 294. So, without saying whether or not other provisions of this will as to pecuniary legacies would demand a sale, and deny a right of election and partition in kind, the want of consent of all, which must, but does not, appear, will deny partition in kind."

Also, in the cases of *Board of Trustees v. Blair*, 45 W. Va. 823, 32 S. E. 203, and *Lynch v. Spicer*, 53 W. Va. 427, 44 S. E. 255, the same doctrine is announced.

In the case of *Harcum v. Hudnall*, 14 Grat. (Va.) 369, this question was before the Court of Appeals of Virginia, and, in referring to the rule relied upon by appellant's counsel, the court said:

"It is a familiar doctrine that land articted or devised to be sold and converted into money, or money articted or bequeathed to be invested in land, shall assume the very character of the property into which it was to be converted; and, if the new form thus impressed upon it remain unchanged, it will pass to such of the representatives of those who take under the will as would be entitled to it as property of the character into which it was to be converted. And land thus directed to be converted into money will pass as money, although the actual conversion by a sale may not yet have been effected; and, if the will directing the conversion also dispose of the proceeds, the gift of the proceeds is to be considered as a gift of personal estate."

The rule is thus stated in 2 Story's Equity Jurisprudence, where it is said:

"Another class of cases illustrating the doctrine of implied trusts is that which embraces what is commonly called the equitable conversion of property. By this is meant an implied or equitable change of property from real to personal or from personal to real, so that each is considered transferable, transmissible and descendible, according to its new character, as it arises out of the contracts or other acts or intentions of the parties. This change is the mere consequence of the common doctrine of courts of equity that where things are agreed to be done they are to be treated for many purposes as if they were actually done. * * * Land articted to be sold, and turned into money, is reputed money, and money articted or bequeathed to be invested in land is ordinarily deemed to be land."

In the case of *McClanachan v. Siter, Price & Co.*, 2 Grat. (Va.) 280, the court said:

"The subject of the deed was thus converted from realty into personalty, and in its new character the equitable right to it was conferred upon the husband and wife jointly. The husband thereby acquired the power to alien or incumber it without the concurrence of the wife, and, in the event (which has happened) of his surviving her, the whole interest, so far as undisposed of by him, became his absolute property."

There are numerous other cases passed upon by the courts of Virginia and West Virginia, which could be cited in support of this doctrine; but we think we have shown that the principle is well established as a rule of property in those states. This is also the doctrine announced by the courts of Maryland.

The case of *Paisley v. Holzshu*, 83 Md. 325, 34 Atl. 832, is in harmony with the doctrine announced by the courts of Virginia and West Virginia. In that case, the father executed to his sons a deed for all of his real estate and personal property, in trust for the benefit of the grantor for life, with the provision that he still held a legal estate in the land, and empowered them, after his death, to sell and convey all things conveyed to them by the deed, and then directed the payment of certain gifts therein made by him, and the division into

seven equal parts of the balance remaining; the trustees to share in such parts. The syllabus in that case is as follows:

"Held, that there was a conversion of the realty at the grantor's death, and that the grantees took no such interest in the land as could be reached by levy of execution thereon."

In the case of *Boyce v. Kelsoe Home for Orphans of the M. E. Church*, 107 Md. 190, 68 Atl. 550, the Maryland court again passed upon this question. There a bill was filed by the executors of James Boyce, deceased, against the Kelsoe Home for Orphans of the M. E. Church et al., legatees under the will of the said Boyce, deceased, for a construction of the will. Later the case was carried to the Court of Appeals, and the court, in the opinion filed, held that there was an equitable conversion under the will; the third syllabus being as follows:

"A testator in his will used the expression 'inasmuch as I shall hereafter give my executors power to sell or lease my real estate and personal estate,' etc., and in the last clause, after appointing his executors, said: 'I confer upon my executors power * * * to make sale * * * of my real estate, * * * not only for the purpose of paying my debts, but to enable them to make the division * * * as hereinbefore provided, it being contemplated by me that they will sell my real estate, though not with undue haste.' Held, that it was his intent that his whole estate, real and personal, should be converted into money."

In the case of *Craig v. Leslie et al.*, 3 Wheat. 563, 4 L. Ed. 460, this question was passed upon by the Supreme Court of the United States. That case grew out of the will of Robert Craig, a citizen of the state of Virginia, and arose in a suit brought on the equity side of the Circuit Court for the District of Virginia, by Thomas Craig, against the trustees named in the will of Robert Craig, to compel them to execute the trusts, by selling the trust estate and paying over the proceeds of the same to the complainant. The clause in the will of Robert Craig upon which the question arose is expressed in the following terms:

"In the first place I give, devise and bequeath unto John Leslie" and four others, "all my estate, real and personal, of which I may die seized or possessed, in any part of America, in special trust, that the aforementioned persons, or such of them as may be living at my death, will sell my personal estate to the highest bidder, on two years credit, and my real estate on one, two and three years credit, provided satisfactory security be given, by bond and deed of trust. In the second place I give and bequeath to my brother, Thos. Craig, of Belth Parish, Ayrshire, Scotland, all the proceeds of my estate, both real and personal, which I have herein directed to be sold, to be remitted to him accordingly as the payments are made, and I hereby declare the aforesaid John Leslie," and four others, "to be my trustees and executors for the purposes aforementioned."

In that case the Attorney General of the state of Virginia filed a cross-bill against the plaintiff in the original suit, and the trustee, the prayer of which was to compel the trustee to sell the trust estate, so far as it consisted of real estate, and to appropriate the proceeds to the use of the said commonwealth, by paying the same into its public treasury.

It was contended that Robert Craig, being an alien, was incapacitated to hold property within the territory of the nation. The court, in discussing the point at issue, among other things, said:

"The incapacity of an alien to take, and to hold beneficially, a legal or equitable estate in real property, is not disputed by the counsel for the plaintiff; and it is admitted by the counsel for the state of Virginia that this incapacity does not extend to personal estate. The only inquiry, then, which this court has to make, is whether the above clause in the will of Robert Craig is to be construed, under all the circumstances of this case, as a bequest to Thomas Craig of personal property, or as a devise of the land itself. * * *

"The settled doctrine of the courts of equity correspond with this obvious construction of wills, as well as of other instruments, whereby land is directed to be turned into money, or money into land, for the benefit of those for whose use the conversion is intended to be made. In the case of *Fletcher v. Ashburner*, 1 Bro. Cas. 497, the master of the rolls says that 'nothing is better established than this principle that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted, and this, in whatever manner the direction is given.' He adds: 'The owner of the fund, or the contracting parties, may make land money, or money land. The cases establish this rule universally.' This declaration is well warranted by the cases to which the master of the rolls refers, as well as by many others. See *Dougherty v. Bull*, 2 P. Wms. 320; *Yeates v. Compton*, Id. 358; *Trelawney v. Booth*, 2 Atk. 307.

"The principle upon which the whole of this doctrine is founded is that a court of equity, regarding the substance and not the mere forms and circumstances of agreements and other instruments, considered things directed or agreed to be done as having been actually performed, where nothing has intervened which ought to prevent a performance. This qualification of the more concise and general rule, that equity considers that to be done which is agreed to be done, will comprehend the cases which come under this head of equity.

"Thus, where the whole beneficial interest in the money in the one case, or in the land in the other, belongs to the person for whose use it is to be given, a court of equity will not compel the trustee to execute the trust against the wishes of the cestui que trust, but will permit him to take the money or the land, if he elect to do so before the conversion has actually been made; and this election he may make, as well by acts or declarations, clearly indicating a determination to that effect, as by application to a court of equity. It is this election, and not the mere right to make it, which changes the character of the estate so as to make it real or personal, at the will of the party entitled to the beneficial interest.

"If this election be not made in time to stamp the property with a character different from that which the will or other instrument gives it, the latter accompanies it, with all its legal consequences, into the hands of those entitled to it in that character. So that in the case of the death of the cestui que trust, without having determined his election, the property will pass to his heirs or personal representatives, in the same manner as it would have done had the trust been executed, and the conversion actually made in his lifetime. * * *

"Equity would surely proceed contrary to its regular course, and the principles which universally govern it, to allow the right of election where it is desired, and can be lawfully made, and yet refuse to decree the money upon the application of the alien, upon no other reason, but because, by law, he is incapable to hold the land. In short, to consider him in the same situation as if he had made an election which would have been refused had he asked for a conveyance. The more just and correct rule would seem to be that, where the cestui que trust is incapable to take or to hold the land beneficially, the right of election does not exist, and, consequently, that the property is to be considered as being of that species into which it is directed to be converted."

The learned judge who heard this cause in the court below, in addition to holding that this was a devise of land, and therefore void under the laws of West Virginia, likewise held that, under the laws of that state, the donee could not take it as personalty, and that, by the provisions of the will, a conversion did not occur. This decision was based upon the theory that the clause of the will in question was void as being against the public policy of that state. This raises the question as to whether there is any law in West Virginia by which the testator was prohibited from disposing of his real property in that state so as to convert the same into personalty to be donated to this church, a resident of the state of Maryland.

The public policy of West Virginia, as evidenced by its constitutional provisions and legislative enactments, is intended to prevent the accumulation of real estate within its domain by churches and religious societies, and is not intended to apply to donations of money or other personal property to churches in other states realized from the sale of real estate situated in that state. The wisdom of legislation of this character, as it affects property within a state, is recognized by all the courts; that it serves a good purpose is admitted by all who had given the question any consideration. We fully appreciate the existence of the evils sought to be remedied by legislation of this character. However, if the state should undertake to legislate so as to control the disposition of personal property in another state realized from the sale of real estate, as in this case, such legislation would be held to be extraterritorial and of no force. To hold that the deed by which this property was conveyed is void because the proceeds resulting from the sale were to be donated to a religious denomination in Maryland would be to establish the rule that the Legislature of West Virginia has the power to direct how the proceeds resulting from the sale of real property situate in that state should be disposed of in another state. That the courts of West Virginia have the power, under her Constitution and laws, to declare donations of real estate to churches in or out of that state void, cannot be controverted; but that question is not before us now. Suppose that during the lifetime of the testator he had conveyed this property in trust, with full power and authority to sell and transfer the property in question for the purpose of raising funds to be donated for the use and benefit of the First Spiritualist Church of the City of Baltimore, Md., and that, in pursuance of such conveyance, the trustee had, during the lifetime of the testator, conveyed the property thus held by him in trust, and paid to the legatee the amount thus realized from such sale, could the state, or any one else, have had the conveyance thus made by the trustee declared void as being against the public policy of West Virginia? We think not. Even if the testator, at the time he made the conveyance, had lived in the state of West Virginia, neither the state, nor any one else, could have had the conveyance declared void as being against the public policy of that state. Such conveyance would not have been in violation of the public policy of that state inasmuch as there would have been no effort to convey real estate in the state of West Virginia to a religious denomination. The execution of the

conveyance to the trustee would simply have been the adoption of a method for converting his real estate into personal property in order to donate the proceeds of such sale to a religious denomination in another state. The evil sought to be remedied by the Legislature of West Virginia was to prevent the holding of real estate in excess of the amount prescribed by law, within its borders by religious denominations. This is the only extent to which it could possibly go. The Legislature of a state can only legislate so as to prevent religious denominations and societies from holding real estate within its territory; and, West Virginia having, in this instance, by constitutional provision and legislative enactment, provided to that effect, such action on the part of the Legislature necessarily applies only to the taking and holding of real estate situate in that state. Here the real estate in question is still held and occupied by citizens of that state, and, as such, is subject to taxation as other property of like character; and the proceeds arising from such sale have been paid into the orphans' court of the state where the testator and the donee resided at the time of the execution of the will, and have been by that court applied according to the directions contained in the clause which authorized the bequest. Of course, if the land in question had been conveyed to the First Spiritualist Church of Baltimore, then we would have an entirely different proposition before us. But such is not the case, and therefore that question does not arise in this controversy, inasmuch as the donee resides in another state, and we know of no law in West Virginia which goes to the extent of preventing a church from accepting personal property as a gift, even if the donee resided in the state of West Virginia. Under these circumstances, we are at a loss to understand upon what theory it can be reasonably contended that the public policy of that state has been violated in any respect in the transfer of this property.

Even if this were a devise of land to a foreign church, the state alone could complain. In the case of *Church v. Arkle*, 49 W. Va. 93, 38 S. E. 486, the court said:

"Where one leases a lot from the trustees of a church in an action of unlawful detainer against him by such trustees for the recovery of possession, he cannot set up that the church holds the lot in violation of section 1, c. 57, of the Code, limiting the ownership of real estate by a church to such as may be necessary as a place of public worship or burial place, or the residence of a minister. None but the state can attack such ownership as violating that statute." *Banks v. Poiteaux*, 3 Rand. (Va.) 136, 15 Am. Dec. 706; *Hanson v. Little Sisters of the Poor*, 79 Md. 434, 32 Atl. 1052, 32 L. R. A. 293.

Also in the case of *Jones v. Habersham*, 107 U. S. 174, 2 Sup. Ct. 336, 27 L. Ed. 401, the court, in referring to this question, said:

"But there are two conclusive answers to this argument: (1) Restrictions imposed by the charter of a corporation upon the amount of property that it may hold cannot be taken advantage of collaterally by private persons, but only in a direct proceeding by the state which created it. *Runyan v. Coster*, 14 Pet. 122, 131 [10 L. Ed. 382]; *Smith v. Sheeley*, 12 Wall. 353, 361 [20 L. Ed. 430]; *Bogardus v. Trinity Church*, 4 Sandf. Ch. (N. Y.) 633, 758; *De Camp v. Dobbins*, 29 N. J. Eq. 36; *Davis v. Old Colony R. R. Co.*, 131 Mass. 258, 273 [41 Am. Rep. 221]."

In the case of *Julian v. Central Trust Co.*, 115 Fed. 956, 53 C. C. A. 438, it was insisted that the Southern Railway Company, being a corporation of the state of Virginia, could not hold railroad property in North Carolina, and, in referring to this phase of the question, the court, among other things, said:

"If the Southern Railway Company holds this property contrary to the will of the sovereign power of the state, it is for the state to interfere. No private individual can usurp its prerogative. *Bank v. Matthews*, 98 U. S. 623, 25 L. Ed. 188; *Leazure v. Hillegas*, 7 Serg. & R. [Pa.] 313."

In the case of *Hickory Farm Oil Co. v. Buffalo, N. Y. & P. R. Co.* (C. C.) 32 Fed. 22, the court said:

"The leading case in Pennsylvania on the subject of the effect of a conveyance of real estate to a corporation forbidden by law to 'purchase and hold' the same is that of *Leazure v. Hillegas*, 7 Serg. & R. [Pa.] 313, in which it was held that such corporation might purchase and take title to the real estate; its title, however, like that of an alien, being defeasible at the pleasure of the commonwealth. That case and the later case of *Gouldie v. Water Co.*, 7 Pa. 233, settle the principle that the commonwealth alone can object to a want of capacity in a corporation to hold land."

It is unnecessary, however, to pursue this matter further, inasmuch as we have reached the conclusion that this is not a devise of land but a bequest of personalty.

In the case of *Commonwealth v. Martin's Ex'rs*, 5 Munf. (Va.) 118, there was a devise of land to the executors with directions that the same be sold and the proceeds paid to aliens. The conveyance in that instance was attacked on behalf of the state upon the ground that aliens were debarred from holding lands in the state of Virginia. The court held that a conversion of the realty into personalty was worked by the will immediately upon the death of the testator, and that the alien legatees were entitled to take as upon a bequest of personalty. In referring to the public policy of that state, the court, among other things, said:

"The question thus presented to us, in which the rights and interests of the commonwealth on the one side, and of alien claimants (under the will of a brother) on the other, come in collision, is one of peculiar interest, delicacy, and importance; and is one in which the court will have no inclination to interfere, to the prejudice of the aliens, unless impelled thereto by the requisitions of the law, bottomed on that principle of self-preservation, inherent as well in society as individuals; that principle which prohibits an alien from holding the soil and territory of our country, to which he holds no reciprocal allegiance.

"The importance to society of that power which is given to individuals of appointing the future heir of their earthly possessions seems to be universally admitted. Those affections which are so necessary to unite and preserve the human family in a state of civilization, and those exertions, whether bodily or mentally, which tend to the convenience, comfort, and ornament of society, depend much on the power of appointing who shall enjoy the fruits of those exertions after the death of the present possessor. To impair this power, therefore, is to lessen the motives to industry, frugality, and every social virtue, and in fact to diminish those endearing affections which so vitally interest as well the happiness as the existence of the social state.

"Hence it happens that all wise governments have carefully preserved to individuals the right of perpetuating to their friends those enjoyments which they have toiled to acquire for themselves; and are solicitous, by law, to

cast the inheritance, where the proprietor dies intestate, on those supposed to be most dear to him. No government has gone farther than ours, in hunting out these objects, being desirous to succeed only where none such can be found, and not to step in before any, wherever they may reside, except to prevent the acquisition, by aliens, of the soil of our country."

Thus we have the public policy of the state of Virginia as applied to cases like the one at bar clearly and forcefully stated by the highest court of that state. In that case the court also said:

"The society then imposes no restraint on her citizens as to the final disposition of their acquisitions, provided it is done in a way not to endanger the community; the next of kin, whether alien or citizen, will succeed, as distributee, to the personal estate, or will take it as legatee; and the question in this case is whether, under the will above recited, the real estate, the soil of the country, passed to aliens, or merely a personal bequest.

"The bill admits that the testator knew that they could not take it as real estate, and that he took advice how he might safely gratify his friendship for them without depriving himself of a home during his life, or violating the above principle of our policy and laws. He might have sold his real estate to a citizen, might have taken a mortgage on it to secure the purchase money, which he might have bequeathed to his sisters. This would have occasioned no injury to the estate. He wishes, though, to enjoy it during his life, and that the same thing should be done, by his executors, after his death, which he might thus have done in his lifetime; and therefore he devises the fee to his executors, who were citizens, with power and directions to make such sale, and to pay over the money."

We think the case of *Craig v. Leslie*, supra, clearly settles this question. There the court, as we have shown, held that the legacy given to the alien was to be treated as a bequest of personal estate, which he was, although an alien, capable of taking for his own benefit. In referring to this point the court said:

"* * * As in the case of a corporation, so in that of an alien, a bequest of land thus converted into money is valid although a devise of land is or may be void." 3 *Pomeroy's Equity Jurisprudence*, § 1164, notes 3 and 5.

Also, in the following cases, it is held that the doctrine of equitable conversion is applicable to corporations incapable of taking land by devise: *Dodge v. Williams*, 46 Wis. 70, 1 N. W. 92, 50 N. W. 1103; *Gould v. Asylum*, 46 Wis. 106, 50 N. W. 422; *American Bible Society v. Noble*, 11 Rich. Eq. (S. C.) 201; *Draper v. Harvard College*, 57 How. Prac. (N. Y.) 273; *Downing v. Marshall*, 23 N. Y. 366, 80 Am. Dec. 311.

In the case of *Downing v. Marshall*, supra, the court, among other things, said:

"The Home Missionary Society, being an unincorporated association, is incompetent to take either real or personal estate, and the residuary clauses of the will are so far wholly void.

"The American Tract Society, and the American Bible Society, being corporations without power to take real estate by will, the residuary devise is void as to them, so far as it relates to the rents and profits of the land, or net annual income to arise from carrying on the *Ida Mills*, as the testator directed.

"But those societies will be entitled to share in the proceeds of the sale and conversion of the said mills and real estate, to be ultimately made, as the will directs. The trusts in their favor are also valid, as to any personal estate embraced therein. * * *

"The distinction between a devise of land and a power to sell for the benefit of another, in respect to the capacity of the donee to take it, is well

settled by authority. The case of *Craig v. Leslie*, 3 Wheat. 563 [4 L. Ed. 460], and *Anstice v. Brown*, 6 Paige [N. Y.] 448, hold that where land is devised or conveyed to be sold, and the proceeds paid to an alien, the trust is perfectly valid. It is true that, when these cases arose, a devise or conveyance to an alien was not absolutely void, as devises are now. But I think this makes no difference; the reasoning of the judges in the cases proceeding upon the effect of an equitable conversion, and upon the consideration that the policy of the law which forbids aliens from holding was not infringed upon by bequeathing money to them to be raised by the sale of the land pursuant to a power. So in the present case. The policy and language of the statute forbids corporations from holding land by the title of devise; but they are free to take money or personal property by a testamentary gift. To me it seems perfectly consistent, as it certainly is with the language of the statute, to hold that a testator may, by will, create a power to dispose of his lands and pay the proceeds to a legatee."

In the case of *Church Extension Society v. Smith*, 56 Md. 362, which was a case where there was a devise of land to a foreign religious society, the court, in passing upon this question, said:

"While it may be conceded that a devise of land in Maryland to a foreign religious corporation would be held invalid as against the policy of the law, and contrary to the spirit of the thirty-eighth article of the Declaration of Rights, which is analogous to the British Mortmain acts, yet it by no means follows that where, as in this case, the will directs that the whole estate, real and personal, shall be converted into money, and constitute a blended fund for the purpose of paying debts and legacies, and the whole surplus is disposed of as money; and a pecuniary legacy is given to a foreign religious corporation, any objection can be made to the validity of the legacy because a portion of the fund out of which it is directed to be paid is derived from the sale of real estate.

"In this case there is a clear and manifest intent to disinherit the heir. The whole fund must be considered and treated as money, and the bequest to the foreign religious corporation, not being affected by the provisions of the Declaration of Rights, was rightly held by the circuit court to be a valid bequest."

Notwithstanding the fact that under the Declaration of Rights of the state of Maryland, as will hereafter appear, a religious denomination, in the absence of legislative sanction, would be incapable of taking such a bequest, yet, where real property is disposed of so as to work an equitable conversion, it will be treated as a valid transaction, even though the proceeds realized from such sale are to be given to a foreign religious corporation.

We will now consider briefly the question as to whether this gift to the church was valid as a bequest of money; and this must be determined by the laws of Maryland, the place where the testator, as well as the legatee, were domiciled at the time the will was made. In the case of *Jones v. Habersham*, 107 U. S. 174, 2 Sup. Ct. 336, 27 L. Ed. 401, the court said:

"According to the uniform course of the decisions of this court, the validity of this devise as against the heirs at law, depend upon the law in the state in which the lands lie, and the validity of the bequest as against the next of kin, upon the law of the state in which the testatrix had her domicile. *Vidal v. Girard*, 2 How. 127 [11 L. Ed. 205]; *Wheeler v. Smith*, 9 How. 55 [13 L. Ed. 44]; *McDonough v. Murdock*, 15 How. 367 [14 L. Ed. 732]; *Fontain v. Ravenel*, 17 How. 369 [15 L. Ed. 80]; *Perin v. Carey*, 24 How. 465 [16 L. Ed. 701]; *Lorings v. Marsh*, 6 Wall. 337 [18 L. Ed. 802]; *U. S. v. Fox*, 94 U. S. 362 [24 L. Ed. 192]; *Russell v. Allen*, 107 U. S. 163 [2 Sup. Ct. 327, 27 L. Ed. 397]; *Kain v. Gibboney*, 101 U. S. 362 [25 L. Ed. 813]."

In the case of *Bible Society v. Pendleton*, 7 W. Va. 79, the testatrix, Mary Cooper, who was a resident of the state of Virginia, conveyed certain land in Pennsylvania in trust, to be sold, with directions that the proceeds be disposed of "as she may direct." After her death the question arose as to the validity of the bequest, and it was insisted that such question should be decided in the state of Pennsylvania, in which state the lands were situated. The Supreme Court of Virginia held that this money was personal estate, and that the validity of the bequest must be determined according to the laws of the domicile of the testatrix. The court, in passing upon this phase of the question, said:

"The will directs the payment of certain legacies, and simply designates the proceeds of this land as a fund or portion of the personal estate out of which they should be paid. Most manifestly, therefore, the laws of Pennsylvania can have no operation and can have no influence in construing the language of this will, or determining the validity of any of its dispositions touching this fund. They can no more control or determine the direction of this fund than they can control and direct the movements of a stream whose source, indeed, may be within the limits of that state, when it comes to flow exclusively within the limits of Virginia."

In the case of *Handley et al. v. Palmer et al.*, 103 Fed. 39, 43 C. C. A. 100, the Circuit Court of Appeals for the Third Circuit passed upon this question. There, the testator directed that his real estate in Virginia and West Virginia be sold and the proceeds given to the city of Winchester, Va. The court held that there was, or had been, a conversion of the property devised, and that the validity of the bequest should be determined by the courts of the state of Pennsylvania, where the testator was domiciled. Among other things, the court said:

"* * * At the threshold of the discussion of these contentions, it is necessary to inquire what law is applicable to their determination—the law of Pennsylvania or the law of Virginia? As to this we cannot do better than to quote the language of the learned judge below:

"It is clear that, as respects all the testator's personal estate and his real estate situated in the state of Pennsylvania, the validity of the residuary clause is to be determined by the law of Pennsylvania; the testator's domicile having been there at the date of his will and at the time of his death. *Desesbats v. Berquier*, 1 Bin. [Pa.] 336 [2 Am. Dec. 448]; *Freeman's Appeal*, 68 Pa. 151; *Magill v. Brown*, Fed. Cas. No. 8,952, *Brightly*, N. P. 847; *Jones v. Habersham*, 107 U. S. 174-179, 2 Sup. Ct. 336, 27 L. Ed. 401. In *Magill v. Brown*, *supra*, a case relating to bequests to charitable uses under the will of Sarah Zane, Mr. Justice Baldwin, sitting at circuit in this state, held that, the domicile of the testatrix being here, the law of this state governed her real estate situated here, and (curiously enough) sustained a bequest "to the citizens of Winchester," Va., to purchase a fire engine and hose, and a bequest "to the select members belonging to the monthly meeting of women friends, held at Hopewell, Frederick County, Virginia," the interest to be applied "towards the relief of the poor belonging thereto." In *Jones v. Habersham*, *supra*, which involved charitable devises and bequests, the Supreme Court of the United States said that the validity of the devises, "as against the heirs at law, depends upon the law of the state in which the land lies, and the validity of the bequests, as against the next of kin, upon the law of the state in which the testatrix had her domicile." It is to be observed that under the will of John Handley no real estate anywhere is devised to the city of Winchester. By the express direction and order of the testator, contained in his will, his entire real estate, wherever lying, is

to be sold by his executors. This direction, by the settled law of Pennsylvania, worked a conversion of the testator's real estate, wherever situated, into personalty, as of the date of his death. *Dundas' Appeal*, 64 Pa. 325; *Roland v. Miller*, 100 Pa. 47; *Miller v. Com.*, 111 Pa. 321, 2 Atl. 492; *In re Williamson's Estate*, 153 Pa. 508, 26 Atl. 246. The plaintiff's counsel, as I understand them, concede that the power of sale given to the executors is mandatory, and worked an equitable conversion of the testator's real estate everywhere, if the residuary clause is valid. In their brief they say: "The property which is subject to the residuary clause or gift (item 28 of will) is to be regarded as personal property, in order to determine the validity of the residuary bequest. * * * If the bequest be held valid, the fund is to be decreed personal property, and passes to the city of Winchester as such. If invalid or void, then, the purpose of the conversion having failed, the conversion of the real estate does not take effect, and the real estate retains its original character for the benefit of the heirs." The plaintiffs' counsel further contends that the question of the validity of the residuary legacy is to be determined mainly by the laws of Virginia."

The case of *Jones v. Habersham*, 107 U. S. 174, 2 Sup. Ct. 336, 27 L. Ed. 401, is very much in point.

The city of Winchester being a resident of the state of Virginia, it became necessary to inquire whether, under the law of that state, it had the power to take the bequest which had been declared valid under the law of the state where the testator resided; and the court, in passing upon that question, held that it had such power.

We now come to consider the question as to whether this bequest is good under the laws of the state of Maryland. Article 38 of the Declaration of Rights, which is a part of the Constitution of the state of Maryland, prohibits devises of bequests to religious societies, orders, or denominations without the prior or subsequent sanction of the Legislature. The Legislature of that state for the year 1900 passed an act giving its sanction and consent to this bequest and devise. Acts 1900, pp. 995, 1005, c. 627. We deem it necessary, however, to only quote sections 1 and 47, which read as follows:

"Section 1. Be it enacted by the General Assembly of the State of Maryland, that the sanction and consent of the said General Assembly be and the same is hereby declared, given and granted to the following gifts, bequests, devises, grants, sales, leases, conveyances and deeds to and from certain persons and bodies corporate to and for the use of certain ministerial persons, religious and educational corporations, orders, denominations or sects, and to certain charitable institutions as herein set forth."

"Sec. 47. To the bequest and devise contained in the last will and testament of Frederick Fickey, Jr., of certain lands in West Virginia to Frank Woods, in trust for the First Spiritual Church of Baltimore City, which will is duly recorded in the office of the register of wills of Baltimore City, in Wills Liber S. R. 'M., No. 81, folio 467," etc.

The rule in the state of Maryland is very clearly stated in the case of *Halsey v. Convention of the Protestant Episcopal Church*; 75 Md. 281, 23 Atl. 781. The court, in that case, among other things, said:

"The statute of 43 Elizabeth in regard to charities is not in force in Maryland, but a court of chancery has jurisdiction independent altogether of the statute, to enforce a trust for charitable and religious purposes, provided the devise or bequest be made to a person or body corporate capable of taking and holding the property so devised and bequeathed; and provided, further, the object and character of the trust be definite and certain. When these exist—and the gift is made to one capable of taking it, and when the trust

is declared in definite terms—a court of chancery has the same power to enforce such a trust for charitable and religious purposes as it has to enforce a trust for any other purpose.” *Erhardt v. Baltimore Friends*, 93 Md. 669, 49 Atl. 561; *Baptist Church v. Shively*, 67 Md. 493, 10 Atl. 244, 1 Am. St. Rep. 412; *Crisp v. Crisp*, 65 Md. 422, 5 Atl. 421; *Barnum v. Baltimore*, 62 Md. 292, 50 Am. Rep. 219.

Thus it will be seen that under the laws of Maryland bequests of this character are valid when the consent of the Legislature is obtained—either before or subsequent to the making of the same—and the act of the Legislature authorizing this bequest is plain in its terms, and leaves no doubt that it was the intent of the Legislature that this church should accept the property bequeathed.

This suit was brought solely upon the theory that the will devised lands, and its purpose was to set aside the deeds of purchase as a cloud upon the title of the plaintiffs. It has been legally established that Frederick Fickey, Jr., the testator, had legal capacity to make a will. Therefore he had legal capacity to determine, under the doctrine of equitable conversion, whether he would leave the property in the shape of lands or in the shape of money. By the fourth clause of his will he leaves certain lands to Frank Woods, as trustee, with absolute directions to sell and dispose of the same and to pay the proceeds of such sale to the First Spiritualist Church of Baltimore City. Under the well-established rule, it seems to us that this, in effect, made these lands money; and, whether the ultimate disposition of this bequest could be attacked, a conversion of these lands into personalty was accomplished; for, by reason of the undoubted capacity of the testator, the trustee had a right to make sale of the lands and to convey legal title. However, this is not all. The trustee had, in pursuance of the directions contained in the fourth clause of the will, sold and conveyed these lands long before any question was made, either of his right to do so, or of the entire validity of the bequest of the proceeds of the sale.

The sale of the real estate by the trustee was to a citizen of the state of West Virginia who had a perfect right to purchase and hold the same under the laws of that state, and the proceeds arising therefrom were disposed of by the trustee in the state of Maryland in accordance with the laws of that state.

From what we have said, it necessarily follows that the plaintiff has no equity against the purchasers of the land, but is remitted to any rights she might have against the First Spiritualist Church of Baltimore City for the money received by them.

In *Hill on Trustees*, 359, it is said that, where there was a devise of real estate to trustees simply (without adding any words of limitation), in trust to sell, the trustee would take the fee by construction. Here, the devise was:

“To have and to hold said three tracts of land situate in West Virginia unto Frank Woods, trustee, in fee simple, upon trust, nevertheless to sell and dispose of said lands at public or private sale, upon the best possible terms and for the best possible prices and pay over the proceeds of such sale, less taxes paid by him, and the expenses incident to such sale including a reasonable commission thereon to himself, to the First Spiritualist Church of Baltimore City, a corporation,” etc.

Could any language be more appropriate, both to create a power of sale, and to vest an interest in the trustee? We can conceive of none. Therefore it necessarily follows that, after the execution of this power, no equity would have existed in Ann R. Miller, even in her lifetime, to attack such sale, but only to pursue the proceeds of the sale, inasmuch as the rights of a beneficiary under a will to the right of an equitable election, in any event, determines with her death, that the plaintiff below would have no right to the equity she seeks, even if the lands were as yet unsold; and that, they having been sold long before the death of her mother, she had no semblance of an equity in her bill.

The discussion of the various questions presented in the briefs filed herein has taken a wide range; but, owing to our view of the law of the case, we have not deemed it necessary to discuss many of the points thus presented. However, we have considered with great care the cases relied upon by the appellee to sustain its contention with respect to the points which we have discussed, but are of opinion that they are not controlling in the case at bar. While we have not discussed the other matters that have been so ably presented by counsel, nevertheless we have given them due consideration and are of opinion that in no view of this case would the complainant be entitled to recover.

We think the court below erred in the following particulars:

(a) In decreeing to be illegal, null, and void the devise made by Frederick Fickey, Jr., of the lands in controversy herein to Frank Woods, trustee, for the benefit of the First Spiritualist Church of Baltimore City, and in decreeing that notwithstanding said devise the title of the said land passed by said will to, and vested in, Ann R. Miller, the residuary legatee therein.

(b) In canceling the several conveyances from Frank Woods, trustee, to John G. Luke, and from John G. Luke, trustee, to the defendant West Virginia Pulp & Paper Company; and in perpetually enjoining the defendants from asserting title thereunder to the undivided $\frac{8}{17}$ of the land in controversy, and from disputing the plaintiff's right thereto.

(c) That the court erred in holding that the matters and things presented by the plaintiff's original and amended bills to be proper subjects for equitable jurisdiction.

For the reasons hereinbefore stated, the decree of the court below is reversed, and the cause will be remanded, with instructions to dismiss the bill herein at the cost of the complainant, without prejudice.

Reversed.

THE KATHRYN B. GUINAN.

(Circuit Court of Appeals. Second Circuit. January 7, 1910.)

No. 123.

1. COLLISION (§ 70*)—VESSEL AT PIER—NECESSITY OF WATCHMAN.

It is not negligence to leave a scow in a slip in New York Harbor, tied up to a pier, without a watchman; there being no custom to keep one in such case.

[Ed. Note.—For other cases, see Collision, Dec. Dig. § 70.*]

2. COLLISION (§ 71*)—OVERTURNING OF VESSEL AT PIER—NEGLIGENCE.

A scow with a deck load of gravel, while lying in a slip in North River, became partially filled with water in the night, listed, dumped her load, and turned over, bouncing as she struck, so as to strike and injure another scow lying behind her. She was new and in good repair, and had lain there for four days, and there was sufficient depth of water in the slip. *Held*, that such facts did not disclose any negligence on the part of the owner which rendered her liable for the injury to the second vessel.

[Ed. Note.—For other cases, see Collision, Dec. Dig. § 71.*]

Appeal from the District Court of the United States for the Southern District of New York.

Suit in admiralty by the Hendricks Brick Company and others against the barge Kathryn B. Guinan; Daniel Guinan, claimant. Decree for respondent, and libelants appeal. Affirmed.

Alexander & Ash, for appellants.

James J. Macklin (De Lagnel Berier, of counsel), for appellee.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

WARD, Circuit Judge. October 6, 1907, the scow Streeter with a deck load of brick was lying bow in on the south side of the pier at the foot of Fifty-Second street, North River, about 10 feet astern of the scow Guinan with a deck load of gravel, also lying bow in. The scows were about 100 feet in length and 32 feet in beam. At 7 a. m. the master of the Guinan was awakened by those on the boat ahead of him and he found 3 feet of water in her hold. Before anything could be done to relieve her she listed to port toward the pier and dumped part of her cargo, then listed to starboard and dumped the balance, and then, turning bottom up, jumped so as to land her starboard bow on the pier 4 feet above the water and her starboard quarter on the Streeter's starboard bow, causing her to sink. Such extraordinary behavior was hardly to be looked for, and yet something like it has occurred before, as may be seen from the cases of *A Scow Without a Name*, 7 Ben. 384, Fed. Cas. No. 12,554; and *The On The Level* (D. C.) 128 Fed. 511.

The libelants contend that the claimant of the Guinan is responsible because he left her without a watchman during the night, who might have discovered the leak and pumped the scow out. But the master was on board, though asleep. There is no evidence of any custom to keep watchmen on boats lying in the slips of New York Harbor, and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

such a burden would be very onerous. Cases cited by the libelants like *The On The Level* (D. C.) 128 Fed. 511, *The Lion*, 1 Spr. 40, Fed. Cas. No. 2,786, and *The Mary E. Cuff* (D. C.) 84 Fed. 719, where vessels were left with no one on board in open waters and sometimes in the face of approaching storms, or like *Campbell v. Pennsylvania*, 85 Fed. 462, 29 C. C. A. 268, which turned upon the question whether a line which rendered had been properly made fast, are quite unlike the one under consideration. There is nothing really to support the libelants' charge of negligence, except the presumption arising from the accident itself. It will not be useful to enter into a discussion of the doctrine of *res ipsa loquitur*. Giving it full effect in this case, it only established a *prima facie* case in favor of the libelants which we think the claimants fully met.

The proofs showed that the *Guinan* had been lying in the same berth for four days; that she drew scant 8 feet where there was 16 feet at mean low water; that she capsized within two hours of high tide; that she was but two years old, needed to be pumped out but twice a day, was so pumped, and was kept in good condition. We think that the trial judge was right in holding that the presumption was fully rebutted.

Decree affirmed, with costs of this court.

NOTE.—The following is the opinion of Hough, District Judge, in the court below:

HOUGH, District Judge. This libel alleges "a cause of damage civil and maritime," declares that the contact between the *Streeter* and the *Guinan* was a collision, and alleges that said collision arose because the *Guinan* was guilty of certain specified faults, which may all be disregarded, as being unproven, except the following: "Said barge (*Guinan*) was not in a sound and seaworthy condition, but, on the contrary, was defective and leaky." For purposes of argument it may be assumed that, when the *Guinan* moored in proximity to the *Streeter*, she was as matter of fact unseaworthy, in that she was then in such a condition of weakness as to be likely to develop an uncontrollable leak from slight and undiscoverable causes. But there is no evidence that this condition of the *Guinan* was either actually known to her master or owner, or that they or either of them had any reasonable cause to believe that such was the *Guinan's* condition; on the contrary, the evidence is full that from her construction, age, and occupation, and every other fact known to or reasonably discoverable by her owner, she ought to have been in sound, serviceable, and seaworthy condition.

The claim of libellant, therefore, rests upon the proposition that, since the unexplained sinking of a vessel in her berth raises a presumption of unseaworthiness (*Dupont v. Vance*, 19 How. 162, 15 L. Ed. 584), damage to any one caused by such sinking is caused by negligence, and therefore recoverable in an action such as this. This position necessarily implies that an actual condition of unseaworthiness, not reasonably to be expected and not discoverable by any inspection reasonably to be required, is either (1) a breach of the warranty of seaworthiness, or (2) in and of itself an act of negligence on the part of the owner. It may be assumed that unseaworthiness, however arising, and whether discoverable or not, is a breach of warranty; but no authority is produced to show that the shipowner warrants the seaworthiness of his vessel to the whole world, and not merely to those with whom he enters into some contractual relation. Such a doctrine seems to me irreconcilable with the plain meaning of the word "warranty."

The industry of counsel has produced no reported instance of so extraordinary an accident as this, and the case might well be disposed of by strictly observing the above outlined form of pleading. The cause is not alleged as one

of warranty. It is set forth as one of negligence; and, by familiar rules, he that alleges negligence must prove it as a fact. The only thing proven is that the Guinan sank unexpectedly, without reasonable explanation from undiscoverable causes. This raises presumption of unseaworthiness; but does it raise a presumption of negligence? I think it does, because the sinking of a vessel in calm weather, to the injury of third parties, is one of those unusual circumstances, from its nature unexplainable by third parties, to which the rule "*res ipsa loquitur*" applies. The reasoning of *Rose v. Stephens, etc., Co.* (C. C.) 11 Fed. 438 (respecting the explosion of a boiler), seems to me wholly applicable.

But the presumption so raised is rebuttable, and when it is shown, as it is here, that there was nothing about the Guinan tending to show her unseaworthiness discoverable by an owner exercising due diligence, the presumption is rebutted; and when it is further shown (as it is by witnesses on both sides) that despite every care in the construction of vessels, and despite the admitted fact that vessels of the Guinan's class are expected to last (when new) between four and five years without recaulking, such vessels do occasionally and unaccountably spring leaks and suddenly sink, this accident must be relegated to that small but real class.

The case has been stated without any reference to the argument that, assuming an act of negligence to have been proven, the injury is not such as could fairly be expected to flow therefrom. About this no opinion is expressed.

The libel is dismissed, without costs.

MARYLAND COAL & COKE CO. v. QUEMAHONING COAL CO.

(Circuit Court of Appeals, Fourth Circuit. November 4, 1909.)

No. 885.

1. SALES (§ 418*)—ACTION BY BUYER FOR BREACH OF CONTRACT—DAMAGES—CONSEQUENTIAL DAMAGES FOR FAILURE TO DELIVER.

In an action by a purchaser against his vendor for failure to deliver, he cannot recover as special damages the damages for nondelivery suffered by his subvendee, in advance of their payment, unless his own liability therefor is absolute and certain.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1195, 1196; Dec. Dig. § 418.*]

2. SALES (§ 418*)—ACTION BY BUYER FOR BREACH OF CONTRACT—SPECIAL DAMAGES—PREMATURE BRINGING OF ACTION.

Defendant contracted to sell and deliver to plaintiff 300 tons of coal per day for a year, and at the same time, with defendant's consent, plaintiff contracted to deliver the same coal to a steel company at an advance of two cents per ton; the contract providing that it would make every effort for prompt and faithful performance, but would not be responsible for delivery if prevented by strikes or "any occurrence beyond seller's control." Defendant having defaulted in delivery, plaintiff sued to recover as its direct damages two cents per ton on the shortage, and also as special damages the amount of a claim made against it by the steel company for breach of its contract, but which had not been adjudicated. *Held*, that as to the claim for special damages the action was premature, and should have been dismissed without prejudice, until plaintiff's liability to the steel company had been adjudicated; the court having no power to construe the contract between them in an action to which such company was not a party.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 418.*]

In Error to the Circuit Court of the United States for the District of Maryland, at Baltimore.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Action by the Maryland Coal & Coke Company against the Quemahoning Coal Company. Judgment for defendant, and plaintiff brings error. Reversed.

See, also, 176 Fed. 309.

Frank Gosnell and Carroll T. Bond (Charles F. Uhl, Jr., on the brief), for plaintiff in error.

Ernst O. Kooser and Frederick Dallam (Ogle Marbury and Edmund E. Kiernan, on the brief), for defendant in error.

Before PRITCHARD, Circuit Judge, and KELLER and McDOWELL, District Judges.

KELLER, District Judge. This was a suit in assumpsit, originally brought by the plaintiff in error (hereinafter called the plaintiff), a West Virginia corporation, against the defendant in error (hereinafter called the defendant), a Pennsylvania corporation, in the superior court of Baltimore city, and removed thence to the United States Circuit Court for the District of Maryland by a petition duly filed by the defendant.

As no motion to remand the case for want of jurisdiction was made by the plaintiff, but, on the contrary, the plaintiff acquiesced in the jurisdiction entertained by the Circuit Court, no question as to the jurisdiction of that court arises in this case so far as the parties are concerned. *Foult v. Gray* (C. C.) 120 Fed. 156; *In re Moore*, 209 U. S. 490, 28 Sup. Ct. 585, 706, 52 L. Ed. 904.

The plaintiff, in addition to the common counts in assumpsit, declared upon a special count founded upon an alleged breach of a contract in writing between the plaintiff and the defendant, evidenced by the following letter and acceptance:

"Quemahoning Mines, Ralphton, Pa.

"D. B. Zimmerman, President.

"(Quemahoning Coal the Best Steam Coal.)

"Quotations subject to change without notice, and deliveries subject to car supply, strikes, accidents, and any other causes beyond our control.

"Railroad weights govern all sales.

"Quemahoning Coal Company.

"Miners and Shippers of Bituminous Coal.

"Offices: Somerset, Pa., Aug. 5, 1905.

"Maryland Coal & Coke Co., Baltimore, Md.—Dear Sirs: In reply to your letter, I will agree to furnish three hundred tons coal per day from our Quemahoning mines at \$1.00½ f. o. b. cars at the mines. This coal must all apply to the Maryland Steel Co. upon their contract. This contract to run one year from this date. You people to furnish the Maryland Steel Co. cars at times when I am short on B. & O. cars or my own equipment.

"Yours truly,

"Aug. 5, 1905. Accepted.

D. B. Zimmerman.

Maryland Coal & Coke Co.,

"By Geo. P. Spates, V. P.

"We get \$1.02½ from Md. Steel Co."

In a statement of account appended to the declaration the plaintiff claimed that the defendant failed to deliver 43,634.483 tons of the coal

*For other cases see same topic & § NUMBER in Dec. & Am. Dig. 1907 to date, & Rep'r Indexes

contracted to be delivered, and that the difference between the contract price of such coal and the market value at the time and place deliveries should have been made was \$7,426.02. The defendant, in addition to the general issue, pleaded that plaintiff was indebted to it in a greater amount than the plaintiff's claim. By stipulation of counsel a jury was waived, and the evidence submitted to the court in lieu of a jury.

From the findings of facts made by the trial court it appears that the letter or contract heretofore quoted, was made in pursuance of a telephonic conversation had on July 31, 1905, and that on August 1, 1905, a contract was entered into between the plaintiff and the Maryland Steel Company in the following words and figures:

"Contract (In Duplicate).

"Baltimore, Md., August 1, 1905.

"Maryland Coal & Coke Company agree to sell, and Maryland Steel Company agree to buy:

"Material.—Quemahoning Coal, mined by Quemahoning Coal Co.

"Quantity.—Three to four hundred tons per day from August 1, 1905, to August 1, 1906.

"Delivery.—F. o. b. cars at mines.

"Shipments.—Daily, except Sundays.

"Price.—One dollar and two and a half cents (\$1.02½) per ton of 2,240 pounds.

"Terms.—Cash on 25th of month following that in which shipments are made.

"Ship to.—Maryland Steel Company, Baltimore Coal Piers, or Sparrow's Point, Md.

"Note.—Cars to be supplied by Maryland Steel Company to take this coal.

"Railroad scale weight at point of shipment to govern settlement.

"Every effort will be made for the prompt and faithful fulfillment of the contract, but seller will not be responsible for the delivery of the same if prevented by strikes and combinations of miners and laborers, accidents in the mines, or interruption of transportation, or from any cause or any occurrence beyond seller's control. In such cases, obligations to deliver coal under this contract are thereby canceled to an extent corresponding to the duration of such interruptions and no liability shall be incurred by seller for damages resulting therefrom.

"Buyers will not be under obligations to receive coal under this contract, providing works are not in operation, and due notice thereof is given to seller.

"Maryland Coal & Coke Company,

"Geo. P. Spates, V. P.

"Accepted.

Maryland Steel Company,

"By Frank Tenney, Asst. to President."

The trial court, referring to the addendum to the contract of August 5, 1905, between the parties, finds:

"The words 'We get \$1.02½ from Md. Steel Co.' were added by Mr. Spates, of the plaintiff corporation, at the request of Mr. Zimmerman, of the defendant corporation, and I find as a matter of fact that this was part of the contract and one of its terms, and was a reasonable and proper provision to limit and assure the amount of profit which the plaintiff was to receive as middleman in the transaction, and which, in case of breach by the defendant, the plaintiff might claim as an element of damages."

The court further found as a fact that the amount of coal that should have been delivered under the contract was 91,800 tons, and that of this amount 49,665.517 tons were actually delivered, leaving

42,134.483 tons which were not delivered, and that there were not such interruptions in the working of the mines as prevented these deliveries, but that the defendant delivered such coal to other purchasers under contracts entered into subsequent to the date of the plaintiff's contract, and at prices higher than those therein specified. The court also found as a fact that the plaintiff was indebted to the defendant in the sum of \$3,917.79 for coal delivered and not paid for under the contract, and that the plaintiff was entitled to damages at the rate of 2 cents per ton for the 42,134.483 tons of coal not furnished by defendant, amounting to \$842.69.

The court further found that the Maryland Steel Company (the vendee of the plaintiff) expended, for coal to take the place of the coal not furnished by the defendant, the sum of \$6,320.34, in excess of the amount which it would have paid for the coal if furnished by the plaintiff under its contract with said Maryland Steel Company, and that, before this suit was brought said Maryland Steel Company made demand upon plaintiff for said sum of \$6,320.34, as its loss and damage. The court, however, concluded as a matter of law, that:

"In view of the efforts made by the plaintiff, as found by the court, to cause and procure the defendant to abide by and fulfill its contract with the plaintiff, and to furnish the 42,134.483 tons of coal not in fact delivered, defendant's breach of its contract is, as matter of law, such cause or occurrence beyond the plaintiff's control as, under the terms of the plaintiff's contract with the Maryland Steel Company, canceled the obligation of the plaintiff to deliver to the Maryland Steel Company the said 42,134.483 tons of coal, and rendered the plaintiff free from any liability to the Maryland Steel Company for the loss and damage of the latter company by reason of nondelivery of such coal, and therefore the plaintiff has no liability to the Maryland Steel Company on account of the increased cost of the coal bought and substituted by the Maryland Steel Company, as above mentioned, and the defendant is not liable in damages to the plaintiff by reason thereof."

The court thereupon entered judgment for the defendant for \$3,075.10, the difference between \$3,917.79, the value of the coal delivered and not paid for, and \$842.69, the amount of the plaintiff's profit of 2 cents per ton on the coal not delivered.

The sole ground of complaint by the plaintiff is that the court concluded that, under the contract made between the plaintiff and the Maryland Steel Company, the latter company would have no valid ground of recovery against the plaintiff, and hence the plaintiff could not recover of the defendant damages which it could not suffer. As stated by the brief of counsel for plaintiff in error, after quoting the clause in its contract with the Steel Company beginning "Every effort will be made for the prompt and faithful fulfillment of the contract," etc.:

"The whole question on this writ of error is whether, upon the proper construction of his clause, the seller, the Coal & Coke Company, was relieved by it from liability to the Steel Company for the excess amount paid by the latter in the purchase and substitution of coal."

That surely is the whole question, but this court fails to see how it was expected that that question could be settled in this case, as it cannot be successfully contended that a finding either way upon this

question would render it *res adjudicata* as between the Steel Company and the Coal & Coke Company.

That there are cases in which the original vendee may recover from his vendor the damages for nondelivery suffered by his subvendee, in advance of their payment, is doubtless settled by the cases of *Josling v. Irvine*, 6 H. & N. 512, *Randal v. Rapier*, 96 English Common Law Reports, 82, and many other English and American authorities; but in none of these cases, so far as we have been able to discover, was it necessary for the trial court to construe a relieving clause in the contract between the original vendee and his subvendee. A brief examination of the two leading English cases just cited may serve to illustrate their wide difference from the case at bar.

Josling v. Irvine:

In this case Irvine sold by sample to Josling, 3,000 gallons of naphtha at 2s. 6d. per gallon. Josling resold the same to Hoile & Co., also by sample, at 2s. 6d. per gallon. The defendant failed to deliver the naphtha. It was proved that Hoile & Co. had demanded from plaintiff the difference between 2s. 6d. per gallon and 5s. 9d. per gallon, and it was also proved that the latter figure was the value in the market of naphtha of the quality of the sample, and that naphtha of like quality could not have been bought by Hoile & Co., at the time of the breach, for less than said sum per gallon. The trial court instructed the jury to give the plaintiff such an amount as would enable him to pay the assignees of Hoile & Co., who in the meantime had become bankrupt. The jury having given the amount claimed, held, that the damages were rightly assessed, and that there was no misdirection. In his opinion sustaining the trial court, Baron Bramwell said:

"There is no real difference between my opinion and that of my Brother Erle as expressed in the case of *Randal v. Rapier*. When a person has bought an article, and the seller does not deliver it, if the buyer can go into the market and get it elsewhere, the difference between the two prices, if any, is the measure of damage. Here it was proved that the plaintiff could not have bought naphtha of the same quality as that contracted to be sold except at an increase of price equal to the damages claimed. If one has the sagacity to discover the value of an article which another possesses, and buys it, he is entitled to the benefit of his bargain. *Randal v. Rapier* is distinguishable from the present case, for the seller, by delivering barley not equal to contract, the defect in which could not be discovered until the barley was delivered, deprived the buyer of the opportunity of going into the market and getting another barley."

Randal v. Rapier:

In this case the defendant had sold to the plaintiff seed barley, warranting it to be of a particular quality known as "Chevalier" barley, but had delivered barley of an inferior quality; and it was alleged as special damage that plaintiff, relying on the warranty, had sold the seed barley to T., who had sown it, and had thereby obtained a crop inferior to that which would have been produced by barley of the quality warranted, and so suffered damages which the plaintiff was bound to make good. Upon the execution of a writ of inquiry, after a judgment by default suffered by defendant, evidence was given of the difference in value of the crop actually produced from the seed sold

and the crop which would have been produced by seed barley of the quality warranted. It further appeared that plaintiff's vendee had claimed from him compensation, which plaintiff had agreed to make, but no sum had been actually agreed upon and no payment actually made. Held, that in assessing the damages the jury ought to include the amount to which they considered the plaintiff had become liable to his vendee in respect of the difference of the crops.

In the opinions of the justices delivered in this case there was some difference of view as to whether damages not actually paid by plaintiff could be recovered; Wrightman, J., being of opinion that they ought not to be allowed until paid, while Lord Campbell, C. J., Compton, J., and Erle, J., held that they might—Erle, J., saying:

"I think the true rule is that a liability to loss is sufficient to give the party liable a title to recover."

Accepting this statement as correctly laying down the law, it seems to us apparent that it is not applicable to the facts of the case at bar, because it cannot be said with certainty that the plaintiff has incurred a liability to the Maryland Steel Company, and we think that the liability referred to by the English court as sufficient to warrant recovery of the special damage must be an absolute liability, not requiring the interpretation of a special contract to ascertain its existence. In the case at bar the trial court held that no liability existed by reason of the relieving clause in the contract between the plaintiff and the Maryland Steel Company. However, it is manifest that that court's finding in that respect is not binding on the Steel Company, which was not a party to the action, and it will have a right to a judicial construction of its contract with the plaintiff, by a court of competent jurisdiction. In the event that such court held that plaintiff was liable to the Steel Company under the contract between them, the amount of such recovery would be, at least, *prima facie* evidence of the amount it should recover, by way of special damage, from the defendant in error. *Reggio v. Braggiotti*, 7 Cush. (Mass.) 166.

The broad distinction between the two English cases referred to and quoted from, and the case at bar, is that in both of the former the liability of the plaintiff was absolute, and the only subject of inquiry was as to the amount. There was no necessity to judicially construe any contract between the plaintiff and his subvendee, because there was no relieving clause in such contract. Here the very finding of the trial court, that the Coal & Coke Company, by virtue of the relieving clause in its contract with the Steel Company is not liable for the damages claimed by the Steel Company, illustrates the danger and difficulty of at all extending the doctrine laid down in *Josling v. Irvine* and *Randal v. Rapier*. In those cases there was and could be no doubt of the liability of plaintiff to his subvendee. In this case that is certainly a serious question, and one requiring a judicial construction of a written contract.

It is manifest, therefore, that plaintiff cannot be said to be under an absolute liability to the Steel Company until the contract between the parties is judicially construed by a court of competent jurisdiction, and inasmuch as, under the doctrine laid down by the English cases

quoted from, the plaintiff's right to sue for such special damages cannot be said to arise until his liability for them exists, it follows, in our view, that the court below erred in its third conclusion of law, to the effect that "the plaintiff has no liability to the Maryland Steel Company on account of the increased cost of the coal bought and substituted by the Maryland Steel Company, as above mentioned, and the defendant is not liable to the plaintiff by reason thereof," for the reason that the court had not jurisdiction to determine that fact, inasmuch as the Maryland Steel Company was not before the court as a party, and is entitled to a judicial construction of its contract by a court of competent jurisdiction in an action against the Maryland Coal & Coke Company.

We conclude that the case at bar, in so far, and in so far only, as it was brought to recover the special damages claimed from the plaintiff by the Maryland Steel Company, was prematurely brought, and that that feature of the litigation should be dismissed without prejudice to a new action therefor in the event that its liability to the Steel Company is judicially determined.

The judgment in this case entered is, in our opinion, correct as to amount, but should be amended so as to be without prejudice. As, in this view of the case, it cannot be said that either party has substantially prevailed in this court, we direct, in the exercise of our discretion, that the costs in this court upon this writ of error be equally divided.

Reversed and remanded for entry of judgment in accordance with this opinion.

Reversed.

QUEMAHONING COAL CO. V. MARYLAND COAL & COKE CO.

(Circuit Court of Appeals, Fourth Circuit. November 4, 1909.)

No. 886.

SALES (§ 417*)—ACTION BY BUYER FOR FAILURE TO DELIVER—SUFFICIENCY OF EVIDENCE.

Evidence considered, and *held* to support a finding that defendant was liable for breach of a contract to deliver coal, as against a defense that it had the right to prorate delivery with other contracts; there being no provision to that effect in the contract, and it being shown that it delivered on contracts subsequently made at a higher price.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1173; Dec. Dig. § 417.*]

In Error to the Circuit Court of the United States for the District of Maryland, at Baltimore.

Action by the Maryland Coal & Coke Company against the Quemahoning Coal Company. From the judgment, defendant brings error. Affirmed.

See, also, 176 Fed. 303.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Ernest O. Kooser and Frederick Dallam (Ogle Marbury and Edmund E. Kiernan, on the brief), for plaintiff in error.

Frank Gosnell and Carroll T. Bond (Charles F. Uhl, Jr., on the brief), for defendant in error.

Before PRITCHARD, Circuit Judge, and KELLER and McDOWELL, District Judges.

PER CURIAM. This was a cross writ of error sued out by Quemahoning Coal Company, defendant below, from the same judgment to review which Maryland Coal & Coke Company sued out a writ of error in No. 885 (176 Fed. 303), and as the essential facts in regard to the origin of the litigation are recited at some length in our opinion in that case it will be unnecessary to restate them here.

The case was tried by the court in lieu of a jury by agreement of counsel, and the court, while its general judgment was in favor of the defendant below (plaintiff in error here), found damages in favor of the plaintiff below in a sum equal to two cents per ton for all the coal not furnished by plaintiff in error under a contract which reads as follows:

"Quemahoning Mines, Ralphton, Pa.

"D. B. Zimmerman, President.

"(Quemahoning Coal the Best Steam Coal.)

"Quotations subject to change without notice, and deliveries subject to car supply, strikes, accidents, and any other causes beyond our control.

"Railroad weights govern all sales.

"Quemahoning Coal Company.

"Miners and Shippers of Bituminous Coal.

"Offices: Somerset, Pa., Aug. 5, 1905.

"Maryland Coal & Coke Co., Baltimore, Md.—Dear Sirs: In reply to your letter, I will agree to furnish three hundred tons coal per day from our Quemahoning mines at \$1.00½ f. o. b. cars at the mines. This coal must all apply to the Maryland Steel Co. upon their contract. This contract to run one year from this date. You people to furnish the Maryland Steel Co. cars at times when I am short on B. & O. cars or my own equipment.

"Yours truly,

D. B. Zimmerman.

"Aug. 5, 1905. Accepted.

"Maryland Coal & Coke Co.,

"By Geo. P. Spates, V. P.

"We get \$1.02½ from Md. Steel Co."

We do not regard it necessary to notice separately all the assignments of error. The first is based on the refusal of the court to hold that the Quemahoning Coal Company had a right to substitute deliveries of coal from the mines of the Valley Coal & Stone Company in lieu of coal from its own mines in filling the contract in suit. The terms of that contract are so plain and absolute that there is no possible merit in this contention, and, it may be further noted, the substitution of this coal was only objected to after the consignee, Maryland Steel Company, had found and reported that the coal delivered from the mines of the Valley Coal & Stone Company was inferior in quality to the Quemahoning product.

The gist of the remaining assignments of error was to the effect

that, inasmuch as the plaintiff in error had other contracts, and was unable to fill them all, it was entitled to prorate its deliveries upon all of its contracts. We think an inspection of the record is all that is necessary to refute the bona fides of this claim. Such inspection will show that, subsequent to the date of the contract in suit (which provided for deliveries of 300 tons per day), the plaintiff in error took additional contracts (at higher prices) conservatively aggregating over 1,000 tons per day, besides having other contracts contemporaneous with, or earlier in date than, the contract in suit, amounting to over 500 tons per day. It is possible that some of these earlier contracts had expired before the additional contracts were taken, but it is certain that these subsequent contracts were taken without regard to that good faith which the contractual relations already entered into with the defendant in error demanded of plaintiff in error.

The court found as a fact, and we conclude was justified in finding, that plaintiff in error was not prevented by any interruption of car supply, strikes or combinations of miners or laborers, or accidents in the mines, or any other cause beyond its control, from delivering the full amount of coal called for by the contract in suit, and found that the amount undelivered was applied to other contracts, subsequently taken, and at a higher price. The evidence shows that, as a rule, so far from there being a shortage of cars, there was an abundance of cars on hand, and it further shows that the plaintiff in error, as early as November 28, 1905, directed defendant in error to cease delivering empty cars of the Maryland Steel Company (the consignee under the contract in suit), and refused to load any more of them for the present. In addition to this the record shows that on only 80 days in the entire contract year did the plaintiff in error load all of the available cars on hand, and that of these days 44 occurred in the period prior to December 1, 1905, up to which date no shortage in deliveries was experienced under the contract in suit. In fact, it was in months when the car supply was most abundant and the shipments greatest that deliveries under this contract were the least. On only one day, viz., July 14, 1906, did the plaintiff in error ship an amount of coal equal to the daily deliveries contracted for with defendant in error and with parties with whom subsequent contracts were made. On that date it shipped 1,582.9 tons, and in the entire month of July, 1906, 21,868.4 tons, and it is significant, upon the question of the good faith of the claim of plaintiff in error that it did not willfully violate this contract, that of this monthly shipment, the largest in its history, but 89 tons were delivered under the contract in suit.

It seems to us that the true state of affairs in regard to these deliveries in the spring and summer of 1906 (when the main part of the shortage occurred) is plainly indicated by provisions inserted in some of the subsequent contracts entered into by the plaintiff in error, at prices higher than that stipulated in the contract in suit. Thus, in the contract (Plaintiff's Exhibit FF) made April 11, 1906, between plaintiff in error and Barnes & Tucker Company, for 40,000 tons of coal to be delivered at the rate of 3,333 tons per calendar month at \$1.25 per ton, it was agreed that:

"If the said Quemahoning Coal Company fails to deliver in equal monthly shipments 8,333 tons of coal per month, as above stated, the said Barnes & Tucker Company have the privilege of going into the open market and buying coal of satisfactory quality, to an extent corresponding to shortage in Quemahoning Coal Company's shipments, and charging to the said Quemahoning Coal Company the difference between the price hereinabove agreed upon and the price they are compelled to pay in open market."

There is nothing in that contract looking to a right to prorate any shortage in deliveries; but, on the contrary, such a right or custom is expressly negatived.

It is unnecessary and useless to analyze the evidence further. We are fully convinced that the learned judge below was abundantly justified in his fifth and sixth findings of fact (page 19, record), and in his first, second, and fourth conclusions of law (pages 21 and 22, record), and we therefore affirm the judgment entered by the Circuit Court, so far as concerns the matters raised by this cross writ of error, with costs.

Affirmed.

MCGRAW v. MCGRAW et al.

(Circuit Court of Appeals, Sixth Circuit. January 4, 1910.)

No. 1,952.

1. WILLS (§ 443*)—GENERAL RULES OF CONSTRUCTION—INTENTION OF TESTATOR.

In the construction of a will, it is the first duty of a court to ascertain the intention of the testator, for which purpose all the provisions of the will should be examined so as to ascertain his general purpose, and, unless the plain import of the words demand otherwise, they should be so construed as to be consistent each one with all the others and not in violation of law, statutory or general.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 960; Dec. Dig. § 443.*]

2. WILLS (§ 449*)—CONSTRUCTION AGAINST PARTIAL INTESTACY.

A will should be so construed as to prevent intestacy as to any part of the testator's property, if such a construction may reasonably be given.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 965; Dec. Dig. § 449.*]

3. WILLS (§ 449*)—PARTIAL INTESTACY.

A will in terms gave, devised, and bequeathed the testator's entire estate, real, personal, or mixed, to trustees to be held and managed on certain trusts, and provided that on the death of the testator's wife and daughter, and after the payment of all his debts, "my remaining estate, real and personal, shall be distributed by my said trustees as follows," and, after making a specific bequest, that "the residue of said estate" should be divided and distributed in certain proportions to persons therein named or designated. *Held*, that it was the evident intention of the testator to dispose of all of his property, and that the will should not be so construed as to leave him intestate with respect to certain real estate which was excepted from the property the trustees were authorized to sell and not specifically devised.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 965; Dec. Dig. § 449.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

4. PERPETUITIES (§ 6*)—SUSPENSION OF ABSOLUTE POWER OF ALIENATION—CONSTRUCTION OF TESTAMENTARY TRUST.

In a will which impliedly prohibited trustees, to whom the entire estate was devised and bequeathed in trust, from selling a certain building and the lots on which it stood, but provided that they should control and manage the same, and that the estate should not finally be distributed until after the death of both the testator's wife and daughter, a provision, that it should be distributed "upon the death of my said wife and daughter and after the payment of all my said debts," did not create a distinct trust for the payment of the debts which should continue beyond the lives of the wife and daughter and until such debts were actually paid, nor operate to suspend the power of alienation of the building and lots for a longer period than during the continuance of the two lives, in violation of Comp. Laws Mich. 1897, §§ 8796, 8797, but the meaning of the provision in respect to the debts was nothing more than that the distributees to whom the property then passed should take the same subject to the payment of the debts, as they must in any case under the law.

[Ed. Note.—For other cases, see Perpetuities, Cent. Dig. §§ 49, 52; Dec. Dig. § 6.*]

Appeal from the Circuit Court of the United States for the Eastern District of Michigan.

Suit in equity by William McGraw against Homer McGraw and others. Decree for defendants, and complainant appeals. Affirmed.

The following is the statement of the case prepared by Harlan, Circuit Justice:

The basis of this suit is the last will of Thomas McGraw, made July 30, 1892. The testator died in Michigan on the 11th of October, 1897, being at the time of his death a citizen and resident of that state. The plaintiff, who is a son of the testator's brother, Miles McGraw, and a citizen of Texas, claims an estate in fee in an undivided one-thirtieth of the real property in Detroit, known as the McGraw Building and the lots upon which it is located. He brought this suit to remove the cloud upon his title, arising, he alleges, from the claims made by the defendants and others. The defendants named, whether individual or corporate, are citizens of Michigan, and no point is made as to the jurisdiction of the court, so far as jurisdiction depends on diversity in the citizenship of the parties.

The controlling questions in the case are thus stated in the twenty-ninth paragraph of the bill:

"(29) That your orator claims and insists that under the proper construction of said last will and testament and the codicils thereto, said McGraw building and the lots upon which the same is situated are not disposed of by said last will and testament and are, under the laws of the state of Michigan, intestate property, and that your orator as one of the heirs at law of said Thomas McGraw has an estate in fee simple in an undivided one-thirtieth part thereof; whereas, the defendants claim and insist that under the proper construction of said last will and testament said McGraw building and the lots upon which the same is situated are disposed of by said last will and testament, and that the defendants Homer McGraw and Hoyt Post, trustees under said last will and testament, and their successors in trust, and their co-trustees in case of the appointment of a trustee to succeed said Charles E. Swales, have, in virtue of said last will and testament, an estate therein for and during the lives of said Sarah I. McGraw and said Ivey McGraw Serrill, with contingent remainders over to the persons and for the uses and purposes set forth in the tenth paragraph of said last will and testament."

A clear understanding of these questions can be had only after an examination of the entire will. It is appropriate therefore to give in full the will and the annexed codicils. They are as follows:

"First. I give, devise and bequeath to Homer McGraw, Hoyt Post, and Charles E. Swales, all of Detroit, Mich., and to their survivors or survivor

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and successors appointed by said survivors or survivor, as hereinafter provided, all my property and estate, real, personal and mixed, wherever the same may be situated, in trust, nevertheless, and for the uses and purposes and subject to the conditions following: They shall take possession of all of said estate and have the control, care and management thereof, and shall have full power and authority at their discretion to sell, dispose of and convey in fee simple any and all of said estate, excepting, however, the block formerly known as Mechanics' Hall and now called the McGraw Building situated at the corner of Griswold street and Lafayette avenue in said city of Detroit, and the lots on which the same is situated; and excepting also my homestead and my household goods and furniture, and out of the proceeds of such sales and from the income of said estate, said trustees shall until all debts and claims against my estate are fully settled and paid, pay quarterly to my beloved wife, Sarah I. McGraw, at the rate of three thousand dollars (\$3,000.00) per annum for her support and maintenance, and shall pay quarterly to my daughter, Ivey F. McGraw, or to her guardian for her, if she shall then be a minor, at the rate of fifteen hundred dollars (\$1,500.00) per annum, for her education, support and maintenance, and shall pay quarterly to each of my sisters, Elizabeth Ford and Mary Ann Williams, if they shall survive me, at the rate of three hundred dollars (\$300.00) per annum, and quarterly to my stepson, James Henry Selden, if he shall survive me, at the rate of two hundred dollars (\$200.00) per annum, to aid in her support and maintenance; and shall expend the sum of three hundred dollars (\$300.00) per annum in the purchase of law books to be added to the law library I now have in said McGraw building, for the use of lawyers occupying offices in said block, said trustees shall also, during said time, pay rent for the pew in St. John's Church, which I now occupy, or a pew in such other church as my wife may wish to attend, and pay the taxes and keep up the necessary repairs on my homestead and said McGraw building, the above provisions in favor of my said wife, daughter, stepson and sisters are intended to be personal, and to cease as to each one of them with her or his death.

"Second. My said trustees are authorized and directed to erect over my grave a suitable monument at such cost as their judgment shall dictate and pay for the same out of the income of my said estate, and as part of the expenses for administering the same, provided I shall not during my lifetime have erected a monument for the purpose.

"Third. It is my expectation that said Homer McGraw will, if agreeable to my said trustees, devote his whole time and attention to the care and management of said estate, and it is my desire that so long as he shall do so with the consent and agreement of my said trustees, he shall receive out of the gross income of said estate such reasonable salary for such services as my said trustees shall fix, the same to be treated and considered as part of the expense of managing said estate, and to be paid monthly.

"Fourth. My said trustees are authorized, if I shall not do so in my lifetime, to erect one or more additional stories upon the top of the said McGraw building, this to be done out of a fund to be accumulated out of the net income, and they are at liberty for this purpose, if in their judgment it shall be best, to delay the payment of the principal of the incumbrances on said premises; my present judgment is that probably within say five years after my decease such erection would be profitable but with this suggestion I leave the matter in the discretion of my said trustees. In case said McGraw building shall be destroyed or partly destroyed by fire or otherwise, my said trustees are hereby authorized to rebuild or reconstruct the same.

"Fifth. The residue of the proceeds of said sales and of the net income of said estate shall be used to pay all my just debts, and upon the payment of all other debts, the same shall be applied as fast as may be, and set aside and accumulated to be applied as fast as may be to the payment of all mortgages and incumbrances which may exist on said McGraw building property and on my said homestead.

"Sixth. After all my debts and mortgages and all incumbrances on my estate are fully paid, and when the net income of my estate shall have reached the sum of twenty-five thousand dollars (\$25,000.00) per annum, my said trustees shall set aside at least twenty-five hundred dollars (\$2,500.00) a year un-

til the sum of about fifteen thousand dollars (\$15,000.00) shall be accumulated, which sum they shall expend in the erection of a suitable fountain of artistic design on the triangular parcel of ground between the city hall and Michigan avenue, and Griswold street in the city of Detroit, or in case that ground shall not be obtainable, then on some other suitable public ground which my trustees may select in that vicinity.

"Seventh. My homestead and my household goods and furniture may be occupied and used by my wife during her lifetime free of rent or charge, and by my daughter with her so long as they live together; and after the death of my said wife my said daughter, Ivey, may occupy and use the same, if not sold, during her lifetime free of rent or charge; and at the death of both my said wife and daughter said homestead, if not sold, shall go in fee simple to the children if any then living, by lawful marriage of my said daughter Ivey, and to the children, if any then living of my deceased child, by right of representation, their heirs and assigns forever. I empower my trustees, however, with the advice and consent of my wife, if at any time in her lifetime she shall desire it or after her death with the advice and consent of my said daughter Ivey, provided the majority of my said trustees shall deem it best, to sell and convey my said homestead, in which case the proceeds of such sale shall fall into and become a part of the residuum of my estate.

"Eighth. After all debts and demands of every kind against my estate are fully settled and paid, said trustees shall pay one per cent. of my annual net income to each of the following institutions of the city of Detroit, viz., St. Luke's Hospital, Harper Hospital, Home of the Friendless, and the Woman's Hospital and Foundlings' Home, to be used and applied solely for purposes as follows, viz., to fully defray the expenses so far as the same may go of one or more indigent and deserving persons as the officers of said institutions shall respectively select; of the remainder of the annual net income of my estate, if the same shall be but ten thousand dollars (\$10,000.00) or less, my said trustees shall pay three-fifths (3-5) thereof in quarterly payments to my said wife during the term of her life, and two-fifths (2-5) thereof in quarterly payments to my said daughter during the term of her life, if the said remainder of my annual net income be over ten thousand dollars (\$10,000.00) said trustees shall pay quarterly to my said wife during her lifetime at the rate of five thousand dollars (\$5,000.00) per annum, and as much more as shall with said five thousand dollars (\$5,000.00) equal one-third (1-3) of the net yearly income of my said estate, and pay quarterly to my said daughter, Ivey F. McGraw, during her lifetime at the rate of five thousand (\$5,000.00) per annum, and as much more as shall with said five thousand dollars (\$5,000.00) equal one-third (1-3) of the net income of my said estate, and until the final distribution of my estate as hereinafter provided shall continue the payments of the annuities to the said Elizabeth Ford, Mary Ann Williams, and James Henry Selden, in amounts and manner as above provided and in the event of the death of said Elizabeth Ford, the annuity payable to her shall be paid to her daughter Mary Ford, if living, and in the event of the death of said Mary Ann Williams the annuity payable to her shall be paid in equal shares to such of her daughters, Jane, Arvilla, Robie and Josephine as shall be then living.

"The above provisions in favor of my wife are intended to be in lieu of her dower interest in my estate, and are to be received and accepted by her in lieu thereof and in full of all her claims against my said estate.

"The payments above provided to be paid out of the income of my estate to my said daughter Ivey F. shall be payable only to her or her legally constituted guardian, and shall in no event be assignable by her and an assignment by her of any portion of such income shall render null and void to that extent the provision of this will for the payment thereof to her, and the same as to the payments above provided to be made to the said James Henry Selden.

"Upon the death of my said wife said trustees out of the gross income of said estate shall pay the expenses of her funeral and burial in proper and fitting manner and of the inscription of her name upon the monument above provided for.

"Ninth. I hereby direct that my estate shall not be finally distributed until the death of both my said wife and my said daughter; and in case of the

death of my said daughter previous to the death of my said wife, then during the remainder of the life of my said wife the annuity hereinbefore provided for my said daughter shall be divided among her children if she leave any at her death, share and share alike.

"Tenth. Upon the death of both my said wife and my said daughter, and after the payment of all my said debts, my remaining estate, real and personal, shall be distributed by my said trustees as follows: The law books and library hereinbefore mentioned, with the accumulation thereof shall be turned over to such association or incorporation composed of attorneys at law of the city of Detroit as my said trustees or their successors shall determine; if such association or incorporation shall then exist, or shall then organize, which shall be willing to accept the same and to maintain and keep up said library separate from any other law library, under and by name of the McGraw Library, for the use and benefit of the members of such association, and such other attorneys at law of the said city as they shall admit under reasonable regulations to the privileges of such library, and I hereby give and confer upon my said trustees, and their successors in office, at the close of said trust, full power and authority in their discretion to name and appoint the beneficiary to take and receive this legacy and to carry out its purposes as above suggested.

"Of the residue of said estate I give, devise and bequeath one per cent. thereof to each of the following institutions of the city of Detroit, viz., St. Luke's Hospital, Harper Hospital, Home of the Friendless and Woman's Hospital and Foundlings' Home, and of the remainder of said estate I give, devise and bequeath one-third (1-3) thereof to the children born in lawful wedlock of my said daughter Ivey F. if any who shall then be living, in equal shares, the shares of any deceased child going by right of representation to its children, if any of them living, and the residue of my estate shall be distributed as follows: One-third (1-3) thereof to said Homer McGraw, his heirs and assigns forever, and the remainder thereof shall be divided into five equal portions, one of which shall go to said Elizabeth Ford, if living, and if not living to her daughter Mary Ford; one to said Mary Ann Williams, if living, and if not living then in equal shares to such of her daughters, Jane, Arvilla, Robie and Josephine as shall then be living; one to William McGraw, son of my deceased brother Richard; one to William McGraw, son of my deceased brother Miles; one to Maggie Whipple and Corrine McGraw, daughters of my deceased brother William, and it is my further will that if any of the aforesaid final bequests shall fail for want of legatees, as above specified, to take the same at the time of final distribution, such bequest or bequests shall be divided among the other legatees as above specified; who shall then be living, in the same proportions as near as may be, as hereinbefore provided.

"Eleventh. I desire that said trusteeship of my estate shall be kept full and I therefore authorize the survivors or survivor of my said trustees, in case of a vacancy by the death, incapacity, removal or resignation of either of their number, to select and appoint his successor, and from the following persons if they shall then be living, William H. Brace, Samuel R. Mumford, and Reuben Kempf, who shall be invested with the same powers and authority to act in all matters pertaining to my estate as the several trustees hereinbefore named.

"Twelfth. I hereby nominate and appoint the aforesaid Homer McGraw, Hoyt Post and Charles E. Swales and the survivor or survivors of them to be the executors of this my last will and testament."

The first codicil, made August 6, 1892, was in these words: "Whereas by my aforesaid will in item first thereof I did provide that my trustees named therein should out of the proceeds of sales therein provided for and from the income of said estate, until all debts and claims against my estate are fully settled and paid, pay quarterly to my beloved wife, Sarah I. McGraw, at the rate of three thousand dollars (\$3,000.00) per annum for her support and maintenance; now I desire to increase said amount to five thousand dollars (\$5,000.00) per annum and provide that my said trustee shall, out of said proceeds of sales and from said income, until all debts and claims against my estate are fully settled and paid, pay quarterly to my said wife at the rate of

five thousand dollars (\$5,000.00) instead of three thousand dollars (\$3,000.00) per annum for her support and maintenance; and in all other respects I hereby ratify and confirm my said will as above written."

The second codicil, made August 15, 1896, was as follows: "Whereas, by paragraph numbered seven of my said will, it is provided among other things that after the death of my wife my daughter Ivey may occupy and use my homestead and household goods, if not sold during her lifetime, free of rent or charge, and that at the death of both my said wife and daughter said homestead, if not sold, shall go to the living children of said daughter and to the children, if any then living, of any deceased child by right of representation; and whereas since making said will I have assisted my said daughter to build her a home elsewhere. Now I desire to provide that upon the death of my said wife said homestead shall at once fall into and become a part of the residuum of my estate to be treated and disposed of as is in said will provided for such residuum, and that thereafter the consent and advice of said daughter shall not be necessary to a sale of said homestead, and in all other respects I hereby ratify and confirm my said will as above written."

The present suit in equity was instituted on the 24th day of August, 1906. After stating the relationship of the several individual defendants to the decedent, and after indicating the contentions of the parties, as above quoted from the twenty-ninth paragraph of the bill, it is alleged:

"(30) That the said Thomas McGraw died leaving debts and liabilities unpaid, which have become and are claims and liabilities against his estate, and that the said claims and liabilities have not yet all been paid, and there is not sufficient personal estate of said estate to pay the same.

"(31) That immediately upon the appointment and qualification of said Homer McGraw, Hoyt Post, and Charles E. Swales as executors of said last will and testament, under the provisions of section 9354 of volume 3 of the Compiled Laws of Michigan for the year 1897, said executors entered into possession of said McGraw building and of the lots upon which the same is situated.

"(32) That since the death of said Charles E. Swales said Homer McGraw and Hoyt Post have, in their capacity as executors of said last will and testament, continued in possession of said McGraw building and the lots upon which the same is situated.

"(33) That said Hoyt Post and Homer McGraw in their capacity as trustees under said last will and testament are not in possession of said McGraw building and the lots upon which the same is situated or any part thereof.

"(34) That the value of your orator's estate in fee simple in an undivided one-thirtieth part of said McGraw building and the lots upon which the same is located, is more than \$2,000.

"(35) That for the purpose of recovering possession of your orator's estate in said McGraw building and the lots upon which the same is located, your orator commenced an action at law in ejectment on August 30, 1905, in the Circuit Court of the United States for the Eastern District of Michigan, Southern Division, against said Homer McGraw and Hoyt Post as defendants.

"(36) That the defendants in said ejectment suit, Homer McGraw and Hoyt Post, claim to be and are in possession of said McGraw building, and the lots upon which the same is located, in their capacity as executors of said last will and testament.

"(37) That inasmuch as the debts and liabilities of the estate of said Thomas McGraw are still unpaid, and there is not personal estate amply sufficient for the payment of the same, said Homer McGraw and Hoyt Post are properly in possession of said McGraw building and the lots upon which the same is located, and your orator can have no relief and is utterly without remedy in a court of law.

"(38) That the defendants not only claim that said Homer McGraw and Hoyt Post, as trustees under the last will and testament of said Thomas McGraw, have a present estate in said McGraw building and the lots upon which the same is located, but also claim that said Ivey McGraw Serrill is the daughter and one of the heirs at law of said Thomas McGraw, and for these reasons that your orator is not an heir at law of said Thomas McGraw under the

laws of the state of Michigan, and has no present interest in said McGraw building and the lots upon which the same is located.

"(39) That by reason of the claims aforesaid your orator's estate in said McGraw building and the lots upon which the same is located is clouded, and inasmuch as none of the defendants herein in the capacity in which they are made defendants are in possession of said McGraw building, and the lots upon which the same is located, your orator has no remedy in the premises except in equity.

"(40) That the heirs at law other than your orator of said Thomas McGraw are very numerous and cannot without manifest inconvenience and oppressive delays be all brought before the court in this suit.

"(41) That the heirs at law of said Thomas McGraw, other than your orator and the beneficiaries under said last will and testament who have not been made defendants herein, are proper parties to the suit, but cannot be made parties by reason of some of them being out of the jurisdiction of the court, and some of them being residents of the state of Michigan and interested, if at all interested, on the same side of the controversy as your orator, whereby their joinder would oust the jurisdiction of the court, but said other heirs at law and beneficiaries are not indispensable parties to the suit, inasmuch as they are either represented by the trustees aforesaid or are not affected thereby to their prejudice, and are not interested in your orator's undivided estate in the property aforesaid."

The relief sought by the bill is as follows:

"First. That the last will and testament and codicils thereto of Thomas McGraw, deceased, may be construed by this honorable court.

"Second. That this honorable court may by its decree so construe the last will and testament and the codicils thereto of Thomas McGraw as to find that the building known as the McGraw building, and the lots upon which the same is situated are not disposed of by said last will and testament and the codicils thereto, and that your orator has an estate in fee simple in an undivided one-thirtieth (1-30) part thereof.

"Third. That the cloud upon the title of your orator to an estate in fee simple in an undivided one-thirtieth part of the McGraw building and the lots upon which the same is located, caused by the claims of the defendants, may be removed and your orator decreed to have the estate aforesaid, free, clear, and unincumbered by reason of the claims aforesaid.

"Fourth. And that your orator may have such further, other, or different relief in the premises as the nature of the circumstances of the case may require."

There were demurrers to the bill which make it necessary to inquire whether the grounds upon which the plaintiff claims relief can be sustained. The case has been argued and submitted to the court upon these demurrers.

Mr. Justice Harlan, after stating the case as above, delivered the opinion of the court:

Learned counsel referred to the general rules which control in the construction of wills, and the duty of the court to give effect to the intention of the testator. There can be no room for dispute as to what those rules are. Chief Justice Marshall, in *Finlay v. King's Lessee*, 3 Pet. 348, 7 L. Ed. 701, said: "The intent of the testator is the cardinal rule in the construction of wills; and if that intent can be clearly perceived and is not contrary to some positive rule of law, it must prevail; although in giving effect to it some words should be rejected or so restrained in their application as to materially change the literal meaning of the particular sentence." Such is the recognized rule in Michigan; for, in *Eyer v. Beck*, 70 Mich. 180, 38 N. W. 20, the Supreme Court of this state, speaking by Mr. Justice Campbell, said that the cardinal principle of interpretation of wills was to carry out the intention of the testator, if it is lawful, and if it can be discovered. The principle is more fully expressed in *Foster v. Stevens' Ex'r*, 146 Mich. 131, 109 N. W. 265, where the court said: "In the construction of a will the first duty of a court is to ascertain the intention of the testator. Such intention is to be ascertained from the whole will interpreted with reference to the obvious or manifest object of

the testator. All parts of the instrument must be construed in relation to each other so as to give meaning and effect to every clause and phrase and, if possible, from one consistent whole, every word receiving its natural and appropriate meaning." *Cummings v. Corey*, 58 Mich. 494, 23 N. W. 481; *Rock River Paper Mill Co. v. Fisk*, 47 Mich. 212, 10 N. W. 344. All the authorities agree that in ascertaining the intention of the testator all the provisions of his will should be examined, so as to ascertain his general purpose, and unless the plain import of the words demands otherwise they should be so construed as to be consistent, each one with all the others and not in violation of law, statutory or general.

Again, it is well settled, as said in *Given v. Hilton*, 95 U. S. 591, 594, 24 L. Ed. 458, that "no presumption of an intent to die intestate as to any part of his property is allowable when the words of a testator's will may fairly carry the whole (*Stehman, etc., v. Stehman*, 1 Watts [Pa.] 460)," and that "the law prefers a construction which will prevent a partial intestacy to one that will permit it, if such a construction may reasonably be given (*Vernon v. Vernon*, 53 N. Y. 351)." Regarding substance rather than form, the Supreme Court of Michigan has said that "all intendments must be made to prevent a partial intestacy." *Toms v. Williams*, 41 Mich. 552, 2 N. W. 814. See, also, *Bailey v. Bailey*, 25 Mich. 185.

The present suit, as we have seen, proceeds upon the ground, primarily, that the McGraw building and the lots appurtenant thereto were not effectively disposed of by the will of Thomas McGraw, and as to that property it must be taken that he died intestate, in which event the complainant has an estate in fee in an undivided one-thirtieth part thereof. Certain it is that the testator did not intend to die intestate as to the McGraw building and the lots on which it is situated. In reference to that particular property, his purpose evidently was that after the death of the wife and daughter it should pass from the trustees to an association or incorporated body, to be selected by them, which should maintain and keep up the law library in it for the use of attorneys in Detroit. We find it impossible to reach any other conclusion. In the first item of the will the testator gives, devises and bequeaths, to certain named parties and their survivors or survivor and successors, "all" his property, real, personal and mixed, "wherever the same may be situated," in trust, for certain uses and purposes, and subject to certain conditions; and they were directed to take possession "of all of said estate," have the control, care, and management thereof, with full power and authority, at their discretion, to sell, dispose of, and convey in fee simple "any and all of said estate," excepting the McGraw building and the lots on which that building was situated, and except, also, the testator's homestead, household goods, and furniture. But of the proceeds of such sales and the income of the estate the trustees were directed, until all debts and claims against the estate were fully settled, to pay certain amounts quarterly to the testator's wife and daughter, and also certain amounts to his sisters and a stepson if they survived him; also, to expend a specified sum per annum in the purchase of law books for the library in the McGraw building, pay the rent of a church pew, and the taxes and cost of keeping in repair the homestead and the McGraw building.

Then, in the seventh item of the will, the testator empowered the trustees, in certain contingencies, during the lifetime of his wife, or after her death, with the consent of the daughter, to sell and convey the homestead, in which case the proceeds were to fall into and become part of the residuum of the estate. Other parts of the will bearing more or less on the particular point now under consideration are items 9 and 10, by one of which the testator directed that his estate should not be finally distributed until the death of his wife and daughter, and by the other that upon the death of the wife and daughter, and after the payment of all debts, the testator's remaining estate, real and personal, should be distributed in a prescribed mode. The tenth item of the will then gives, devises, and bequeaths the "residue" and "remainder" of the estate in certain proportions to specified persons and corporations.

These provisions, in connection with others in the will, leave no doubt in our minds that the testator intended to dispose of his entire estate, and not to die intestate as to any part of it.

But the plaintiff contends that the will makes a disposition of the McGraw building which is void under the statutes of Michigan. The statutes here referred to (Comp. Laws) are as follows:

"(8796) Sec. 14. Every future estate shall be void in its creation, which shall suspend the absolute power of alienation for a longer period than is prescribed in this chapter; such power of alienation is suspended when there are no persons in being, by whom an absolute fee in possession can be conveyed.

"(8797) Sec. 15. The absolute power of alienation shall not be suspended by any limitation or condition whatever, for a longer period than during the continuance of two lives in being at the creation of the estate, except in the single case mentioned in the next section."

The exception in the latter section is of no relevancy here.

The general contention of the plaintiff is that the provisions of the will amount to a prohibition, expressed or implied, of the "alienation" of the McGraw building during a period of time not based on lives in being at the date of the creation of the estate. And that contention rests principally on those clauses directing that the estate shall not be finally distributed except upon the death of both the wife and daughter, and after the payment of the testator's debts. Items 9 and 10. Thus, it is argued, the alienation of that estate is suspended not only during the lives of the wife and daughter, but must await the payment of debts which might not occur until long after the death of the wife and daughter. We cannot accept that view. If the testator had given no specific direction for the payment of debts, his estate would still have been charged with such debts; for the statutes of Michigan provide that "all the estate of the testator, real and personal, shall be liable to be disposed of for the payment of his debts, and the expense of administering his estate." 3 Comp. Laws Mich. § 9289. The existence, under the statute, of a lien for creditors upon the estate of deceased persons is well established by judicial decisions. *Lafferty v. People's Savings Bank*, 76 Mich. 35, 51, 43 N. W. 34, and authorities there cited. The direction, therefore, in the will not to finally "distribute" the estate until the debts were paid, should be interpreted to mean nothing more than what the law required as to payment of debts. We cannot agree that the will created a separate, specific, independent trust for the payment of debts to continue, if necessary, beyond the lives of the wife and daughter. If the will were so construed, there would be some ground to contend, as to the McGraw building and lots, that the power of "alienation" had been suspended beyond the term of two lives in being at the date of the creation of the estate. *State v. Holmes*, 115 Mich. 458, 73 N. W. 548; *Casgrain v. Hammond*, 134 Mich. 419, 96 N. W. 510, 104 Am. St. Rep. 610. But we do not so construe the will. In effect it provided that the estate created was to be enjoyed after the death of the wife and daughter, subject to the payment of any debts legally chargeable upon it. That is, the words "after the payment of all my said debts" should be held to mean nothing more than if the testator had said, in terms, that the property devised could be enjoyed by the beneficiary after the death of the wife and daughter, "subject to the payment of all my said debts." We accept that view. Sound reason, we think, supports this view, and it is sustained by many authorities. We will refer to some of them.

A leading case is that of *Jones v. Habersham*, 107 U. S. 174, 176, 2 Sup. Ct. 336, 27 L. Ed. 401. It was sought by the plaintiffs in that case to have certain devises and bequests in a will adjudged to be void, and a resulting trust declared in their favor. The first question considered related to the following clause of the will: "Twenty-Second. It is my wish, and I hereby so direct, that none of the legacies, bequests, and devises in any of the clauses of this my will shall be executed or take effect until the building and other improvements on the lot on the corner of Gaston and Whittaker streets, and known as the Hodgson Memorial Hall, which I have conveyed in trust to the Georgia Historical Society, shall be completed and entirely paid for out of my estate." The contention was that all the devises and bequests were within the rule against perpetuities by which every devise or bequest is void, which may by possibility not take effect within a life or lives in being and 21 years afterwards. The court said: "The bill, which was filed nearly four years after the death of the testatrix, alleges, and the demurrer admits, that the building and other improvements referred to were in course of construction at

the time of her death, but were not completed until many months thereafter. but whether they were yet entirely paid for the plaintiffs were not certainly informed, and that, if not paid for, it was the only debt known to them, now existing against the estate. Reading the twenty-second clause in connection with the other parts of the will, and in the light of the attending facts, it is quite clear that the words 'take effect' are used by the testatrix as synonymous with or equivalent to the word 'executed,' with which they are coupled, and not as signifying that the devises and bequests shall not vest immediately, but only that they shall not be paid or carried out until the debt contracted by the testatrix for the construction of the Hodgson Memorial Hall shall have been paid out of her estate. Each devise and bequest is present and immediate in form, introduced by the words 'I give, devise, and bequeath.' The bill shows that the building and improvements referred to were, at the time of the death of the testatrix, in the course of construction, and so far advanced that they were actually completed within some months afterwards, so that the probable cost must have been capable of estimation at the time of the making of the will. The twenty-second clause is but a declaration of what the law would require, that the debt of the testatrix for the construction of the memorial hall must be first paid out of her estate before her devisees and legatees receive any benefit therefrom."

In *Treadwell v. Cordis*, 5 Gray (Mass.) 341, we have the case of a will which made certain bequests and legacies, and provided, "and the rest, residue and remainder of the testator's estate, real, personal and mixed, not before disposed of, after payment of my just debts, funeral charges and charges of settling my estate, as well as the charges of my executors, * * * I give, devise and bequeath to my executors" in trust, etc. The Supreme Judicial Court of Massachusetts said: "The first and principal question upon the construction of this will is: How is this residue to be formed and ascertained, of what it shall consist, and in reference to what time it shall be considered to be made? (1) As to the first branch of this question, it appears to us that this 'residue' is to consist of the whole of the real and personal property which the testator leaves, subject to certain deductions, to be made by operation of law, or by direction of the testator. The executors are to administer the estate according to law, and for that purpose the first charge upon the property in their hands is for the payment of debts and charges on the estate; and to this they are liable whether the testator so directs or not. But in the present case he does direct that all debts and charges shall be deducted. There is also to be deducted that part of his estate 'otherwise disposed of' by the same will. * * * (3) The next material question is, at what time this residue must be deemed to be formed and established; and, though this has been already alluded to, it may be proper to add something further. We are of the opinion that this residue must be considered as formed at the time of the decease of the testator. He gives this residue, both of the real and personal estate, to the executors—the real estate in fee, the personal not subject to any condition precedent—so that the whole property vests in them by relation from the time of the decease of the testator, subject, of course, to charges upon it created by law, and others imposed by the will. The real estate is upon trust, to pay the net amount of the rents and profits 'as soon as received'; the personal upon trust, to pay all the dividends and income subject to charges 'as fast as they shall be received.' Now, as owners of the real and personal estate by the bequests, they are entitled to receive, and must actually receive, rents, dividends, and income; and they become accountable for such income to those entitled to it, from the decease of the testator. It is no objection to this view, we think, that the testator uses the term 'the residue of my estate, after the payment of my just debts.' The term 'after' does not always designate the time at which one thing is to be done in reference to something else; but it expresses the relative priority and subordination of one claim to another in matter of right. So we think it does here; the residue is to be formed subject to the payment of debts and charges, although they may be actually paid afterwards. And so of all other receipts and payments to be taken into consideration, as ascertaining the 'residue'; they cannot be made at the time of the decease; some time must be required to prove the will, and do many other things; but they may be charged and credited as of that time, and so by an

easy computation show the residue ascertained as of that time, for the purpose of adjusting the relative rights of those entitled to the income, and those entitled to a distribution of the capital."

In *Haug v. Schumacher*, 166 N. Y. 506, 60 N. E. 245, the words in a will which were construed, "immediately after the death of my said wife and the death of my said two sons * * * I give, devise, and bequeath all of my estate, real and personal," to grandchildren, were held to create future estates that vested at the time of the testator's death in the grandchildren in being at that time. The court quoted from the previous case of *Corse v. Chapman*, 153 N. Y. 466, 47 N. E. 812, the following words: "It is a well-settled principle of construction that the law favors the vesting of estates, and that the words 'from' and 'after,' or like expressions, as relating to the termination of the life estate, do not postpone the vesting of the estates in remainder until the death of the life tenant, but rather refer to the period when the remaindermen would become entitled to the estates in possession."

In *Lamb v. Lamb*, 11 Pick. (Mass.) 378, the court construing the words, "It is my will that after settling my estate my wife have the interest of the remainder of my personal estate," said: "'After settling my estate' seems equivalent to subject to the settlement. The word 'after' does not always nor necessarily refer to time, but to order in point of right or enjoyment."

We deem it unnecessary to make other citations of authorities, and hold: (1) That the will of the testator did not create a distinct trust for the payment of his debts, which should continue beyond the lives of the wife and daughter, and until such debts were actually paid. (2) That the will did not, in violation of the statute of Michigan, suspend the power of alienation beyond the continuance of two lives in being. (3) That the testator did not die intestate as to the McGraw building and the lots upon which it is located. (4) That the grounds upon which the plaintiff seeks to establish an interest in the McGraw building and the lots on which it is situated cannot be upheld.

These conclusions render it unnecessary to consider other questions discussed by counsel.

The demurrers must be sustained, and the bill dismissed.

It is so ordered.

Henry B. Graves, for appellant.

Orla B. Taylor, for appellee Ivey McGraw Serrill.

James Oxtoby and Hoyt Post, for trustees.

Before LURTON, SEVERENS, and WARRINGTON, Circuit Judges.

PER CURIAM. Bill to remove a cloud cast upon the title to certain property to which complainant claims title as heir at law as not validly claimed under the will of Thos. McGraw, though claimed thereunder by some of the defendants. The cause came on to be heard upon demurrers to the bill, which were sustained, and the bill dismissed by the court below.

This court upon full consideration sees no error in the decree below, and is content to affirm upon the opinion of Circuit Justice Harlan, who heard the case below in connection with District Judge Swan.

Judge LURTON participated in the hearing and decision of this case, while a member of this court.

HARRISON v. PHILADELPHIA CONTRIBUTIONSHIP FOR THE INSURANCE OF HOUSES FROM LOSS BY FIRE.†

(Circuit Court of Appeals, Third Circuit. February 12, 1910.)

No. 67.

INSURANCE (§ 55*)—MUTUAL COMPANIES—MEMBERS—RIGHT TO QUESTION VALIDITY OF PRE-EXISTING BY-LAWS.

The holder of a policy of insurance containing a provision giving the company the right to cancel it on certain terms in accordance with the deed of settlement constituting the fundamental law of the company when it was issued cannot defeat such right on the ground that a prior amendment of the deed of settlement by which such provision was incorporated was *ultra vires*.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 69; Dec. Dig. § 55.*]

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

Suit in equity by S. Graeme Harrison against the Philadelphia Contributionship for the Insurance of Houses from Loss by Fire. Decree for defendant, and complainant appeals. Affirmed.

For opinion below, see 171 Fed. 178.

R. Mason Lisle, for appellant.

W. W. Montgomery and John G. Johnson, for appellee.

Before GRAY, BUFFINGTON, and LANNING, Circuit Judges.

BUFFINGTON, Circuit Judge. This case is interesting historically, from the fact that it concerns the first organization in this country to insure property; but the facts and legal questions involved in its disposition are few and simple. The bill is by a member and policy holder to prevent the company from enforcing discontinuance of a policy of insurance on his property, unless he pays hereafter an increased premium. On final hearing the court below, in an opinion reported at 171 Fed. 178, dismissed the bill, whereupon complainant appealed.

The company was formed in March, 1752, by a deed of settlement which constituted the subscribers members thereof, stipulated for their sharing the profits and loss "for and during the respective terms in his or their respective policies," and providing insurance for their property as follows:

"Every person insuring shall deposite in the Hands of the Treasurer, as a Pledge for the Performance of his Covenants a certain Sum for every One Hundred Pounds insured, according to the greater or less Hazard of the Building on which the same is insured, agreeable to the Table hereto annexed. Which Deposit Money shall be returned to the person or Persons so depositing it, his, her or their Executors, Administrators or Assigns, at the Expiration of His, Her or Their Respective Policies, together with a proportionable Dividend of the Profits in the meantime, after Deduction of Losses and incident Charges only."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied.

In 1836 the deed of settlement was further changed by this provision:

"Every policy hereafter to be issued by this Society shall be made to continue in force for an unlimited period. * * * And it shall moreover be lawful for this Society, upon giving thirty days' notice, to cancel the policy, returning the deposit money upon a surrender of the policy. It shall also be lawful for the insured, on giving five days' notice and surrendering the policy to withdraw the deposit money, allowing a reduction of five per centum thereon."

The relation between the complainant and the company is contractual, and originated in 1856, when his ancestor deposited \$225 with the company and received its policy, dated June 3d of that year, for \$1,500 on his property, and on February 27, 1871, another policy on other property for \$7,500, he having deposited \$490 therefor. Such policies provided that they were made "on the terms, conditions, and provisions in the said deed of settlement and in this policy contained or referred to." They contained the provision cited above, as amended in 1836. The insurance contracts continued undisturbed until September 20, 1907, when respondent notified complainant, who had succeeded to the rights and liabilities of his ancestor, of its intention to return his deposits and cancel the policies within 30 days, unless he would accept a partial reduction of the risk and an increase in the rate, with the return of a proportionate part of the deposit. No question of good faith is involved or that the action of the company is not justified by judicious insurance practice. The complainant refuses to modify his policies so as to permit them to remain in force, and by this bill seeks to enjoin their cancellation and the return of his ancestor's deposits.

His contention is that his deposits constitute $\frac{1}{176}$ part of the deposits in the company, that he is equitably interested in the assets in a similar proportion, and that a return thereof and cancellation of the policies would deprive him of the right to participate in assets and profits. To sustain this contention the plaintiff contends that the alterations of 1836 and other precedent actions of the company were ultra vires, illegal, and void. With that question this court has nothing to do; but, assuming for present purposes such provisions were open to such challenge by a proper party, those questions do not concern the complainant. His ancestor's connection with this company rests on the contract he made with it in 1856, and with the stipulations in that contract in his favor he must accept the stipulations his ancestor made in favor of the company. While that contract provided for the creation of rights to him, it likewise provided for the termination of those rights. His position is not unlike that of a tenant under lease, who, so long as that relation exists, is denied the privilege of contesting the title of him who created the tenure. *Western Union Telegraph Co. v. Pennsylvania R. R. Co.* (C. C.) 120 Fed. 362. In other words, standing on the insurance contract, to establish a right to relief, he must accept such relief only as is warranted by enforcing all the provisions of the contract. To sustain this bill, and prevent the company from in good faith forfeiting these policies in accordance with their stipulated provisions, would be to use the pow-

ers of a court of equity to aid in the violation, rather than the enforcement, of contracts.

The decree of the court below is affirmed.

GREAT WESTERN MFG. CO. v. ADAMS.

(Circuit Court of Appeals, Eighth Circuit. February 23, 1910.)

No. 3,095.

1. EQUITY (§ 3*)—GROUNDS FOR RELIEF—RELIEF AGAINST NEGLIGENCE.

Courts of equity will not relieve parties when their condition is attributable to a failure to exercise ordinary care for their own protection.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 16; Dec. Dig. § 3.*]

2. REFORMATION OF INSTRUMENTS (§ 16*)—RIGHT TO REFORMATION—NEGLIGENCE.

Complainant executed a deed for leasehold property which it held under a long term lease containing a provision for a reversion to the lessor for breach of a condition subsequent. Its deed contained a covenant of warranty which did not except such right of reversion and such right having been exercised it was sued on in its covenant by its grantee. Its attention had been particularly drawn to the omission, and it executed the deed only after verbal assurance from its agent contrary to the plain terms of its covenant. *Held*, that if the deed did not express its true intent it was due to its own fault or negligence, and that it was not entitled to a reformation of the same in equity on the ground of either mistake, fraud, or accident.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 68; Dec. Dig. § 16.*]

Appeal from the Circuit Court of the United States for the District of Kansas.

In Equity. Suit by the Great Western Manufacturing Company against W. W. Adams. Decree for defendant, and complainant appeals. Affirmed.

James A. Reed (W. W. Hooper and John H. Atwood, on the brief), for appellant.

H. C. Mechen, for appellee.

Before SANBORN and ADAMS, Circuit Judges, and McPHERSON, District Judge.

ADAMS, Circuit Judge. This was a bill to enjoin an action at law and reform a deed. Relief was denied in the Circuit Court, and complainant appealed. The facts are these: On April 30, 1898, the complainant, the Great Western Manufacturing Company, executed a deed conveying to defendant Adams a leasehold term in and to a lot of ground in the town of Ozark, Ark. Before the execution of that deed the lot had been leased by the town, its owner, to the Ozark Canning Company for the term of 99 years. That company subsequently reconveyed it to its owner, and the town again leased it for practically the unexpired term of the Canning Company lease to W. S. Schultz and J. T. Jones, from whom the Manufacturing Company derails

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

title. The last-mentioned lease contained a condition subsequent that the lessees should maintain upon the demised premises during the entire term of the lease a roller flouring mill of a specified capacity, and, as security for the performance of that condition, a provision for a reverter to the town in case of its breach was inserted.

The lease having been first made to the Canning Company was, even after the second lease had been given to Schultz and Jones, colloquially referred to as the "Canning Company lease." In the conveyance to Adams made by the Manufacturing Company there was a general warranty of title with a saving clause as follows:

"Saving and excepting only the right of reversion after the expiration of said lease of ninety-nine years and the vendor's lien herein reserved."

The "said lease" there referred to was in the fore part of the deed described as the 99-year lease under which the Canning Company had occupied the premises. Adams, who held by mesne conveyances through the Manufacturing Company, under the Schultz and Jones lease, was ousted by the town for breach of the condition requiring the maintenance of the flouring mill and sued his grantor, the Manufacturing Company, on its covenant of warranty for damages. In the trial of that action the defendant was confronted with the fact that the saving clause in its covenant of warranty did not except the right of reversion reserved in the Schultz and Jones lease. Thereupon this suit was instituted by it to stay further prosecution of the action at law and reform the deed so as to make it except from the warranty the right of reversion contained in the last-mentioned lease, on the alleged ground that the language of the saving clause was a mistake and did not express the intention of the parties.

No right of reversion was reserved in the Canning Company lease and the exception of that supposed right from the operation of the warranty in the Adams deed was meaningless. There was no right of reversion except that specified in the Schultz and Jones lease to which the saving clause could by any possibility apply. The parties to the Adams deed, therefore, must have intended to except from the covenant of warranty the right of reversion reserved in the last-mentioned lease. The failure of the scrivener to accurately express the true intent of the parties undoubtedly arose from the commonly accepted colloquial name given to the lot which was the subject of the conveyance. We reformed a contract in the case of *Assman v. Travelers' Ins. Co.*, 94 C. C. A. 58, 168 Fed. 694, upon a similar state of facts and should not hesitate to do so in this case were it not for certain facts which, in our opinion, deprive the Manufacturing Company of the right to equitable relief. To those facts we will now give attention.

E. H. Mathes, a lawyer practicing in the town of Ozark, had been the attorney for the Manufacturing Company in the proceedings which resulted in its acquisition of the Schultz and Jones lease, and subsequently became the agent of that company to make a sale of it. He conducted negotiations with Adams, who resided also at Ozark, which resulted in a sale of the property to him for \$3,000, and afterwards prepared the deed for his principal to execute. This was sent by mail

to Leavenworth, Kan., its place of business. The deed as prepared and sent to complainant contained the covenant of warranty and the saving clause as they now appear; and the complainant's officers upon its receipt executed it and returned it to Mathes for delivery to Adams. Some fault was found with the acknowledgment of the deed which necessitated its return to the complainant for correction. Upon receiving it the second time Mr. Samuel H. Wilson, then secretary and now president of the Manufacturing Company, who appears to have had the transaction in charge, read over the deed and according to his testimony was struck by the peculiarity of the covenant of warranty. He testified that he discussed the matter with his father, then president of the company, and that they declined to execute the deed until they were assured that it was mutually understood that the company was conveying only the title it had received from Schultz and Jones. He said:

"After receiving this assurance our fears were quieted and we executed the deed. * * *

He further testified as follows:

"When it [the deed] was returned to us with an objection, very naturally I read the whole instrument over in order to see just exactly what it was. I then raised the point with my father that I did not understand that clause, and we discussed the matter pro and con until we finally received assurance that the reversionary clause simply meant that we were conveying only the title that we secured from Schultz and Jones, and until this matter was mutually understood we did not execute the deed."

The substance of the whole matter is this: The attention of complainant's officers was attracted to the peculiar phraseology of the clause in question before they executed the deed to Adams. It stated in plain English that their company warranted title in Adams against all lawful claims except only the possibility of reversion supposed to have been contained in the Canning Company lease. That language necessarily implied that it warranted title in Adams against the assertion of the reversionary right actually reserved in the Schultz and Jones lease. In other words, with knowledge of the full meaning and import of the covenant now sought to be corrected they caused the deed to be executed and delivered, in reliance upon an assurance, contrary to the import of the terms employed, that it was mutually understood that the covenant of warranty did not mean what it said. On this state of facts we think there is no equity in the present bill. If an injustice is done it was invited by complainant. Neither mistake, fraud, nor accident brought it about. Complainant's present dilemma is attributable to a misplaced confidence in the assurance received from its agent Mathes. It placed an unwarrantable reliance upon a verbal understanding to contravene the effect of a written contract. A little trouble and possibly a little expense would have protected it from all hazard.

Courts of equity will not relieve parties from the consequences of their own folly or assist them when their condition is attributable to a failure to exercise ordinary care for their own protection. *Farnsworth v. Duffner*, 142 U. S. 43, 12 Sup. Ct. 164, 35 L. Ed. 931; *Burk v. Johnson*, 76 C. C. A. 567, 146 Fed. 209, 215, 216; *Betts v. Gunn*,

31 Ala. 219; Roemer v. Conlon, 45 N. J. Eq. 234, 19 Atl. 664; Andrew v. Spurr, 8 Allen (Mass.) 412. The decree of the Circuit Court must be affirmed.

GREAT NORTHERN RY. CO. v. JOHNSON.

(Circuit Court of Appeals, Eighth Circuit. February 18, 1910.)

No. 3,029.

MASTER AND SERVANT (§ 278*)—ACTION BY SERVANT FOR INJURY—SUFFICIENCY OF EVIDENCE.

Plaintiff while working for defendant railroad company as a boiler maker was injured by a small piece of a flue which, while he was setting the flue in a boiler, broke off and struck him in the eye. He alleged that the injury resulted from the negligence of defendant in using in the boiler "old, worthless, and worn out flues" which were dangerous to work with. There were 220 flues in the boiler, some old and some new, and the only evidence tending to show whether the one by which plaintiff was injured was old or new and its condition was the testimony of a witness that he afterward took out some of the old ones, and that a small piece had been broken from the end of one of them. *Held*, that such evidence was too uncertain and inferential to sustain the allegation of the complaint as to the character and condition of the flue by which plaintiff was injured.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 958, 959; Dec. Dig. § 278.*]

In Error to the Circuit Court of the United States for the District of North Dakota.

Action by Charles Johnson against the Great Northern Railway Company. Judgment for plaintiff, and defendant brings error: Reversed.

Arthur Le Sueur (C. J. Murphy and Fred S. Duggan, on the brief), for plaintiff in error.

Seth W. Richardson (William H. Barnett and Thomas E. Neary, on the brief), for defendant in error.

Before VAN DEVANTER, Circuit Judge, and CARLAND and POLLOCK, District Judges.

CARLAND, District Judge. This action was brought by Johnson against the railway company to recover damages for a personal injury received by him January 7, 1908, while in its employ at Minot, N. D., as a boiler maker. He recovered a verdict, and the railway company has removed the case here by writ of error. One of the errors assigned is the ruling of the trial court made at the close of all the evidence, refusing to direct a verdict for the railway company. It is claimed that this ruling was erroneous because there was no evidence that the railway company was negligent as alleged in the complaint. Johnson stated his cause of action as follows:

"That on the 7th day of January, 1908, this plaintiff, in the performance of said work and duties, as boiler maker for defendant, and under the instructions and orders of defendant, was performing work and duties in a boiler,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

known as shaping up the flues preparatory to having the same rolled with an instrument, known as a flue roller, in order to prevent the flues in the said boiler from leaking; that immediately prior thereto the said defendant had, through the work of other employes refitted the said boilers with flues, and in so doing had negligently and carelessly placed in said boiler old, worthless, and worn out flues, which were of such poor material by reason of their long use that they could not withstand the force used in the work done in so reshaping them, * * * well knowing that the said flues so placed in said boiler were of such defective and bad material, and that the same were exceedingly unsafe and dangerous to this plaintiff while he was so shaping same, and without warning to plaintiff; that said plaintiff while so performing said work and duties in a careful, ordinary, and prudent manner, and without any negligence on his part in so shaping up said flues, struck the pin with which he was then attempting to shape said flue, and that said flue was of such poor quality as to be entirely unfit for the purpose for which it was used and to be exceedingly and extremely dangerous and unsafe to the plaintiff while so doing said work and duties, and, in so striking said pin necessarily in the performance of said work, the flue broke and a piece thereof flew striking said plaintiff in the left eye and inflicting in his left eyeball a cut, and thereby said left eye was permanently injured and the vision thereof entirely destroyed."

It was the duty of the railway company to use ordinary care to furnish reasonably safe appliances and materials with which Johnson might perform his work. The question for determination then is: Did the railway company violate this duty in the particular manner charged in the complaint, and if so was such violation of duty, the proximate cause of Johnson's injury? The only charge of negligence specified was the use by the railway company of "old, worthless, and worn out flues." Taking that view of the evidence most favorable to Johnson and the following facts appear: At the time Johnson was injured he was engaged in the work of pinning a flue in the front end of a locomotive boiler. The pinning of a flue consists in driving into the end of a flue an iron pin for the purpose of expanding the flue so that its outer circumference will come in close contact with the flue sheet through which it passes and thus prevent the boiler from leaking around the flue. The end of the flue in question extended in front of the flue sheet from $\frac{1}{2}$ to $\frac{3}{4}$ of an inch. Johnson inserted the iron pin into the flue and struck the pin with a hammer, whereupon, a piece of the flue as large as a dime, heart shaped and of the thickness of the flue, broke off and struck him in the eye. The boiler in question had 202 flues. A short time prior to the date of the injury it had been refueled by a witness for Johnson by the name of Starr. One Collins was boiler maker foreman at the roundhouse. Starr testified as follows:

"Q. Prior to installing those flues, you may state whether you and Mr. Collins had any conversation relative to the flues? A. Yes, we had a conversation. Q. What was that conversation? A. I brought his attention to the flues, and told him some of them I did not think were flues fit to put in the boiler. Q. In what way, Mr. Starr? A. Why the flues were old; they were very thin and light, some of them; others were crystallized—holes in them. Q. What did Mr. Collins say? A. He told me to go ahead and put the flues in anyway and if we could not use them, we could rip them out and put others in. Q. And you did that, did you? A. Yes, sir. Q. Did you do any work on that boiler after Johnson was injured? A. Yes, sir. Q. Now what did you do? A. Why we took out some flues. Q. I wish you would state to the jury what, if anything, you observed with reference to any one of those flues that you removed from the boiler after Johnson was hurt? A. Well I noticed that one of those flues had a piece broken out of it. Q. Now, then, with reference

to the flue that had the piece broken out of it, did you or did you not observe that before you removed the flue from the boiler? A. Yes, sir; before. Q. About how large was this piece? A. Oh, perhaps it was five-eighths of an inch across it and perhaps that long, heart shaped like the bottom of a heart, not exactly wedge shaped. Q. Were those flues you put in that boiler before the accident old or new flues? A. Why they were nearly all old flues, I believe some were new, there were some good ones."

The fact that Johnson was injured, as alleged, as between him and the railway company was no evidence of negligence on the part of the company. *Patton v. Texas Pacific Railway Co.*, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361. Conceding that there was evidence of negligence in the use, among other flues, of some which were old, thin, and crystallized, as testified by Starr. Still there was no evidence connecting this negligence with plaintiff's injury. The particular flue that caused the injury was in nowise identified except that one of the flues that Starr removed had a piece broken out of it similar to the one noticed by Johnson in the flue he was pinning. Neither Johnson nor Starr located with any definiteness in the boiler head the flue that caused the injury or the one taken out. On this small nick in the flue must rest the identity of the flue, and on the mere fact that Starr removed it from the boiler must rest the finding that it was old, worthless, and worn out. No reason is given for taking the flue out of the boiler, nor is there evidence of its condition when taken out or whether it was new or old. Johnson testified that although the flue extended in front of the flue sheet from one-half to three-quarters of an inch, he could not say and had no means of knowing whether the flue was an old one or not. No witness testifies that the flue from which the piece broke off was new or old. Starr testifies that there were new and old flues in the boiler.

The verdict in the case then rests upon two inferences. First, the inference that because Starr took out of the boiler a flue with a nick in it that, therefore, it was the flue from which the piece broke off that hit Johnson. Second, the inference based upon the other inference that because Starr took it out of the boiler it was old, worthless and worn out. We think a verdict based upon these inferences would be based upon mere speculation, and, therefore, not warranted by the evidence. *M. K. & T. Ry. Co. v. Foreman* (C. C. A.) 174 Fed. 377.

Judgment reversed and new trial ordered.

DELAWARE, L. & W. R. CO. V. ROYCE

(Circuit Court of Appeals, Second Circuit. February 8, 1910.)

No. 127.

1. MASTER AND SERVANT (§§ 101, 102*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—DUTY WITH RESPECT TO MACHINERY.

The master does not insure the servants against defects in or breakdown of his machinery or appliances, but all that the law imposes on him is the duty to exercise reasonable care to make and maintain them safe.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 171-184; Dec. Dig. §§ 101, 102.*]

2. MASTER AND SERVANT (§ 185*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—NEGLIGENCE OF FELLOW SERVANT.

A guide for one of the crossheads on a locomotive drawing a train was lost, and as the train lay on a siding the conductor reported the loss to the train dispatcher and procured another engine to help the train in, but did not report it to the superintendent, as required by the rules of the company. The engineer negligently failed to disconnect the disabled side of the engine while it was being moved, and the driving rod became disconnected, with the result that plaintiff, who was a brakeman stationed in that side of the cab, was injured. Prior to the loss of the guide, the engine was in good repair. *Held*, that defendant railroad company was not chargeable with notice of the dangerous condition of the engine, but that the negligence which caused plaintiff's injury was that of the engineer or conductor, who were his fellow servants, for which defendant was not responsible.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 385-421; Dec. Dig. § 185.*]

In Error to the Circuit Court of the United States for the Southern District of New York.

Action by Joseph M. Royce against the Delaware, Lackawanna & Western Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

F. W. Thomson, for plaintiff in error.

Hatch & Clute (Edward S. Hatch and Vincent P. Donihee, of counsel), for defendant in error.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

WARD, Circuit Judge. March 1, 1907, plaintiff was brakeman on a coal train of the defendant en route from Scranton, Pa., to Hoboken, N. J., which according to schedule ran into a siding near Waterloo Station, N. J. It was there discovered that the upper guide on the left side of the engine had dropped off. The piston which is driven forward and back by the cylinder or steam chest is attached at its outer end to one side of a block of steel called a "crosshead," to the other side of which the driving rod of the driving wheel is attached. The crosshead moves forward and back between two parallel horizontal guides; the upper one being lost on this occasion. Thereupon the conductor, after consultation with the engineer, called up the office of the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

chief train dispatcher at Hoboken, and delivered the following message over the telephone.

"Engine 866 is at Waterloo Siding, and we have lost our top guide; if you send us a pusher we can bring our train in all right."

The engine was of the type known as "Mother Hubbard"; the cab being right over the boiler and fastened to it, leaving a place for the engineer to stand on the right side and for a brakeman on the left. A pusher was promptly sent, and the train proceeded with the intention of leaving the engine for repairs at the Port Morris yard; but in entering the yard the driving rod became disconnected, struck the floor of the cab, and loosened one of the bolts which held it to the boiler, from which steam escaped, seriously injuring the plaintiff, who was on the left side of the cab.

The only error assigned that need be considered is the refusal of the trial judge to direct a verdict for the defendant. He did so on the ground that the engineer upon the happening of the first accident to the engine became the alter ego of the defendant, and he left it to the jury to determine whether the engineer did what he ought not to have done, or left undone what he ought to have done, in respect to the disabled engine.

The following rules of the company were offered in evidence:

461. "All irregularities such as derailment, breaking of cars, defect in cars or engines; defective condition of bridges or track; failure in water supply, and unusual detention of trains must be promptly reported by conductors to the superintendent."

360. "Chief train dispatchers will report to the superintendent. In matters relating to the management of telegraph lines they will also report to the superintendent of telegraph."

361. "They are in charge of the movement of trains; of the local distribution of cars and of the operation of telegraph lines on their respective divisions. They are also in charge of the train dispatchers, telegraph operators and linemen. * * *"

366. "They must keep constantly and closely informed as to the location and progress of all trains, require prompt reports of their departure, and, when necessary, of their arrival, from all open telegraph offices, and see that all such reports are entered upon the train sheet. Causes of delay must be immediately ascertained, and, if possible, remedied."

The master does not insure the servants against defects in or breakdown of his machinery and appliances. All the law imposes on him is the duty to exercise reasonable care to make and maintain them safe. When it is said that the master cannot delegate this duty, no more is meant than that this reasonable degree of care must be exercised either by himself or by those who stand in his place. No antecedent negligence was alleged as to the engine. Indeed, the proofs established that it was originally fit, was kept in repair, and regularly inspected. Therefore, if the defendant failed of its duty to the plaintiff, it did so at the time the loss of the upper guide was discovered. The jury having found that the engine was unfit, and that it was negligence to proceed with it, the question arises whether this negligence was that of the defendant as master or of the plaintiff's fellow servants. The conductor and engineer were, as such, certainly his fellow servants. *Baltimore & Ohio R. R. Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914, 37

L. Ed. 772; *New England R. R. v. Conroy*, 175 U. S. 323, 20 Sup. Ct. 85, 44 L. Ed. 181. Notice to them was not notice to the defendant as master. The defendant had prescribed reasonable rules applying to the situation. The conductor, as the head of the crew, was required to communicate to the superintendent, who was the alter ego of the defendant; but he neglected to do so. He reported to the chief train dispatcher, another alter ego, but only in respect to the location and movement of the train. It is, therefore, plain that the defendant as master had no notice that the engine, originally fit, kept in good order, and regularly inspected, had broken down. Although the report to the chief train dispatcher stated that the upper guide had been lost, this was done merely to explain the delay. Even if the train dispatcher knew or thought the defect was one likely to make it dangerous to proceed with the engine in that condition, he had a right to suppose that the engineer had disconnected the disabled side, as the proofs show he could perfectly well have done. The purpose of the message was to get from the train dispatcher the remedy which the conductor applied to the situation, namely, the pusher, and this was promptly supplied.

The record disclosing no evidence of negligence on the part of the defendant as master, the judgment is reversed.

POLLITZ v. WABASH R. CO. et al.

(Circuit Court of Appeals, Second Circuit. February 8, 1910.)

No. 109.

REMOVAL OF CAUSES (§ 49*)—DIVERSITY OF CITIZENSHIP—SEPARABLE CONTROVERSY.

A bill by a stockholder of a railroad company against the company, its resident officers, and directors, certain bondholders and the trustee in a mortgage securing a new issue of bonds to be exchanged with a large bonus of stock for the old bonds of the company, praying that such exchange be adjudged illegal and ultra vires and that the original status be restored, and alleging that such exchange was effected through a confederacy of certain of the defendants for their own benefit and to the injury of the stockholders, states a joint cause of action, and the cause is not removable by the company, which is a foreign corporation, on the ground of separable controversy, where the other defendants are citizens of the state.

[Ed. Note.—For other cases, see *Removal of Causes*, Cent. Dig. §§ 95-99; Dec. Dig. § 49.*]

Separable controversy ground for removal of cause to federal court, see notes to *Robbins v. Ellenbogen*, 18 C. C. A. 86; *Mecke v. Valleytown Mineral Co.*, 35 C. C. A. 155.]

Coxe, Circuit Judge, dissenting.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Suit in equity by James Pollitz against the Wabash Railroad Company and others. Decree for defendants (167 Fed. 145), and complainant appeals. Reversed.

See, also, 153 Fed. 941.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Stephen M. Yeaman (J. Aspinwall Hodge, of counsel), for appellant. Rush Taggart, Lawrence Greer, and F. C. Nicodemus, Jr., for appellees.

Before COXE, WARD, and NOYES, Circuit Judges.

WARD, Circuit Judge. The complainant, a citizen of the state of New York, is the owner of 1,000 shares of the common stock of the Wabash Railroad Company, a consolidated corporation under the laws of Missouri, Ohio, Indiana, Michigan, and Illinois, one of the defendants. The railroad company after long negotiations entered into an agreement with a committee representing its debenture mortgage bondholders to exchange those bonds, aggregating \$30,000,000, for bonds of a new issue, together with common and preferred stock aggregating a much larger sum. October 20, 1906, this agreement was approved at a meeting of the stockholders and debenture mortgage bondholders by bondholders and stockholders representing more than 80 per cent. of the stock and debenture bonds of the company; the complainant protesting against the plan as illegal and inequitable for various reasons not necessary to be stated. October 30th the plan was advertised, and holders of debenture bonds were invited to deposit them with the United States Mortgage & Trust Company at New York for exchange.

November 7th the complainant brought a suit in the Supreme Court of the state of New York, alleging that the plan was illegal and inequitable, against the Wabash Railroad Company, its resident officers and directors, the Mercantile Trust Company of New York, which was as registrar to countersign the new securities, the United States Mortgage & Trust Company of New York, which was, as depositary of the securities to be exchanged, to distribute the same, and the persons composing the committee of the debenture mortgage bondholders, praying that they might be enjoined from doing anything to carry out the plan. December 5th the defendant railroad company removed the cause to the Circuit Court. December 31st was fixed as the date for the distribution of the securities issued in exchange for the debenture mortgage bonds.

January 23, 1907, the complainant began a second suit in the Supreme Court of the state of New York against the same defendants in the first suit, together with the trustees of the mortgage securing the new issue of bonds and the Metropolitan Trust Company of New York, which had owned \$5,435,000 of the debenture mortgage bonds, alleging that the plan had been substantially carried out, and praying that it might be declared illegal and void, and that the defendants be ordered to re-exchange and re-deliver the securities, or, in default of so doing, that they, or some of them, be ordered to pay into the treasury of the defendant railroad company the par value of all the new bonds and common and preferred stock countersigned, issued, used, or received by them in exchange for the debenture mortgage bonds, together with any interest paid on the new bonds in the meantime. The bill also set up as an additional reason for declaring the plan illegal article 12, § 10, of the Constitution of Missouri (Ann. St. 1906, p. 305),

providing that no corporation shall issue preferred stock without the consent of all stockholders. January 25, 1908, the defendant railroad company removed the cause into the Circuit Court, on the ground that there was a separable controversy between the complainant and the defendant railroad company, to the complete determination of which the other defendants were neither indispensable nor necessary parties. February 21st an order was entered denying the complainant's motion to remand the cause to the state court.

Subsequently, the complainant having moved for leave to discontinue the first suit upon payment of costs, and the defendant railroad company having moved to consolidate the two causes and for leave to amend its answer in the second cause and file a cross-bill the Circuit Court denied the complainant's motion and granted the motions of the railroad company. June 18th the railroad company amended its answer by setting up the new defense that the complainant was estopped from relying upon article 12, § 10, of the Constitution of Missouri, and filed a cross-bill praying that he be enjoined from questioning in any other suit the validity of the plan of exchange or of the acts done in carrying it out.

The only question we need to consider is whether the motion to remand the second suit was properly denied. We do not agree with the learned Circuit Judge that there was a separable controversy between the complainant and the defendant railroad company, to which the other resident defendants were not necessary parties. The bill charged them, or some of them, with confederating to carry out an illegal agreement ultra vires of the company for their own benefit and to the prejudice of the holders of common stock, and demanded that the original status be restored, or in default thereof that they or some of them pay into the treasury of the defendant railroad company the par value of the securities which they had issued or received, together with any interest paid upon the new bonds in the meantime. Only the bill is to be considered on this motion to remand (*Graves v. Corbin*, 132 U. S. 571, 585, 10 Sup. Ct. 196, 33 L. Ed. 462), and we think it alleged a cause of action against the defendants jointly, and that the complainant could not have the relief demanded without the presence of the resident defendants, or of some of them.

The Circuit Court would not have had jurisdiction of the cause if originally brought there, and therefore it is not removable (Act March 3, 1875, c. 137, 18 Stat. 470, as amended by Act Aug. 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508]). For these reasons the complainant's motions to remand the second cause and for leave to discontinue the first cause on payment of costs should have been granted, and the defendant railroad company's motions to consolidate both causes and for leave to file a cross-bill should have been denied. *Boston Co. v. Montana Co.*, 188 U. S. 632, 640, 23 Sup. Ct. 434, 47 L. Ed. 626; *Ex parte Wisner*, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264; *Thorn Wire Hedge Co. v. Fuller*, 122 U. S. 535, 7 Sup. Ct. 1265, 30 L. Ed. 1235; *Torrence v. Shedd*, 144 U. S. 527, 12 Sup. Ct. 726, 36 L. Ed. 528; *Ward v. Franklin* (C. C.) 110 Fed. 794.

Decree reversed, with the direction to the Circuit Court to permit the complainant to discontinue the first cause on payment of costs ac-

crued at the time the motion was made and to remand the second cause to the Supreme Court of the state of New York; the costs to be paid by the defendant railroad company.

COXE, Circuit Judge, dissents.

WARREN et ux. v. OREGON & W. R. CO. et al.†
(Circuit Court of Appeals, Ninth Circuit. February 7, 1910.)

No. 1,714

TAXATION (§ 789*)—TAX DEEDS—EFFECT AS EVIDENCE—WASHINGTON STATUTE.

Under Laws Wash. 1899, p. 299, § 18, as construed by the Supreme Court of the state, a tax deed is prima facie evidence, not only of the validity of the deed and order under which the sale was made, but also of the regularity of all prior proceedings.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1556-1569; Dec. Dig. § 789.*]

Appeal from the Circuit Court of the United States for the Western Division of the Western District of Washington.

Suit in equity by A. R. Warren and Daisy W. Warren, his wife, against the Oregon & Washington Railroad Company and others. Decree for defendants, and complainants appeal. Reversed.

O. G. Ellis, John D. Fletcher, and Robert E. Evans, for appellants.
F. A. Huffer and F. H. Kelley, for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. This suit was commenced for the determination of conflicting claims to certain real estate situate in Pierce county, state of Washington; the complainants alleging their ownership of the property by virtue of two deeds executed by the treasurer of that county in pursuance of a sale of the property to them for delinquent taxes under and by virtue of a decree of the superior court of Pierce county, foreclosing a lien for taxes thereon. The answer of the defendants put in issue the alleged title of the complainants, but admitted:

"That the plaintiff A. R. Warren made a pretended purchase of said real estate, with other property, from Pierce county, a legal subdivision of the state of Washington, at a pretended public sale of real estate held on the 23d day of August, 1902, in the city of Tacoma, Pierce county, Washington, which sale purported to be held pursuant to a pretended real estate tax judgment entered in the superior court of the state of Washington for the county of Pierce on the 12th day of August, 1902, in proceedings to foreclose tax liens upon real estate in said county, being tax case No. 851 of the files of said court, and a pretended order of sale issued by said court, and that thereafter plaintiff A. R. Warren received from the treasurer of said Pierce county, Washington, a certain paper writing purporting to be a tax deed, and purporting to grant and convey to the said A. R. Warren, his heirs and assigns, forever, the real estate described in said first cause of action, together with other property, which deed was dated the 23d day of August, 1902, and filed for record on the 25th day of August, and was recorded in Book 190 of Deeds, at page 292, of

*For other cases see same topic & § NUMBERS in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied March 11, 1910.

the records of Pierce county, Washington; but this defendant denies that said pretended order of sale was duly issued, or issued at all, and denies that said pretended purchase by said Warren and sale by said county conveyed to said Warren, or to his coplaintiff, Daisy W. Warren, or their community, any right, title, or interest in said real estate, or any part thereof, and denies that any judgment was ever entered in said cause. That this defendant denies that under or by virtue of said pretended tax deed, or at all, plaintiffs, or either of them, became entitled to the possession of said real estate or any part thereof, and denies that at the time of the commencement of this suit, or at any time, plaintiffs, or either of them, were or are entitled to the possession of said premises, or any part thereof. That no certificate of delinquency of said property, or any part thereof, was ever signed, executed, or issued, or filed in the office of the clerk of said superior court, no valid service by publication or otherwise was ever made or had in said proceeding, and said superior court was without jurisdiction to make or render any judgment or order in said cause, and said tax proceedings, so far as they affect said property, and each and every part thereof, are null, void, and of no effect."

Similar denials and allegations are made in the answer in respect to the other cause of action stated in the bill, covering the other of the real property in controversy. The answer also set up the specific action and proceedings therein culminating in the judgment so questioned.

The complainants, to prove their claim of title, introduced in evidence the two tax deeds, but not the judgment or order of sale pursuant to which the sale was made. In giving judgment for the defendants the court below held, in effect, that the deeds constituted no evidence of any judgment or order of sale, and, consequently, that the burden rested upon the complainants to otherwise prove the validity of such judgment and order. In the absence of a statute regulating the effect of tax proceedings, that would undoubtedly be the correct rule; but there are statutory provisions in the state of Washington upon the subject, which, as construed by the Supreme Court of the state, would seem to hold that a tax deed is at least *prima facie* evidence, not only of the validity of the deed and order under which the sale is made, but also of the regularity of all former proceedings. See *Laws Wash.* 1899, p. 299, § 18; *Laws Wash.* 1897, p. 190, § 114; *Laws Wash.* 1875, p. 72, § 41; *Ward v. Huggins*, 7 Wash. 620, 32 Pac. 740, 1015, 36 Pac. 285; *Rowland v. Eskeland*, 40 Wash. 253, 82 Pac. 599; *Miller v. Henderson*, 50 Wash. 200, 96 Pac. 1052; *Carson v. Titlow*, 38 Wash. 196, 80 Pac. 299. See, also, *Ontario Land Company v. Yordy*, 212 U. S. 152, 29 Sup. Ct. 278, 53 L. Ed. 449; *Wilfong v. Ontario Land Company*, 171 Fed. 51, 96 C. C. A. 293.

The judgment is reversed, and the cause remanded to the court below for a new trial.

E. B. ESTES & SONS v. GEORGE FROST CO.

(Circuit Court of Appeals, First Circuit. February 8, 1910.)

No. 836.

TRADE-MARKS AND TRADE-NAMES (§ 70*)—UNFAIR COMPETITION—FRAUDULENT IMITATION OF PATENTED ARTICLE.

Complainant, as exclusive licensee, made hose supporters having a rubber button, which was protected by a patent covering the use of rubber as the material, and advertised and sold the same under the trade-name of "Velvet Grip." Defendant made wooden buttons for similar use, colored to imitate rubber and used by other manufacturers on hose supporters which were sold to the public as rubber button supporters, and sometimes as "Velvet Grip" supporters. *Held*, that such sales constituted unfair competition.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 81; Dec. Dig. § 70.*

Unfair competition, see notes to *Scheuer v. Muller*, 20 C. C. A. 165; *Lare v. Harper & Bros.*, 30 C. C. A. 376.]

Appeal from the Circuit Court of the United States for the District of Massachusetts.

Suit in equity by the George Frost Company against E. B. Estes & Sons. From a decree granting a preliminary injunction, defendant appeals. Affirmed.

See, also, 156 Fed. 677.

George C. Wing (George C. Wing, Jr., on the brief), for appellant. Alexander D. Salinger, for appellee.

Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

ALDRICH, District Judge. In this case of alleged unfair competition it seems quite plain that the decree of the Circuit Court should be affirmed. The competition complained of has reference to the wooden buttons of the defendants which are finished in imitation of rubber. Manifestly, the purpose of finishing the buttons in rubber was to deceive an unsuspecting public into thinking they were buying the garter or hose supporter with the rubber button attachment. The precise ground upon which the Circuit Court based the decision was that the button was intended to simulate the plaintiff's patented article, and by reason of the simulation to replace it in the art; and we think that court properly characterized such an intention, carried into effect through manufacturing and placing the goods upon the market, as unfair competition and as a wrongful act, whether done before or after the expiration of the patent.

In respect to the question of deceit this case is within the principle of *Church v. Proctor*, 66 Fed. 240, 13 C. C. A. 426, and *G. & C. Merriam Company v. Ogilvie*, 159 Fed. 638, 88 C. C. A. 596, 16 L. R. A. (N. S.) 549, again, 170 Fed. 167, 95 C. C. A. 423, decided in this circuit, which fully recognize the idea that members of the public are

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

entitled to know what they are buying, and that a purpose to create imitations or similitudes calculated in themselves to deceive, or making false characterizations calculated to deceive, amount to an imposition, and that when a deceptive article is purposely brought into competition with the genuine it amounts to unfair competition.

The whole trend of modern decision is in the direction of making it clear, whether in respect to food, drink, or wearing apparel, that placing adulterations and imitations upon the markets, with the purpose of deceiving members of the public who buy, as they do oftentimes upon casual inspection, into buying something for what it is not, is a business which is not countenanced by the law, and when with such deceptive purpose things are brought into situations of competition with the genuine that the competition is unfair. Such rules of law are in a large sense based upon the idea that the public in its relation to business and business in its relation to the public, in respect to the necessary and useful articles of life and trade, ought to have such protection as results from fair competition. And it follows that if one business concern has created, advertised, and sold a particular thing which proves to have intrinsic natural or inventive merit, which commends itself to the public under actual continuous use, that if another business concern conceives the idea of making something not possessing this merit at all, but making it so nearly in resemblance as to deceive members of the purchasing public into buying it, it not only becomes an imposition upon the public, but an imposition upon the rightful business of the one whose goods are imitated, and the imposition results from what, in law phrase, is called unfair competition.

The particular article in question is used largely in connection with hose supporters and garters, and the particular thing of novelty was the rubber button, properly mounted, performing an intended function in connection with the other parts of the supporter. This button was mounted upon a plate, and the stocking, or whatever material was to be held, was drawn over the head of the button, and when the restricted part of the wire clasp, under slight strain, was drawn over the fabric and upon the neck of the button, the button being rubber, would yield, and, under its inherent resilient quality, would create a lock upon the material which was intended to be held. The invention relates solely to the rubber material and its introduction in the shape of a button into old structures. The cases relating to this patent are based upon that ground, and invention is sufficiently established by adjudicated cases. The patented button in its setting proved to be exceedingly useful and attractive to the trade, for the reason that it stayed in place and did not cut fabrics, as did the old metal and other button holders of hard substances.

It was the rubber feature that made it salable. The defendants, apparently discovering this, and having made buttons and other turnings of wood for many years, conceived the idea of making a wooden button and painting it, or enameling it, or coloring it in imitation of rubber, and putting it in the hands of manufacturers, to the end that it should get into trade in imitation of the genuine. Indeed, in a letter to the trade they say:

"We have succeeded in producing an excellent imitation of the rubber button, and so good in fact that it takes quite a close inspection to detect the difference."

The fact that an inferior thing on the trade counters requires close inspection to detect it from the genuine goes a long way towards establishing its unfair influence in the market. If an unwary person, who was seeking to buy a hose supporter with a rubber button which would hold and not cut stockings or other fabric, was deceived, without close inspection, into buying one of wood made in imitation of rubber, which would cut, and which would not hold the stocking in place, that person would have been wronged through unfair competition in trade. And that the general public may be wronged, as well as business concerns dealing in the genuine article, is one of the reasons for the law against unfair competition. In a word, a rubber button being desirable for a certain purpose, the unfair competition consists in making and putting upon the markets a wooden button, made in imitation, which is not desirable for that purpose, with the idea of deceiving the public into buying it for the genuine. The fact that a thing influences the public and trade deceptively puts the thing into the field of unfair competition. It is understood that the decree of the Circuit Court directed itself against making and selling, for use in hose supporters, wooden buttons made in imitation of rubber.

The decree of the Circuit Court is affirmed, with costs.

In re KOHL-HEPP BRICK CO.

(Circuit Court of Appeals, Second Circuit. February 8, 1910.)

No. 224.

BANKRUPTCY (§ 262*)—SALE OF PROPERTY—SALE FREE FROM LIEN.

A court of bankruptcy has power to order property sold free from a lien claimed thereon, provided the lien, if established, is preserved against the proceeds, and provided, further, that due notice of the sale is given to the lien claimant; but such provision and notice are essential to the validity of the sale.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 365; Dec. Dig. § 262.*]

Appeal from the District Court of the United States for the Southern District of New York.

In the matter of the Kohl-Hepp Brick Company, bankrupt. From a certain amendatory order, Anna Day Ward and Henry L. Poinier, as guardians, appeal. Reversed.

The District Court of the Southern District of New York made an order on July 23, 1909, amending nunc pro tunc an order of February 23, 1909, so as to provide that certain real and personal property of the bankrupt be sold free and clear of any lien of appellants, as guardians of William R. Ward, an alleged incompetent, and free and clear of any and all other lien or claims thereto or thereon, except a specified mortgage and a specified mechanic's lien reduced to judgment.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Joseph Duffy, for appellants.

R. R. Howard and Guthrie B. Plante, for appellee.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge. This record as presented is so imperfect and so inartificially prepared that it is very difficult to marshal the facts in proper chronological order. It may be assumed that at some time, by some proper authority, appellants were appointed guardians of William R. Ward, an incompetent, and it may further be assumed that they were so appointed prior to November 13, 1908. Their contention appears to be that \$16,100 was obtained by some one from Ward without consideration and invested in the property, which was subsequently sold, and that they can trace the money into the property. The title to that property, a brick plant, at the time of the bankruptcy, was in the bankrupt.

Adjudication of bankruptcy was had November 12, 1907, and after various efforts to make the plant productive a meeting of creditors was called for November 5, 1908, to consider the propriety of selling it. After a long discussion adjournment was had to November 12, 1908, when it was decided to sell the property at public auction. On November 13th the trustees received a letter from the attorneys of the alleged guardians protesting against any sale of the property, except subject to a lien in their favor for \$16,100, by reason of moneys advanced by the alleged lunatic. Such a claim thus advanced did not operate to prevent the court from selling the property free of that particular lien, provided the lien, if subsequently established, should apply to the proceeds, and provided, further, that timely notice of the time and place were given to the persons who claimed such lien, so that they might have an opportunity to attend and by bidding or otherwise protect their interest. Collier on Bankruptcy (7th Ed.) pp. 838, 839. We have searched the record in vain to find that any such notice was ever given to them. Notices were given to every creditor who appeared in the bankrupt's schedule, or who had filed a claim in the office of the referee; but appellants were not enumerated in the schedule, nor did they file any claim with the referee. They elected to rely on their alleged lien against the res.

The property was offered at auction on January 14, 1909, and a bid of \$20,500, the highest one, accepted by the trustees, subject to the approval of the court. Thereafter, on notice to all creditors and lienors other than appellants, the question of confirming the sale was brought on for hearing before the referee on January 20, 1909, such hearing being continued on February 3d, 10th, 15th, 17th, and 19th. An offer by one Buell to purchase the property for \$31,287.67 being then made, the successful auction bidder waived his bid and an order was made February 23d directing sale of the property for the last-named sum. The order sought to be reviewed amends this order of February 23d, so as to provide expressly that the property be sold free and clear of appellants' alleged lien, which, if any, shall be transferred to the proceeds. It was admitted on the argument that the trustees did not give appellants notice of any of these proceedings, because

they "ignored" their claim, considering it to be frivolous. On the record, disregarding contributions to the facts advanced in counsel's argument, it does seem rather slim; but possibly, when they have their day in court, appellants may be able to make something out of it. That is not now the question. Concededly before the sale at auction, and the subsequent sale, when, the bid being rejected, the referee approved a private sale at a higher price, the trustees were advised that a lien on the property was claimed, and neither they nor the court could shift the lien from property to proceeds without such notice of proposed sale of the property free from incumbrances as would enable the appellants to protect their interest by bidding, if they so desired.

Nor do we find in the record any action of appellants which would constitute a waiver or estoppel and preclude them from asserting that by reason of failure to give them proper notice their lien has not been displaced. They appeared by attorney at the hearing on February 3d and filed a notice to all "whom it may concern" that they claimed a lien for \$16,100 and were about to enforce it by suit. It is stated in the brief that they also appeared by attorney on February 10th; but there is nothing to show that they were present or represented when the first bid was withdrawn and the higher offer accepted. The original order for sale November 30, 1908, is not in the printed record; but we have obtained it from the referee. It provides that the property—

"shall be sold by the trustees free and clear from any liens and incumbrances, and that upon such sale thereof the said trustees shall take the proceeds therefrom into their possession, and after first paying therefrom the expenses of such sale, including auctioneer's fees and the reasonable charges for advertising and notices of sale and insurance to the date of such sale, shall pay and dispose of the same in the following manner and to the following named persons and corporations in the order of priority hereinafter stated; the amounts due those hereinafter named, and for which such persons and corporations have or claim to have liens against said real property, being hereby declared liens against the proceeds accruing from any such sale and entitled to payment as aforesaid in so far as such proceeds shall be sufficient therefor: (1) P. F. McCutcheon, tax collector of Sayreville township, \$1,121.12, with interest thereon to the date of payment. (2) Conrad W. Kuhlthau, \$9,000, with interest at the rate of 5 per cent. from February 2, 1907, to the date of payment. (3) Manhattan Trust Company, holder of receiver's certificates issued under and pursuant to order of this court, \$3,000, with interest thereon from December 1, 1908, to the date of payment. (4) American Blower Company, amount of mechanic's lien reduced to judgment pursuant to order of court \$8,434.75. (5) Nathan W. Clayton and Elbert C. Pierson, partners as Clayton & Pierson, \$2,194.96."

This order was made after appellants had given notice of their alleged lien, but it makes no provision for the imposition of such lien on the proceeds of sale. Under the authorities such provisions are essential. Collier on Bankruptcy, *supra*. The order is fairly open to the construction that the general phrase "free and clear from any liens and incumbrances" covers only such liens as are by its terms imposed upon the proceeds, because the court had power to displace existing liens only to the extent to which they were thus imposed upon the proceeds. With this order before them, if it be assumed that it was known to them—evidently it was not served on them—appellants might reasonably suppose that whatever sale might thereafter take place would not be free from their lien, since no provision was made to trans-

fer it to the proceeds. Until notice to the contrary was given them they might fairly rely on such supposition.

The order of February 23d, confirming the sale to Buell, says nothing about the sale being free and clear of liens and incumbrances. Manifestly that is the reason why the subsequent order of July 23d undertook to amend it by the insertion of such provisions. It does state that the sale is made upon the terms and conditions stated in a contract between Buell and the trustees; but it nowhere appears that appellants were informed as to the terms of such contract. Moreover, the contract itself makes no provision for imposing any displaced lien upon the proceeds. It also recites that an order was duly made and entered directing the sale of the property "free and clear of incumbrances and upon certain terms and conditions in said order stated and set forth." Manifestly this is the order of November 30th, which, as we have seen, contained no provisions as to appellants' lien, although all parties were then advised that such lien was asserted against the property. Inspection of the contract would not have advised appellants that the terms and conditions of the later sale, so far as liens and incumbrances were concerned, were in any way different from those contained in the order of November 30th.

It is unfortunate to have to reverse the order at this late stage of the proceedings; but the power to displace liens is a drastic one, and should be exercised only with scrupulous attention to secure the lienor specific notice and full opportunity to protect his interests. If, however, the price at which the property was sold is fair and reasonable, a resale after proper notice and with sufficient provisions to impose all displaced liens upon the proceeds will probably result in a transfer to the same individual for the same price. Should a higher price be realized, no one can reasonably complain.

The order is reversed.

O. J. LEWIS MERCANTILE CO. v. KLEPNER.

(Circuit Court of Appeals, Second Circuit. January 11, 1910.)

No. 104.

1. APPEAL AND ERROR (§ 1002*)—REVIEW—JURISDICTIONAL QUESTIONS.

Where the question whether a foreign corporation was doing business in a state, so as to render it subject to suit therein, was submitted to the jury, its decision on conflicting evidence will not be set aside by an appellate court, unless clearly against the weight of evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

2. COURTS (§ 328*)—JURISDICTION OF FEDERAL COURTS—AMOUNT IN DISPUTE.

The amount in dispute in an action for damages, in which the damages are determinable by the jury, is sufficient to give a federal court jurisdiction, where more than \$2,000, exclusive of interest and costs, is demand-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ed, and the facts alleged are such as to justify the good faith of such demand.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 890-896; Dec. Dig. § 328.*]

Jurisdiction of Circuit Courts as determined by the amount in controversy, see notes to *Auer v. Lombard*, 19 C. C. A. 75; *Tennent-Stribling Shoe Co. v. Roper*, 36 C. C. A. 459.]

3. COURTS (§ 329*)—JURISDICTION OF FEDERAL COURTS—ESTOPPEL.

A defendant, who pleads a counterclaim in a federal court, is estopped to deny jurisdiction on the ground that the amount in dispute is insufficient.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 897; Dec. Dig. § 329.*]

In Error to the Circuit Court of the United States for the Southern District of New York.

Action by Annie Klepner against the O. J. Lewis Mercantile Company. Judgment for plaintiff, and defendant brings error. Affirmed.

On writ of error to the Circuit Court of the United States for the Southern District of New York to review a judgment entered on the verdict of a jury in favor of the plaintiff for \$1,649.05. The interest and costs, amounting to \$881.98, made the total amount of the judgment \$2,531.03, which was entered November 11, 1908. Upon a former trial a verdict was directed in favor of the defendant, this judgment was reversed and a new trial ordered by this court, the opinion being reported in 159 Fed. 94, 86 C. C. A. 284.

Herbert H. Gibbs, for plaintiff in error.

Edward A. Alexander and Jerome H. Buck, for defendant in error.

Before COXE, WARD, and NOYES, Circuit Judges.

COXE, Circuit Judge. On the former trial the court directed a verdict for the defendant. This court decided that the testimony warranted a submission of the controversy to the jury and every disputed question of fact was so submitted at the trial now under review. No serious contention based upon the merits can be urged against the verdict. Unquestionably the conduct of the defendant in sacrificing the plaintiff's property damaged her in at least the sum found by the jury. This fact, coupled with the additional fact that the litigation has already extended over a period of more than six years involving three trials and two appeals, predisposes the court not to dismiss the cause upon a doubtful question of jurisdiction.

The principal contention of the defendant is that the court should have dismissed the complaint: First, because the proof fails to show that the defendant—a Missouri corporation—was a resident of the Southern district of New York or was transacting business therein; and second, because the amount in controversy was less than \$2,000. The question whether the defendant had a place of business and an agent in New York and was doing business there was submitted to the jury and decided in favor of the plaintiff. This finding was amply sustained by the proof. It was at all times conceded that J. H. Hall was the defendant's New York agent, but it is said that his agency

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

was limited to soliciting and receiving consignments. The defendant's counsel presents a careful analysis of the evidence and bases thereon an elaborate argument to demonstrate the contention that the defendant was not doing business in this state.

The question is not here as an original proposition; it was decided upon conflicting testimony in the Circuit Court and we cannot say that the decision is so clearly against the weight of evidence as to justify us in setting it aside. In addition to the oral testimony the accounts of sales dated at St. Louis and forwarded by the defendant have printed prominently upon their face the words "New York Office, 442 Broadway." Similarly the letter heads and cards used by Hall have printed upon them the name of the defendant, "J. H. Hall, Agent, 442 Broadway, New York." This evidence coupled with testimony that the defendant's officers frequently came to New York to assist Hall in securing business, that Hall had authority to advance money for defendant and the strong presumption that the defendant must have known that Hall was representing himself as its general agent at its New York place of business, amply sustained the conclusion of the court and jury.

The contention that the court has no jurisdiction because the amount involved is less than \$2,000 proceeds, we think, upon a mistaken interpretation of the judiciary act (Act March 3, 1875, c. 137, 18 Stat. 470) as amended in 1887-88 (Act March 3, 1887, c. 373, 24 Stat. 552; Act Aug. 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508]). Section 1 provides that the Circuit Courts shall have original cognizance of certain designated suits at common law "in which the matter in dispute exceeds, exclusive of interest and costs, the sum of two thousand dollars." "The amount in dispute"—says the defendant's brief—"was legally determined at the trial, at less than \$1,868.25 exclusive of interest and costs."

If the amount of the recovery were to settle the question it would never be possible, in an action where the damages are in the discretion of the jury, to ascertain whether the court has jurisdiction until the jury has reported. The question is—did the court have jurisdiction in limine, had the plaintiff a cause of action upon which he might recover more than \$2,000? This question must be answered by an examination of the pleadings. The fact that the verdict was for less than \$2,000, that plaintiff, after she discovered that the goods were being sold at ruinous prices, was willing to take less than that sum in settlement, and the fact that the theory of the recovery was changed at the trial to conform to the proof and thus was limited to a sum less than the jurisdictional amount, are not, in our opinion, germane to the question. It would produce a grotesque and an intolerable condition if the law were interpreted so as to permit the jurisdiction to depend upon the decision of the court or jury upon disputed questions of fact.

In her amended complaint the plaintiff "demands judgment against the defendant for the sum of \$2,550 with interest." Of course it is not pretended, if on the face of the complaint it clearly appears that the plaintiff cannot recover more than \$2,000, that the mere demand in excess of that sum will give the court jurisdiction. If, on the other hand, the demand is made in good faith and is justified by a fair and reasonable interpretation of the facts it is the true criterion. The

rule is well stated in *Peeler v. Lathrop*, 48 Fed. 780, 1 C. C. A. 93, as follows:

"It is not the amount a plaintiff is able to prove he is entitled to that determines the amount in dispute for the purpose of jurisdiction, for otherwise the failure of a plaintiff to recover would oust the court of jurisdiction. The amount in dispute or matter in controversy, which determines the jurisdiction of the Circuit Courts in suits for the recovery of money only, is the amount demanded by the plaintiff in good faith."

In *Washington County v. Williams*, 111 Fed. 801, 811, 49 C. C. A. 621, 631, it is said:

"The amount claimed in the declaration or complaint, not the amount of recovery, is the test of jurisdiction, and the fact that a sum in excess of \$2,000 exclusive of interest and costs, was claimed, gave the trial court jurisdiction to render a judgment for a less amount unless this court is able to find that a demand for a sum in excess of \$2,000 was interposed in bad faith, for no other purpose than to give the federal court jurisdiction."

The theory of the complaint was that when the defendant violated its obligations under the contract, the plaintiff was entitled to recover, not the invoice value or cost price of the goods, but the actual value, as measured by the highest market value at the time of the breach, which was alleged to be \$3,000. There is nothing to indicate bad faith in this demand, indeed, from the plaintiff's point of view it was the reasonable demand to make and was justified by the facts. The trial court, against the plaintiff's objection and exception, limited the recovery to the prices stated in the invoice, but we cannot say that this ruling establishes the bad faith of the plaintiff in demanding the full value of the property of which she had been deprived by alleged unlawful conduct of the defendant.

Again, the defendant interposed a counterclaim and, having invoked the jurisdiction of the court for its own benefit, is now estopped from denying it. *Merchants' Co. v. Clow*, 204 U. S. 286, 27 Sup. Ct. 285, 51 L. Ed. 488.

We have examined the other exceptions argued and are of the opinion that none of them is well taken. The cause was fairly submitted to the jury and no prejudicial error was committed.

The judgment is affirmed with costs.

SNYDER v. NEW YORK CENT. & H. R. R. CO.

(Circuit Court of Appeals, Second Circuit. February 8, 1910.)

No. 116.

**MASTER AND SERVANT (§ 286*)—MASTER'S LIABILITY FOR INJURY TO SERVANT
—SAFE PLACE TO WORK.**

Plaintiff's intestate, while working with others at night in defendant's railway tunnel making alterations, was struck and killed by a passing train. There was a narrow space in which the men could work in safety, but the tunnel was filled with smoke and only lighted by torches carried

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

by the men. *Held*, that the fact that defendant had provided a safe place to work, provided the men kept carefully within it, did not relieve it from liability as matter of law, but that it was a question for the jury whether, under all the facts, it should not have taken further precautions by rules or regulations to warn the workmen of the approach of trains.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1010-1050; Dec. Dig. § 286.*]

In Error to the Circuit Court of the United States for the District of New York.

Action by Henry Snyder, administrator, against the New York Central & Hudson River Railroad Company. Judgment for defendant, and plaintiff brings error. Reversed.

I. H. Harris (Arthur Ofner, of counsel), for plaintiff in error.

Charles C. Paulding (R. A. Kutschbock, of counsel), for defendant in error.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

WARD, Circuit Judge. The plaintiff's intestate was one of a gang of laborers who were working in the defendant's tunnel running north and south under Park avenue, New York City. It contains four tracks numbered from east to west 1 to 4. Tracks Nos. 1 and 4 are walled in; the walls having holes about 10 feet apart to admit air and let out smoke of passing trains so that it may escape through the openings between the streets running east and west, over tracks Nos. 2 and 3. The decedent's gang was engaged in drilling holes in the wall between tracks Nos. 1 and 2 to receive an electrical equipment. To do this it was necessary for the men to work from a scaffold of loose planks laid on wooden horses placed against the wall on track 2 on which no trains were allowed to run. As the work proceeded, it was necessary from time to time to move the scaffold, and to do this the planks had to be taken off and laid in the space between tracks Nos. 2 and 3 called the "Six Foot," although it appears to have been little over five feet wide; then the horses had to be moved and the planks picked up and placed upon them again. Tracks Nos. 1, 3, and 4 were in use. The overhang of the cars is from $2\frac{1}{2}$ to $2\frac{3}{4}$ feet, so that it will be seen that when trains passed on track No. 3 a safe space of only $2\frac{1}{2}$ feet or less was left in the Six Foot between tracks 2 and 3.

April 23, 1906, at 11:50 p. m., when there was no light in the tunnel except the torches carried by the men, and when, according to some of the testimony, it was filled with smoke, the deceased, while picking up the end of a plank in the Six Foot and looking south, was struck on the head by a train coming north on track No. 3 and instantly killed. The complaint states a cause of action good both under the New York employer's liability act of 1902 (Laws 1902, c. 600) and at common law. The trial judge held as matter of law that the defendant had furnished the deceased with a safe space, though a small one, in which to work, because if he had kept on the east side of the middle line of the Six Foot he would not have been hit. Accordingly, his death being due

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to no negligence on the part of the defendant, a verdict was directed in its favor. But we do not think that the only place which can be regarded as unsafe is one where the workmen must get into a situation of danger in doing their work. In this dark and noisy tunnel a very slight inattention would expose them to the loss of life or limb, and we think it was a question for the jury to determine on all the facts whether the defendant should not have taken precaution by rules or regulations to warn the workmen of the approach of trains.

The judgment is reversed.

AMERICAN BONDING CO. OF BALTIMORE v. STRASBURGER.

(Circuit Court of Appeals, Second Circuit. February 8, 1910.)

No. 145.

1. TRIAL (§ 419*)—DEMURRER TO EVIDENCE—EXCEPTIONS TO RULING—WAIVER.

An exception to the overruling of a motion to dismiss, made at the close of plaintiff's case, is waived by the defendant by the introduction of evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 982; Dec. Dig. § 419.*]

2. APPEAL AND ERROR (§ 977*)—DECISIONS REVIEWABLE—DISCRETIONARY ACTION—RULING ON MOTION FOR NEW TRIAL.

The ruling on a motion to set aside a verdict and for a new trial is not reviewable in the federal courts.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3865; Dec. Dig. § 977.*]

In Error to the Circuit Court of the United States for the Southern District of New York.

Action by Theresa Strasburger against the American Bonding Company of Baltimore. Judgment for plaintiff, and defendant brings error. Affirmed.

Wilder, Ewen & Patterson, for plaintiff in error.

E. Hall, for defendant in error.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

PER CURIAM. The action was brought upon a policy of insurance by which defendant agreed to indemnify Mrs. Theresa Strasburger, therein called the "assured," in the sums of money respectively specified in a schedule therein contained, for one year, "for direct loss by burglary, theft or larceny * * * of any of the property described in the schedule hereinafter given and stated to be insured hereunder, occasioned by its felonious abstraction from the interior of the house, building, flat, apartments or rooms actually occupied by the assured * * * by any domestic servant or employé of the assured, or by any person, or persons, except the assured."

The complaint alleged that during the period covered by the policy

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

certain articles of jewelry, specifically set forth, belonging to herself and her two daughters, Hanna and Lillian, were stolen and removed from her residence. The plaintiff, the two daughters, and a son testified to the circumstances attending the disappearance of the property from the bureau and chiffonier drawers in which it was kept. The jury were instructed that they must be satisfied from the evidence that the property was stolen. There were no objections taken to any part of the charge, and no requests to charge were refused.

It is assigned as error that the court denied defendant's motion to dismiss the complaint made at the close of plaintiff's case. Having subsequently introduced testimony in its own behalf, defendant waived the exception reserved to such denial.

It is also contended that the court erred in denying defendant's motion to dismiss the action at the close of all the evidence. No exception was reserved to such refusal, and it cannot be considered.

It is also contended that the court erred in denying defendant's motion to set aside the verdict and for a new trial; but such denial is not reviewable by appeal in the federal courts.

All that is left are some exceptions to testimony as to value of the missing articles, which are trivial and unimportant.

The judgment is affirmed.

HERZOG et al. v. NEW YORK TELEPHONE CO.

(Circuit Court of Appeals, Second Circuit. February 8, 1910.)

No. 111.

PATENTS (§ 328*)—INFRINGEMENT—ELECTRIC SIGNALING APPARATUS.

The Herzog patent, No. 628,464, for an electric signaling apparatus and circuit used principally to enable guests in hotels by means of latent signal transmitters in the rooms to signal the office, embodies a system of bidirectional signaling to a limited extent only, it being possible to signal from the office to a room only when the transmitter in the room is set for a signal to the office, and is not infringed by the system of bidirectional signaling in use in a telephone exchange.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Suit in equity by Felix Benedict Herzog and others against the New York Telephone Company. Decree for defendant (172 Fed. 425), and complainants appeal. Affirmed.

William Houston Kenyon and Seabury C. Mastick, for appellants.
Charles Neave and F. P. Fish, for appellee.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

NOYES, Circuit Judge. This is a suit to restrain the alleged infringement of letters patent No. 628,464, issued to Felix Benedict Herzog on July 11, 1899, for an improvement in electric signaling apparatus and circuits. The application for the patent was filed October 25, 1884.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The patentee stated in the first part of his specifications that in an earlier patent he had described an automatic signaling instrument, the main feature of which was that it could be set by a person desiring to signal a distant point, and was so constructed that the signal would not be transmitted at the moment of setting the instrument, but would be retained until released by the action of a person at the distant point when he was ready to receive it, and would then be automatically transmitted. These instruments were capable of being set so as to transmit alterable signals and combinations of signals and thereby convey information. The patentee called these instruments "latent signal transmitters" because they retained the signal—it was inoperative until released—and they were the essential features of the "teleseme system" in use in many hotels some 10 years ago.

It is unnecessary, in the view we take of the case, to differentiate between the prior Herzog patents and the patent in suit. Taken together they undoubtedly show the development of the latent signal system, although the complainants contend that the present patent relates primarily to circuit connections rather than to the latent signal instrument. We shall confine ourselves to the patent in suit and shall examine the case along the lines laid down by the complainants.

Turning then to the specifications, it will be noticed that the patentee describes his apparatus with especial reference to its use in hotels:

"Its main feature consists in providing the guest's room with such an instrument whereby he can at pleasure signal to the hotel clerk his various wants, and so combining and connecting these separate instruments with means for releasing them and receiving the signals controlled by the hotel clerk or receiving person that, if desired the mere act of setting any guest's instrument automatically operates an annunciator at the receiving end so as to inform the clerk that the particular instrument has been set and that thereupon the clerk, as soon as prepared to receive the signal, can, by making certain connections, introduce a receiving instrument, release the guest's signal instrument and thus receive the guest's signal at pleasure."

But while the apparatus was especially designed for hotels, the patentee also says in his specifications:

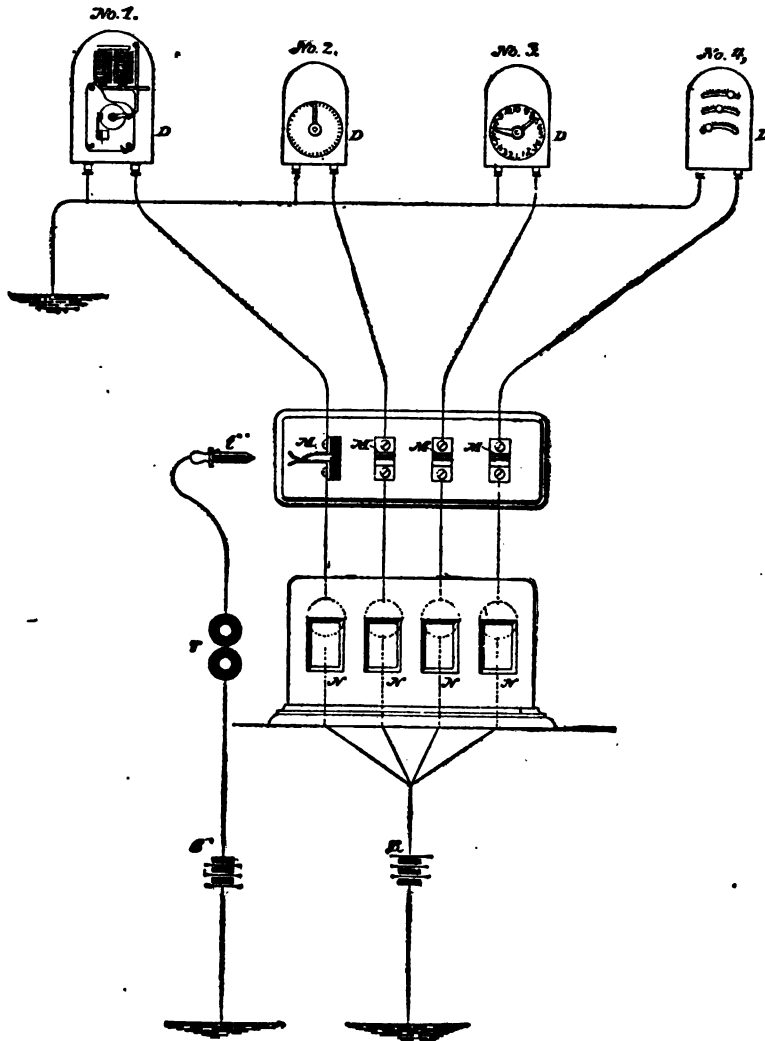
"I shall describe my invention chiefly as applied to hotel purposes; but it is equally applicable to telephone exchange systems or other circuits."

And in another part of the specifications he says:

"My present invention relates principally to the application of such apparatus to telephone exchanges, hotels and private circuits, though parts of the invention are applicable to many circuits."

It is, however, apparent from the language of the specifications that the apparatus which the inventor proposes to apply to telephone exchanges was the latent instrument itself. There is nothing to indicate that he had in mind any such application of the circuit connections of the patent separate and apart from the latent signal apparatus. Still it is undoubtedly true that a patentee is not obliged to describe all the uses which the subject of his patent is capable of. He is entitled to all the beneficial functions of his invention whether he described them or not.

The following drawing, similar to the third figure of the patent, illustrates the apparatus and circuits described in the specifications:



The different parts of the apparatus illustrated and its operation are thus described in the specifications:

"D, D, D, D, represent separate latent signal instruments constructed as I have described, one being placed in each guest's room. Each instrument is connected by a separate wire with the receiving station or clerk's office, and each circuit leads through a separate spring-jack, M, and an annunciator, N, after which the circuits join and lead through a battery, R, to the ground. In a separate circuit are placed a battery, S, opposite in polarity to the battery R, and a sounder, T. This circuit terminates at one end in the ground and at the other in plug, t, one side of which is insulated, as shown. The apparatus is

represented as in its former condition, and all the separate circuits are open at the guest's instruments, a notch in each break-wheel being under the contact-springs.

"When any guest sets his instrument, it closes the circuit and drops the annunciator drop corresponding to that instrument and room, thereby making the clerk aware that that instrument has been set. It is to be observed that the instrument remains locked when set, for the reason that the polarity of the current in circuit is such as to repel the armature and make it lock the escapement. The circuit is thus closed at the room and remains so closed until the clerk opens it again by his action in releasing the latent signal. The annunciator may be provided with a continuous ringing arrangement to call attention, but in any case will prevent the drop from being raised inadvertently before the number is noted, as if so restored it will drop back again until the current is again opened at the room by proper means. The clerk thereupon inserts the plug, *t*, in the proper spring-jack, and the battery *S*, being of opposite polarity to the battery *R*, causes the guest's instrument to be released and transmit its signal, which is received by the clerk on the receiving instrument, *T*, for which purpose a sounder or bell may be employed to sound or a visual indicator or a register to record the signals received."

The claims of the patent in issue are Nos. 11, 12, 13, 19, and 20. Claim 19 is selected by the complainants as typical, and is as follows:

"At each of several substations a calling apparatus including a circuit terminal and a manually operated element co-operating therewith and constructed to have with respect to the terminal a normal position of rest and one of action separate lines from these stations to a central station having a separate annunciator device for each such substation, and a common connection to a common source of current arranged to be controlled by the change of position of the substation manual element to begin the actuation of the corresponding annunciator device and nominally to continue this actuation until the said substation element is again in its position of rest, a switching connection at the central station for each such line arranged during its operation to interrupt the operation of the annunciator element; and co-operating therewith, a plug and cord adapted to be used in turn with all the switching connections, and a second connection controlled by the plug and supplying current of another character or condition; together with a magnetically controlled device at each substation arranged and adjusted to be controllable by the current controlled by the plug and not by the normal current and to operate as a notification to the transmitting operator."

The scope of this claim can best be appreciated by analyzing it and examining its elements in reference to the structure illustrated in the drawing and described in the specifications:

The first element of the claim is:

"At each of several substations a calling apparatus, including a terminal and a manually operated element co-operating therewith, and constructed to have with respect to the terminal a normal position of rest and one of action."

In the apparatus described and shown in the patent the substation is the latent signal instrument in the guest's room. The circuit terminal is the contact-spring, and the manually operated element is the break-wheel. These are nominally separated and in a position of rest; the spring being opposite a notch in the periphery of the wheel. They can be brought into a position of contact and, consequently, of action by rotating the wheel by hand.

The second element of the claim is:

"Separate lines from these stations to a central station having a separate annunciator or device for each such substation, and a common connection to a common source of current arranged to be controlled by the change of position

of the substation manual element to begin the actuation of the corresponding annunciator device, and nominally to continue this actuation until the said substation element is again in its position of rest."

In the structure described and shown in the patent, the parts embraced in this element are the separate signal circuits to each latent signal instrument, the individual annunciators, and the common battery.

The third element of the claim is:

"A switching connection at the central station for each such line arranged during its operation to interrupt the operation of the annunciator element."

In the apparatus described in the patent this element is the plug and cord at the central office. It is not regarded as of importance, however, that the annunciator should be cut out of circuit when the plug is inserted, for the patent says:

"Of course there is no objection in having the annunciator drop magnet left in circuit other than that it increases the resistance of the circuit."

The fourth element of the claim is:

"And co-operating therewith a plug and cord adapted to be used in turn with all the switching connections and a second connection controlled by the plug and supplying current of another character or condition."

In the apparatus described and shown in the patent, the plug at the central station is adapted to be used with all the switching connections and also controls a second connection with the battery S which is a different source of current from the battery R and of opposite polarity. When the plug is inserted in the spring-jack at the central station, the current flows from the second source of supply to the substation and energizes the magnet shown at the top of the left-hand figure so that it attracts its armature and releases the signaling instrument, which thereupon transmits its message to the central station.

The last element of the claim is:

"Together with a magnetically controlled device at each substation arranged and adjusted to be controllable by the current controlled by the plug and not by the normal current and to operate at a notification to the transmitting operator."

In the apparatus of the patent this magnetically controlled device is, strictly speaking, the armature of the magnet above referred to. Speaking more broadly it is the magnet, the armature, and the break-wheel. They serve to hold the signaling instrument in its set position and to release it so that the message can be sent in when the central office is ready to receive it. When the instrument is released its running down indicates either audibly or visually to the person at the substation that his message has been received.

And here it should be observed that all that the patent from beginning to end says about signaling from central to substation—the "outward call"—is as follows:

(1) The claim—as already noted—speaks of the "notification to the transmitting operator" and implies a prior transmitting operation on his part.

(2) The specifications say:

(a) "This opening of the circuit (by the clerk), moreover, is so arranged as to serve as a return-signal to the guest and to indicate to him that his call has been noted."

(b) "When the clerk releases any latent-signal instrument, the guest is informed of the fact by observing the hand of the instrument or by the noise of the clock work in unwinding and is thereby assured that his wants are being attended to."

It is obvious from the claims and specifications as a whole that what the patentee especially desired to provide was means of communication from guest to central office, and not from central office to guest—that the outward notification was merely an incident to the inward call.

Up to this point we have examined the claim in question in connection with the specifications and drawings, both of which refer to latent signal instruments. The whole organization of the patent seems to center around these instruments. There is much ground for contending that it cannot be read away from them—that the patent covers circuit connections only in connection with such instruments. And, if this be true, want of infringement is obvious, for it is conceded that the defendant does not employ latent signal instruments or any devices having similar functions.

The complainants, however, as already indicated, urge that the claim is for circuit connections, and not for the latent signal instrument or connections solely therewith, and the feature of the invention is said to be the "to and fro calling system" and the capacity for bidirectional calling embodied in the last element of the claim which we have examined.

Assuming then that we may eliminate from the patent, as the complainants have sought to do, all reference to the latent-signal instrument, it must still be clearly borne in mind that the "notification to the transmitting operator" of the last element of the claim is in the nature of an acknowledgment signal rather than an independent signal. Indeed, it is not contended by the complainants that in the specific structure of the patent an initial message can be sent from the central office to the substation. And while, for the purposes of this case, we may assume that the specifications and drawings can be considered as applying (1) to a calling system and (2) to a latent signal system and confine ourselves to the former, we see no ground whatsoever for holding that the calling structure covered by the claim has any greater capacity for bidirectional signaling than that illustrated in the drawings of the complainants' own brief, viz., a capacity to send a signal from central to substation as the result of initial action there. To give the claim a broader application would be to depart from its own language as well as to wholly ignore the extracts from the specifications which we have quoted. We cannot accede to the proposition that the patentee can, under any doctrine of equivalents, change or add to the circuit connections of the patent so as to make the apparatus work in a different way or under different conditions.

Consequently, even if we admit that the claim is essentially for circuit connections and not for a latent signal instrument, still in view of its own language and of the specifications and drawings it must be

construed as covering only apparatus the parts of which act in such relation and subordination to each other that a signal from central office to substation follows only as the result of prior action taken at the substation. There must be an electrical or mechanical connection between the element used by the transmitting operator and the element employed for the return signal.

This limitation upon the scope of the claim renders it possible to confine the examination of the question of infringement within comparatively narrow bounds, and, possibly, to avoid altogether the question of validity. We have to look in the defendant's structure for the elements which we have found in the claim co-ordinated in the same way. If we do not so find them, infringement is not established, and it is unnecessary to consider the questions whether the patent is valid in view of the prior art, or whether on account of such art the patent should be construed broadly or narrowly. Only in case infringement is established is the question of validity important. Only in case the defendant infringes the claim as we have construed it is it important to consider whether we are justified in assuming, in accordance with the complainants' contention, that the claim should be treated as covering circuit connections separate and apart from the latent signal instrument.

Turning now to the defendant's structure, we find that it is operating a telephone system consisting of: (1) The apparatus at each subscriber's station (the substation); (2) the lines connecting each subscriber's station with the central station or exchange; and (3) the apparatus at the central station for receiving and making calls and permitting the intercommunication of subscribers.

All the apparatus and circuits of the defendant's system are telephone apparatus and circuits, and there seems to be little ground for the complainants' attempt to differentiate between its signaling part and its telephone part. In order, however, to determine whether the claim in question covers any portion of the defendant's apparatus, we shall only examine those parts which the complainants assert constitute defendant's "signaling system" and have the limited capacity of bidirectional calling covered by the claim. We will attempt to read the claim upon the defendant's apparatus.

At each subscriber's station in the defendant's system there is a break in the circuit at the telephone hook normally maintained open by the weight of the telephone receiver and closed when the receiver is removed from the hook and the latter moved by spring action into contact with the circuit terminals. Although the hook is actuated by a spring and not by hand, it may perhaps be regarded as the manually operated element of the claim. It is in a normal position of rest when the receiver is on the hook and is in a position of action when the receiver is off the hook and it is moved into contact with terminals. We will assume that this apparatus is covered by the first element of the claim, although, were we considering the prior art, it would be difficult to see why, in case this element appears in the defendant's structure, it does not also appear in the organization of the prior Cheever patent (No. 208,463). In that organization there is at a sub-

station a circuit terminal and a spring normally held in a position of rest by the weight of the receiver—an exact equivalent of the hook—and brought into a position of action when the receiver is removed.

Similarly we may assume for the purposes of this case that the defendant's apparatus embraces the second and third elements of the claim. There are separate lines from each subscriber's station to a central station, a separate annunciator device for each subscriber's station, and a common source of current arranged to be controlled by the manual element at the subscriber's station to actuate the annunciator device. So there are switch terminals the operation of which interrupts the operation of the annunciator device.

In so far as the claim covers automatic signaling from a substation to a central station, a common battery and the interruption of the annunciator by the central operator, undoubtedly the defendant's apparatus comes within it. So also it may be remarked would the structure of the prior Cheever patent. The complainants' expert says:

"The Cheever organization does embody automatic signaling and a common battery."

And here it should be noted, also, that the claims of the patent not embracing the return signal feature seem clearly to be anticipated by this Cheever patent.

The substantial questions of infringement arise then in the attempt to read the concluding elements of claim 19—especially those relating to the return signal—upon the defendant's apparatus. As we have already pointed out, the claim calls for a second source of current at the central office of opposite polarity to the normal current. When the plug is inserted at the jack in the central station, this second kind of current flows from the central station to the substation and controls a magnetically controlled device—the armature of the magnet—at the substation "to operate as a notification to the transmitting operator." But, as we have further pointed out, this second kind of current cannot be made to flow unless and until the transmitting operator has initiated the operation by closing the circuit with the manually operated element. An independent call from central station to substation is impossible with the apparatus of the patent.

Now what is there in the defendant's structure which has similarity to this apparatus of the patent?

The complainants insist, in the first place, that the magnetically controlled device of the claim is the armature of the bell at the subscriber's station, which makes it necessary for us to consider the nature and operation of such bell. At each subscriber's station in the defendant's system there is an electric bell which is rung by an alternating current of electricity sent over the circuit by the central operator when she desires to call the subscriber to his telephone. The alternating current passes through a magnet and causes its armature to vibrate and to make the clapper attached thereto strike the bell. The bell or the armature may be called the "magnetically controlled device" of the claim, and it is controlled by a different kind of current from the normal current. So it must be observed that the ringing of the bell is a signal to the subscriber. But the vital question is whether the

ringing of the bell is a return or acknowledgment signal within the meaning of the claim as we have interpreted it—whether it results electrically or mechanically from any initial operation by the transmitting operator—or is a wholly independent operation.

It seems to us entirely clear that there is no electrical or mechanical connection between any act of the subscriber and the ringing of the bell of his telephone by the central operator. The subscriber desires to call another subscriber. He takes his receiver off the hook; the current flows, and the annunciator at the central office falls. The central operator seeing the annunciator fall inserts a plug in the jack of the calling line. The operator is then in communication with the subscriber, ascertains the connection desired, and takes the necessary steps to make it. Intercommunication having taken place, the subscriber hangs up the receiver, and his apparatus is in the same condition as it was before he gave the call. The bell of the calling subscriber has not been rung. In so far as the bell was affected by the subscriber's action, it might as well have been upon an entirely different circuit. The bell magnet has no relation to or control over the hook or its contacts. It is true that the ringing of a subscriber's bell may be the result of a previous call by the subscriber in the sense that it was the circumstance which caused it. The central might call the subscriber to tell him that she could not get a desired connection which he had previously telephoned her to ask for. But so she might call him to state her inability to get a connection which he had requested by letter or through a messenger. There would be no combination or joint operation. The bell at the subscriber's station is unrelated structurally or operatively to the apparatus by which the subscriber calls the central station. The bell does not ring as a notification to the transmitting operator in the sense that it is the completion of an operation instituted by him. It always rings as an independent operation which may or may not have been brought about by the circumstances of a previous call by the subscriber. There is no such interrelation between the different parts of the defendant's apparatus that the signal from central office to substation follows as the result, either mechanically or electrically, of prior action taken at the said station. While the elements of the defendant's apparatus are similar to those of the organization of the patent, they co-operate in a different way and produce different results.

It is urged, however, by the complainants, that apparatus only should be compared, and that the defendant's apparatus has the capacity for the return signal of the apparatus of the patent and more. But even this is not shown. The return signal of the apparatus of the patent can only be sent over the defendant's circuits when the receiver is off the hook. But it is not intended that the bell shall be rung when the receiver is off the hook. It is shunted and is not organized to ring. If it does ring, the operation is an accidental, uncertain, and unintended one which should not be considered in determining the operation or capacity for operation of the apparatus. Instead of there being similarities between the apparatus of the patent and that of the defendant's system—so far as the calling of the substation is concerned—they are marked in dissimilarities. The magnetically controlled device

of the patent can only receive a signal when the manually operated element has made the circuit connection. The magnetic device—the bell—of the defendant's apparatus can only be rung when the manually operated element has not made the circuit connection. The apparatus of the patent is capable of bidirectional signaling only to the limited extent that return dependent signals can be sent. The apparatus of the defendant's system is capable of almost unlimited independent to and fro calling, but cannot be used for dependent signaling. The only time when one apparatus can be used is the time when the other cannot be used.

It follows that infringement is not established. And this result cannot be regarded as surprising. While we have followed the lines of the complainants' discussion and have sought to ascertain the generic invention of the patent sued upon as distinguished from any specific illustration thereof, it has still always seemed apparent that the real subject-matter of the patent related to something else than telephony. The object of the patent considered as a whole was to improve the inventor's latent-signal apparatus—to relieve its peculiar necessities. It is true that the claims are broader than the specifications. They were prepared some 14 years after the application was filed, and the electrical art had developed phenomenally in the meantime. Nevertheless, it is only by placing strained constructions upon words, by laying special stress upon isolated sentences, and by reading the claims without reference to the specifications and drawings, that any foundation is shown for the contention that the patent covers circuit connections employed in the defendant's telephone system. And, for reasons already stated at length, such interpretation of the patent is impossible.

The decree of the Circuit Court is affirmed, with costs.

TIME SAVER CO. v. STAMFORD TRUST CO.

(Circuit Court of Appeals, Second Circuit. January 11, 1910.)

No. 101.

PATENTS (§ 328*)—INVENTION—BANK ACCOUNT BOOK.

The Rand patent, No. 748,157, for a bank account book, in which the leaves have a vertical crease down the center, upon which the outer half may be folded forward or backward to facilitate the carrying forward of balances to another page, is void for lack of invention, in view of the prior art, as shown in the Wever and Farmerter patent, No. 632,769.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Suit in equity by the Time Saver Company against the Stamford Trust Company. Decree for defendant, and complainant appeals. Affirmed.

R. Cushman, for appellant.

E. R. Newell, for appellee.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

NOYES, Circuit Judge. This is a suit in equity to restrain the alleged infringement of letters patent No. 746,157 issued December 8, 1903, to James H. Rand for an improvement in bank ledgers or similar books and assigned to the complainant.

The patent relates particularly to skeleton or daily balance ledgers used in banks for recording the daily deposits, withdrawals, and balances of depositors. Each page is provided with vertical lines dividing it into columns to receive the appropriate items for different days as well as the names of the depositors. On each page are usually three groups of columns, so that when the ledger is open spaces for six days' transactions are shown. The successive pages required for the names of depositors are termed a section. Sections recording the weekly transactions are repeated throughout the book. At the end of each week it is necessary to continue each depositor's account in the next succeeding section by carrying forward the balance of the last day. In the absence of a device to facilitate the operation it was the practice in transferring balances to bend the successive pages of the old weekly section forward so as to expose Saturday's transactions and to bend the corresponding pages of the new section backward to expose Monday's column and the additional column for Saturday's balance. This practice required much care in adjusting the corresponding horizontal lines and the leaves turned toward each other were bulged at the center.

The primary object of the patent in suit was to facilitate this operation of the carrying of the balances forward. In the ledger of the patent there is a vertical crease or perforation at the middle of each leaf. At the end of the week, when it is desired to carry over the balances, the left-hand page is folded forward at the crease, and the corresponding right-hand page, with the intervening leaves, is folded backward. The creases being vertical in the middle of the pages, the edges of the leaves meet at the center of the book in proper alignment and the leaves lie comparatively flat.

The first claim of the patent—which may be taken as illustrative—is as follows:

"An account book having leaves creased vertically midway between their bound edges and their free outer edges whereby opposing leaves meet at the center of the book when folded toward each other, each leaf being provided on opposite sides of its crease with account columns having appropriate headings, and at its outer vertical margin with a balance column having a suitable heading substantially as set forth."

It is unquestionable that account books with creased leaves were old. It is also certain that account columns with appropriate headings—and even marginal balance columns—had been used or described before the time of this patent. Indeed all the complainant contends for as novel is the combination with the other elements of the vertical crease in the middle of the pages.

While the vertical crease of the claim is not referred to anywhere in the patent as being double-acting, it must necessarily be of that nature to operate as described. Each leaf must be folded both forward and backward and the crease must permit this to be done. The patentee says that "one or more lines of perforations formed in the middle of the leaves" may be employed in lieu of the crease.

The defense being invalidity of the patent, it is thus necessary to look in the prior art for an account book with vertical creases or perforations in the middle of each page permitting it to be turned forward and backward. But in making this investigation we are not called upon to go further than to the Wever and Parmerter patent, No. 632,769, of September 21, 1899, which likewise relates to bank account books. If that patent does not anticipate or show such a state of the art as to negative invention, no other patent or prior use does. The complainant concedes, and the defendant claims, that it is the best reference.

The object of the Wever and Parmerter patent is substantially the same as that of the patent in suit. The patentees speak of carrying over the balance from one week to the next and say:

"The purpose and object of our invention is to facilitate the accurate transferring of these balances by having exposed to the view of the accountant the name of the depositor in the preceding closed period or week and at the same time the names of the same depositors in the succeeding period or week to which the balance is being carried, and also to have the transferring point approximately at the center of the page, or, in other words, a considerable distance from its edges, which makes the transferring of the balance much easier and much more convenient than when made at the edge of the book."

The first claim of the Wever and Parmerter patent is illustrative:

"An account book comprising a plurality of leaves containing the depositor's name or the subject-matter of the account, each leaf provided with a forwardly folding crease at a point sufficiently removed from its edge to expose the depositor's name, and the succeeding leaves adapted to be turned backward to receive the balances of the accounts, substantially as described."

While the claims of the Wever and Parmerter patent speak of a forwardly folding crease, the specifications say:

"Each page is provided with a vertical crease or line of perforations."

It is undoubtedly true that the preferred form of construction under the Wever and Parmerter patent does not anticipate the patent in suit. The crease is located a considerable distance from the middle of the leaf toward the edge. Consequently, when the left-hand leaf is folded forward upon the crease, it does not meet the right-hand leaf, which is bent backward, anywhere near the center of the book.

This construction was apparently considered by the present patentee to be the only construction of the Wever and Parmerter patent, and an objection thereto was thus pointed out by him when that patent was cited against him in the Patent Office:

"In Wever and Parmerter, No. 632,769, the leaves are creased between their middle and their outer edges, and the leaves when folded for transferring balances, therefore, do not reach the center of the book, but extend merely to the center of the page. This requires the right-hand leaves to be rolled or bulged at the center of the book, * * * which is objectionable."

This objection the patentee sought to, and undoubtedly did, remove by the improvement of the patent in suit. But the difficulty is that he did not escape the Wever and Parmerter patent by so doing. He apparently overlooked the alternative construction permitted by the specifications of that patent. After describing the preferred form of construction it is said:

"Or the first balance column and transactions of the first day may be placed before the name column without varying from the principle of our invention."

The "transactions of the first day" are, obviously, the transactions for Monday, including the deposits, checks, and balance. Those are the items included under the headings for each day as shown in all the drawings of the patent.

Now the Wever and Parmarter patent calls for a crease or perforation which must be so located as to expose the depositors' names when the left-hand page is folded forward. Consequently the crease must be at the right of the depositors' names—the name column—on the left-hand pages. But "the first balance column and the transactions of the first day" together with the name column would, according to the drawings of the patent, occupy substantially half the left-hand page. This would bring the vertical crease practically in the middle of the page. Folding the left-hand leaf upon the crease, and turning the right-hand pages backward, would make the opposing leaves meet at practically the center of the book. It is true that the patent does not expressly call for backward folding creases in the right-hand leaves, but it does say in its claims that the leaves "must be adapted to be turned backward to receive the balances." And the most obvious way of turning them backward would be to fold them upon the line of the forwardly folding creases. This would bring the edges of the right-hand leaves, like the edge of the left-hand leaf, substantially at the center of the book. If the pages were perforated, instead of creased, it is hardly conceivable that they would be turned back upon anything else than the line of perforations. Therefore it seems to us that the Wever and Parmarter patent may fairly be said to present an account book with creases or perforations in the middle of each page, permitting it to be turned forward and backward, and, consequently, to anticipate the patent in suit.

But whether, in view of the fact that the crease of the Wever and Parmarter alternate construction does not necessarily come precisely at the middle of the page, and thus bring the edge of the folded leaf at the exact center of the book, and of the further fact that it is not expressly required that the right-hand leaves should be folded backward flat upon the same crease or perforations, anticipation is shown, we need not definitely determine. It is sufficient now to say that, in our opinion, a person skilled in the art, with this construction before him, would have no difficulty by the use of mere mechanical skill in making the creases or lines of perforations precisely in the middle of each page, and in so making them that the left-hand pages could be turned forward and the right-hand pages turned backward upon them.

It follows, then, that the first claim of the patent is invalid for want of invention in view of the prior art. This disposes of the case. There is nothing in the remaining claims showing invention, if it is absent from the first claim. The second and third claims are not materially different from the first. The additional elements of the fourth and fifth claims do not help them.

The decree of the Circuit Court is affirmed, with costs.

WESTINGHOUSE ELECTRIC & MFG. CO. v. ALLIS-CHALMERS CO.

(Circuit Court of Appeals, Third Circuit. January 20, 1910.)

No. 72.

1. PATENTS (§ 234*)—CONSTRUCTION—ELECTRICAL MECHANISMS.

In dealing with patents having relation to electricity, an invisible, intangible agency, and in itself of different kinds, which in its different phases may affect or be affected by metals or appliances in different ways and with wholly different results, a court must guard against being misled by the mere superficial resemblances of the appliances and machines used in connection with it; for from an electrical standpoint the real significance of such appliances lies, not in their material, external appearance, but in their working effect, under the influence of diverse electrical factors.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 234.*]

2. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—SYSTEM OF ELECTRICAL DISTRIBUTION.

The Lamme patent, No. 606,015, for a system of electrical distribution and regulation designed to obviate the variation in speed of a rotary converter with changes in the amount of the inductive load, when converting a direct into an alternating current, is not for a mere aggregation of previously known devices, but discloses invention of decided merit, in view of the fact that the problem of preventing such machines from racing and destroying themselves when such conversion was attempted had been known for several years, at a time when such apparatus was particularly in demand, and that the patentee was the first to devise an efficient means; also *held* infringed.

3. PATENTS (§ 287*)—INFRINGEMENT—PERSONS LIABLE—CORPORATION CONTROLLING ANOTHER.

Where one corporation owns or controls absolutely the entire property of another, including its business and good will, and operates its plant and conducts its business as a department of its own business, it is responsible for the acts of such other company, and may be held liable for its infringement of a patent.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 457; Dec. Dig. § 287.*]

Appeal from the Circuit Court of the United States for the District of New Jersey.

Suit in equity by the Westinghouse Electric & Manufacturing Company against the Allis-Chalmers Company. Decree for defendant, and complainant appeals. Reversed.

For opinion below, see 168 Fed. 91.

Kerr, Page, Cooper & Hayward (Edwin B. Smith, of counsel), for appellant.

Thomas F. Sheridan and Clifton V. Edwards, for respondent.

Before GRAY and BUFFINGTON, Circuit Judges, and McPHERSON, District Judge.

BUFFINGTON, Circuit Judge. In a bill filed in the court below, the Westinghouse Company charged the Allis-Chalmers Company with infringement of patent No. 606,015, issued June 21, 1898, to one Lamme, for a system of electrical distribution and regulation, and now

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

owned by it. That court, in an opinion reported at 168 Fed. 91, held that no infringing act on the part of the Allis-Chalmers Company was shown, and dismissed the bill, without discussing the patent questions involved. From such decree the Westinghouse Company appealed. As we have reached the conclusion that under the pleadings and proofs the alleged infringing acts are chargeable to the Allis-Chalmers Company, we turn to a discussion of the patent in question.

When, in the early 90's, the advantages, for transmission and other purposes, of an alternating over a direct current became apparent, there arose a demand for appliances whereby existing electric plants, built to generate direct currents, could convert such direct into alternating currents. This demand, as well as the desirability of at times converting alternating into direct currents, led to the development of rotary converters. Without discussing details, it suffices to say that such converters so coupled a motor and a generator that, when the direct current was the electro-motive force at one end, the other produced an alternating current, and vice versa. This rotary converter was improved from time to time, and when used to convert alternating to direct currents proved satisfactory. On the other hand, when used to transform a direct to an alternating current, the converter proved unsatisfactory, and its dangers were such as to almost prohibit its use. These dangers arose from its erratic actions, in that it would, without warning to or knowledge by the operator, so suddenly and at such high speed begin racing that before the operator could control the apparatus it was liable to destroy itself.

Now the rotary converter, as constructed at the date of the patent, consisted of a motor and a generator, placed side by side on a common shaft, and having a common magnetic field. They had also a common winding connected at different points to the bars of the commutator and to the collecting rings, respectively, so that, when a direct current was led into the coils through the commutator, thus driving the machine as a direct current motor, an alternating current could be taken from the collector rings. But this conversion of direct to alternating current brought into play inductive forces which are not present where a direct current is used for nonconverting purposes. If an inductive load—such, for example, as inductive motors—were thrown upon the alternating current circuit, a demagnetization of the field of the converter resulted, with an attendant increase in the speed of the armature, such as noted above. Now, as this speed-causing factor was without the knowledge and beyond the control of the operator, it can readily be seen that this uncontrolled inductive factor dominated the converter and precluded its use, except in cases, theoretical rather than real, where no variation in the inductive load on the alternating current circuit could possibly occur. Moreover, the result of this inductive force in abruptly changing the speed of the armature and the regularity of the alternating current was objectionable, in that such currents work properly only under a fixed rate of alternation. To counteract this destructive force was Lamme's purpose, and the proofs show that, although such evil was recognized, it was not remedied until he did so near the close of the 90's, and it is significant that no other mode has since been devised.

Turning to the patent, we find Lamme stated his object clearly in these words:

"My invention relates to the transformation of direct currents to alternating currents, and has for its object to provide a method and a means whereby the speed of the rotary transformer employed may be maintained substantially constant, irrespective of changes in the amount of inductive load on the alternating current circuit."

He then states the effects on a rotary converter of inductive and non-inductive loads on the alternating current circuit, to which we have referred, and says:

"Therefore, if the alternating current circuit carries an inductive load—such, for example, as inductive motors—which changes from time to time, the variations in the amount of inductive load will cause variations in the speed of the transformer, which will in turn vary the speed of the motors driven by it."

The patentee then describes his remedial mechanism as follows:

"In order to obviate this variation in speed with changes in the amount of inductive load, I propose to employ a small direct-current generator for exciting the field-magnet of the rotary transformer, which may have either a shunt, a series, or a compound winding, but which must be normally operated to produce an electro-motive force, which corresponds to a degree of field-magnet excitation very much below saturation. This exciting generator is driven either by an alternating current motor, which is in turn driven by current supplied by the rotary transformer, or it is belted directly to the rotary transformer."

And of the electrical action of such device he says:

"If the amount of the alternating current inductive load on a rotary transformer changes, so that the rate of alternating decreases, for example, then the exciting generator and the motor driving the same will also decrease in speed. This action will also decrease the exciting electro-motive force of the rotary transformer, and as the exciter is unsaturated a small drop in speed will produce a relatively large drop in the electro-motive force. This lowering of the exciting electro-motive force will thus weaken the field of the rotary transformer and effect an increase of its armature speed up to near the normal. On the other hand, an increase in speed of the rotary transformer will be accompanied by an increase in the exciting electro-motive force, which will act immediately to lower the speed of the transformer."

But, while Lamme's device was the first to solve the difficulty, it is still contended, inasmuch as the elements of his device, for example, a rotary converter and an auxiliary exciter, were old, that Lamme's device was a mere assembling of these appliances, which did not involve invention. But the fact that the electrical world, with the knowledge of the use of both rotary converter and auxiliary exciter, during the several years the difficulty existed, made no such combination as Lamme's, is highly suggestive that it required more than mere engineering advance of the electrical art to devise the possibility of a use of these old elements in the new and changed relations resulting from the presence of induction motors in an alternating current-circuit. This deepening of the complexity of the problem made more unlikely the possible use of old elements under situations widely different from the theretofore practice. Moreover, when we are dealing with electricity, an invisible, intangible agency, and in itself of different kinds, and when we know that in its different phases it may affect, or

be affected by, metals and appliances in different ways and with wholly different results, we must guard against being misled by the mere superficial resemblances of the appliances and machines used in connection with it; for from an electrical standpoint the real significance of such appliances lies, not in their material, external appearance, but in their working effect under the influence of diverse electrical factors.

Take, for example, the use by Kielholtz of an auxiliary exciter, which is the nearest approach to Lamme. In the first place, Kielholtz's device was addressed to an entirely different problem. He used a wholly different electrical mechanism and secured a wholly different electrical result. Indeed, no one contends his mechanism could be so modified, readjusted, or reconstructed as to do the work of Lamme's. In fact, the two devices were in wholly different electrical fields, and the only thing in common between them was the self-use of rotation to control speed through the well-understood principle of a common steam governor, which increased or decreased the supply of steam as the engine speeded or slowed. This familiar governor principle Kielholtz utilized in an auxiliary motor or exciter, and the value of his device lay, not in the mere use of an exciter, but in the use he made of it to control the electrical conditions with which he dealt. Now his problem was, with the factor of a fixed electro-motive power of a direct current applied to a motor and a generator, of maintaining unvarying speed whereby the distant lamps of an electric light system would remain constantly and equally bright with those near at hand. He dealt wholly with a direct current. The destructive, disturbing force of induction motors on an alternating current was not involved. There was no danger in any shape from any destructive electro-motive force or speed racing. His motor was driven by a fixed direct current, controlled by a rheostat, and worked on a generator with an individual magnetic field. His object was simply to maintain uniform, not to prevent destructive, speed; for, under his conditions, such speed could not exist. In his device the magnetic field of his generator was self-excited; it was not connected with or affected by the auxiliary exciter, which latter increased or decreased the magnetism of the magnetic field of the motor alone. Consequently, as the speed of the motor armature tended to decrease, Kielholtz's exciter responsively tended to decrease the opposing magnetism of the main motor's magnetic field, and under this dual decrease tendency of opposing forces of field and armature his motor maintained its former speed.

Now this device, ingenious and effective as it seems, in no way solved or tended to solve the problem to which Lamme addressed himself. For it will be noted that the use of an auxiliary exciter by Kielholtz was in itself no more suggestive to Lamme than the steam governor, for both alike simply addressed themselves to the problem of maintaining a constant level of speed by making increased or decreased applications of the motive power the governing factor. But this plain and simple application of the governor principle would not avail in Lamme's problem, because there induction on the alternating current circuit introduced an additional disturbing element, which tended to radically disturb the equipoise controlled by a governor. Indeed, as stated by one of the witnesses:

"It was five years subsequent to the discovery that a self-exciting rotary transformer was a dangerous and self-destructive machine before any one made the discovery that its defects could be cured by providing it with an exciting dynamo by itself."

During this period the electric profession tried to solve the problem of a possible safe use of a rotary converter, when converting a direct to an alternating current, but without success. During such experiments at the General Electric Company's works in April, 1893, such a machine speeded up and burst the armature; the experimenting engineer testifying:

"Precautions were taken to guard against accidents; but the inverted rotary speeded up so rapidly that before the man could open the switch connecting it to the course of direct current supply the armature burst. * * * I discussed the matter with other engineers, with the hopes of understanding the phenomenon."

Indeed, the proofs show that a number of accidents occurred during these years, and although, as we have seen, such machines were in great demand in the new practice that had grown up of utilizing old, direct-current systems to convert their currents to alternating ones, manufacturers were averse to furnishing such machines, much as they were called for, and when they did so it was only with full instructions as to the dangers incident to their use. But not only was this new disturbing factor of inductive force thus introduced, but it was made to acutely operate on a single magnet field and simultaneously unbalance the magnetic counterforces of both motor and generator. For the situation was one where not only the magnetic inequality passively caused by decrease in speed must be reckoned with, but also the magnetic inequality actively caused by demagnetization resulting from inductive force in the alternating line, and both these influences, as we have seen, were exerted in a magnetic field common to both the motor and generator of a rotary converter, which latter Kielholtz did not have. With these new factors entering into the situation and the many electrical problems resultant therefrom, it will be seen that the application of the auxiliary motor was a step which involved much more of the inventive faculty than the use of such an exciter did in the device of Kielholtz. If the Patent Office was justified—which presumably it was—in conceding inventive character to Kielholtz, it would seem warranted in regarding as inventive the application of the governor principle by Lamme to a different and more intricate field.

In view, therefore, of the electrical problems which confronted him, we are of opinion that Lamme's work involved invention. The proofs bearing on the difficulties and obscurities the electrical art in rotary converter practice had before it satisfies us that Lamme's problem, far from being a mere adaptation of recognized agencies to accomplish a simple expedient was a complex, obscure electrical difficulty which involved invention of decided merit. We think this well summed up in the frank statement of one of the electrical engineers called by complainant, who says:

"From time to time thereafter other similar accidents were reported, and it was not until 1898, when the patent in suit issued, that any satisfactory solution of the problem was reached, and that inverted rotary transformers could

be produced which would produce the constant frequency and safe operation required. The means set forth by Mr. Lamme furnishes a complete solution of the problem, since it not only prevents the machines from being self-destructive, but also renders them capable of giving the substantially constant frequency so essential for alternating current systems. This means, while simplicity itself as a matter of structure, was by no means an easy one to conceive of, as is shown by the fact that through five years of knowledge of the problem, at a time when the apparatus was particularly in demand, no one else thought of it. Indeed, for my own part, I do not find it easy to understand, even now that I have been familiar with it for many years, and if I did not know to the contrary, I should still be inclined to say, with much positiveness, that the means shown would not work to accomplish the result. I remember very well that after the accident in the power house of the Westinghouse Company, when this invention was applied to prevent its repetition, the fact that it worked to secure that result created much surprise."

We accordingly hold the patent valid..

That the installation in the Merchants' Heat & Light Company at Indianapolis is an infringement is clear, and the only question is whether the Allis-Chalmers Company is chargeable as the infringer. The issues settled by the pleadings establish that the Allis-Chalmers Company owns the controlling majority of the stock of the Bullock Electric Manufacturing Company, which furnished the infringing apparatus but the bill does more than charge such corporate control as might result merely from such majority ownership, and that some of the directors of one company are also directors of the other. These two facts, without more, might be insufficient to establish the proposition that the Allis-Chalmers Company was liable for the acts of the other corporation. But there is more. There is the positive averment that the Allis-Chalmers Company either owns absolutely or controls the entire property of every kind, including the business and good will, of the Bullock Company, and is operating and conducting the plant and business as the electrical department of its own business. In corroboration of these averments it is charged that the Allis-Chalmers Company advertised its entry upon the electrical field, giving as its reason the facts that it has acquired the plant of the Bullock Company, that its own electrical department consisted of or comprised the plant of the Bullock Company, and that its intention was to go on with the manufacture of the Bullock Company's product. Since these significant averments are either admitted in terms, or are only met by the formal denial of control, "save as the Allis-Chalmers Company is lawfully entitled thereto as the holder of such majority of stock," we think the situation justifies a court in acting upon it. The two corporations evidently preserve their separate organizations; but the control of the Bullock Company's business is exercised by the Allis-Chalmers Company, which has taken over all that is valuable in this business and made it a department of its own.

The substance of the matter is that the Allis-Chalmers Company is the unquestioned master, whose orders are obeyed, and we think that under such circumstances a court of equity may well look behind the corporate screen and determine where the real and responsible power lies. It is not a question where the formal legal title to the property rests. The bill avers—and the answer passes the averment over in silence—that even the ownership of the property may have passed,

for it charges that either the ownership of the property has been transferred, or, if not the ownership, at least the control, and the answer confines such denial as is made solely to the transfer of control, and says nothing whatever about the transfer of ownership. But we lay no stress upon the ownership of the legal title to the property. It is enough for the present purpose to note that on the face of the pleadings the power to control, operate, and manufacture is in the Allis-Chalmers Company and is being exercised by that company. In our opinion, therefore, it is liable for the infringing act complained of as being its own act done through a controlled agency.

The decree dismissing the bill, therefore, must be reversed, the bill reinstated, and a decree entered holding the patent valid and infringed.

DONALDSON v. ROKSAMENT STONE CO.

(Circuit Court, E. D. New York. January 21, 1910.)

PATENTS (§ 326*)—SUIT FOR INFRINGEMENT—VIOLATION OF INJUNCTION.

An officer of a corporation enjoined by final decree from infringing a patent, who was personally responsible for its acts and also for those of a new corporation formed thereafter, *held* in contempt for violation of the injunction.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 613-619; Dec. Dig. § 326.*]

In Equity. Suit by John Donaldson against the Roksament Stone Company. On motion to punish John Boswell, an officer of defendant corporation, for contempt for violation of injunction. Motion sustained.

See, also, 170 Fed. 192.

O. Ellery Edwards, Jr., for complainant.

William H. Janes (Clarence Ladd-Davis, of counsel), for respondent Boswell.

CHATFIELD, District Judge. This court decided in the above-entitled action that patent No. 624,563, dated May 9, 1899, to C. W. Stevens, was valid, and on the 18th day of May, 1909, an injunction was issued to the defendant, its officers, trustees, directors, managers, agents, servants, and workmen. Among the parties so served was one John Boswell, the former president of the defendant corporation, which was then in liquidation or insolvency. Subsequently it appeared that the said Boswell, who is within the jurisdiction of this court, was, under the name of "The Marbolith Stone Company," conducting, in the Southern district of New York, the business of making artificial stone, and an application was made to this court to punish him for contempt, upon allegations that the Marbolith Stone Company was but a means adopted by the said Boswell to avoid the effects of the injunction issued against the defendant corporation and its offi-

*For other cases see SAME topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

cers, and also alleging that Boswell, by means of the Marbolith Stone Company, was infringing, and thus was in contempt of the decree and injunction order of this court.

Considerable testimony has been taken on behalf of both the complainant and Boswell, and certain experiments have been performed in the presence of the court. In the meantime, also, an action has been started in the Southern district of New York, by the complainant herein, against the Marbolith Stone Company, in which an application for a preliminary injunction was made. It appears by the record that the question of issuing a preliminary injunction in that action turned upon the use by the Marbolith Stone Company of what is known as the Sellars patent, No. 244,321, dated July 12, 1881, and an order was made in the action in the Southern district of New York restraining the Marbolith Stone Company from making stone by the Stevens process, but expressly providing that no injunction was intended against operations by the defendant in that suit under the Sellars patent above referred to.

Upon the argument of the motion to punish for contempt in this court, the experiments performed by the complainant showed that certain material, admittedly of the same sort or a part of the molding material used by Boswell for the operations of the Marbolith Stone Company, absorbed and drained away water in substantially the same manner as the material used by the complainant under its method of utilizing the Stevens patent; and, while there was some dispute as to the accuracy of tamping the two molds, the general principles involved and the application of the illustration was apparent. At the same time the complainant poured the fluid material out of which stone was to be made into various molds prepared for the purposes of illustration, one of which was made under the specifications of the Sellars patent with paraffine wax, mixed in the proportion of 7 parts of paraffine to 93 parts of sand, and then treated with steam or hot air before pouring in the concrete. In this particular mold, the liquid did not drain or flow away to any appreciable extent, but stood at the surface level for several hours, and the setting of the concrete or fluid material in the mold was accomplished by the chemical hardening and the evaporation of the water from the bare or exposed surface of the casket.

These experiments exactly defined the scope of this court's former decision, and made it apparent that, if the Sellars patent had been misinterpreted by this court, then it probably should have been held as an anticipation of the Stevens patent; whereas, on the other hand, if the Sellars patent was correctly interpreted by this court, the respondent Boswell, in his operations under the name of the Marbolith Stone Company, was certainly infringing the Stevens patent, and not using the Sellars patent in any sense of the term. Because, therefore, the question has arisen in just this way, and because the court's original decision must stand upon the merits if it is to be upheld, it seems proper to decide the motion in the present contempt proceeding, even though it involves a question that may be before the Circuit Court in the neighboring district, upon final hearing of the case against the Marbolith Stone Company.

The language of the Sellars patent is as follows:

"Concrete, artificial stone, cement, and like substances have not hitherto been made available for ornamental purposes generally, or where great diversity of form or shape has been requisite, on account of the difficulty of giving the desired outline to the said concrete, artificial stone, cement, and like substances." (Lines 11-17.)

"The great obstacle to making castings of concrete or artificial stone has been the facility with which such concrete or stone has adhered to the surface of the mold, rendering the removal of the casting from the said mold difficult, and a disfigured and rough article, quite unfit for use from an artistic point of view, has been produced. By my invention perfect concrete or like castings of any form or design obtainable in metal can be easily formed." (Lines 26-37.)

"In carrying my invention into practice, the molds in which the concrete, artificial stone, cement, or like substances are cast are formed or made of the following ingredients combined in the proportions stated: Sand, charcoal, or finely-divided material, 100 parts, by weight; paraffine or similar wax-like substance unacted upon by alkaline matter, from 6 to 11 parts, by weight. Molds made with 93 parts by weight of sand and 7 by weight of paraffine answer well." (Lines 40-51.)

"To insure that the casting shall be smooth and well finished, steam or hot air is passed over the surface of the composition mold before the concrete or the like is poured or filled in." (Lines 55-58.)

"Claim 1. A composition to be used in the formation of molds for shaping concrete and like plastic material, the same consisting of a lubricating binding material which is not affected by alkalies, such as paraffine, and a finely-divided body material, such as sand or charcoal, substantially as and for the purpose specified."

The testimony upon this motion shows that the Marbolith Stone Company, or Mr. Boswell in his work with that company, has been using a mold of some sort of sand, mixed with what his testimony shows is a preparation of paraffine, sold for the purpose of oiling waxed floors, and generally described by the term "floor oil," a substance fluid at ordinary temperatures and solidifying at a point below freezing, or below 32 degrees Fahrenheit. It is apparent that artificial stone could not be cast by the use of water at a temperature below freezing, and nothing is shown which would indicate that Sellars had in mind the use of any such liquid, or that his patent referred to a liquid of any sort. His statement that the paraffine or other wax was to be mixed with sand, in the proportion of certain parts which would seem to be determined by volume rather than weight, and his further direction that the mold is to be smoothed and finished by the use of heat or steam, under which the paraffine wax would melt and cause a surface impervious to water, seemed to this court at the time of its original decision to place the Sellars patent entirely within the realm of a nonabsorbent or substantially water-tight mold, and this would be no anticipation of the Stevens patent.

If this court was wrong in such a conclusion, and if the Sellars patent discovered and taught the use of a mold in which drainage was intended or accomplished by the use of the process, then it would seem that the Sellars patent should have been considered an anticipation of the Stevens patent, and the decree sustaining the validity of the Stevens patent could not have been made. For this reason, no further determination of the issues involved upon the present motion to punish for contempt need be made, and the application holding Mr. Boswell in contempt, because of his use, through the form of the Marbolith

Stone Company, of the ideas secured to the complainant, within a certain territorial district, by the decree in this action, must be granted. Inasmuch, however, as Mr. Boswell's acts have been under an apparently honest assumption that the question of using the Sellars patent was still open to him, and that his use thereof was without knowledge of this court's decision that the Sellars patent was limited to a non-absorbent mold, and inasmuch as Mr. Boswell and the Marbolith Stone Company both agree to refrain from further acts, so long as this court's decree shall remain in force, no award of damages or costs will be made.

VOIGTMANN et al. v. SEELY et al.

(Circuit Court, S. D. New York. December 22, 1909.)

No. 600,186.

PATENTS (§ 310*)—SUITS FOR INFRINGEMENT—DEMURRER TO BILL.

Where the question of the validity of a patent involves an examination of the prior art or of prior patents, it cannot be declared void on demurrer to a bill for its infringement; nor is it ground for demurrer that the patent has been adjudged void in other jurisdictions in suits against different defendants.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 310.*]

In Equity. Suit by Frank Voigtman and another against Frank Seely and others. On demurrer to bill. Overruled.

Offield, Towle, Graves & Offield (C. K. Offield and Philip B. Adams, of counsel), for complainants.

Phillips & Avery (R. H. E. Starr, of counsel), for defendants.

HOLT, District Judge. This is a demurrer interposed by the defendants to a plea in equity brought to restrain the infringement of a patent. Similar suits against other defendants, on the same patent, were brought in the Circuit Courts in the Seventh and Eighth circuits, and on final hearing the court decided in favor of the defendants, on the ground that the claims of the patent sued on were void for lack of invention, and as being mere aggregations. Both these decisions were affirmed on appeal by the Circuit Courts of Appeal. 133 Fed. 298; 133 Fed. 934; 138 Fed. 56, 70 C. C. A. 482; 148 Fed. 848, 78 C. C. A. 538. The patentee thereupon filed a disclaimer, disclaiming a portion of the specifications and the first four claims, and thereafter brought this suit on the patent as disclaimed. The defendants have demurred; the ground of demurrer being, as I understand it, that the disclaimer has made no substantial change in the patent, and that the patent in its present form is void for want of invention.

I think the disclaimer has made no substantial change in the alleged invention. The cases in the Seventh and Eighth circuits were both brought on claims 5, 6, and 7, and those are the claims upon which this suit is brought. But I cannot see how the fact that a disclaimer has been filed makes the complaint demurrable. Undoubtedly, if a patent is manifestly invalid upon its face, the question of such validity

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

may be raised by a demurrer to the bill. *Richards v. Chase Elevator Co.*, 158 U. S. 299, 15 Sup. Ct. 831, 39 L. Ed. 991. But the cases in which such a demurrer will lie are very unusual. They are cases where the alleged invention is something so obviously incapable of being considered an invention that a demurrer will lie. When the question whether any invention has taken place involves an examination of the prior art, or of prior patents, no demurrer will lie. I think that is the case here. It is true that, in two litigations in which evidence was taken, the Circuit Court in another circuit has held, on final hearing, upon an investigation of the evidence, that the patent discloses no invention and consists of mere aggregations; but any patentee has the right to bring a suit in another circuit against alleged infringers, and prior decisions in other circuits are not necessarily decisive. *Mast & Co. v. Stover Co.*, 177 U. S. 485, 20 Sup. Ct. 708, 44 L. Ed. 856. In actual practice, of course, great weight is usually given to a previous decision on the merits on the same patent; but, as the litigation is not between the same parties, a previous decision is not *res adjudicata*, and if any different evidence is produced, and, indeed, if only the same evidence is produced, no court is bound to follow a previous decision by another co-ordinate court.

My conclusion, therefore, is that the demurrer should be overruled, with leave to the defendants to answer within 20 days on payment of costs.

ELLIOTT-FISHER CO. v. UNDERWOOD TYPEWRITER CO.

(Circuit Court, S. D. New York. November 1, 1909.)

PATENTS (§ 95*)—PERSONS ENTITLED TO PATENTS—ASSIGNEES OF INVENTORS.

A patent may be issued to an assignee of an inventor through mesne assignments, provided they are first entered of record in the Patent Office.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 127; Dec. Dig. § 95.*]

In Equity. Suit by the Elliott-Fisher Company against the Underwood Typewriter Company. On motion by defendant respecting proofs. Denied.

Robert Fletcher Rogers, for complainant.
Briesen & Knauth, for defendant.

LACOMBE, Circuit Judge. I find no authority for the proposition that patents may not be issued to an assignee, who holds through mesne assignments from the inventor, provided such assignments are first entered of record in the Patent Office. So to hold would require a very strained and unreasonable construction of section 4895, Rev. St. (U. S. Comp. St. 1901, p. 3385). That section leaves the discretion with the Patent Office, which may issue to the inventor or to the assignee; and no doubt where there are conflicting assignments the office will avoid passing on questions of title by issuing to the inventor. But

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

it does not appear that the assignments in this case, which were recorded before issue, were conflicting assignments.

Nor is there any difficulty about proving the assignments, if notice to produce and subpoena duces tecum fail to secure the originals, the copies recorded in the Patent Office would be competent.

Motion to require complainant to prove them as part of his prima facie case is denied.

TOLMAN BROS. MFG. CO. v. SILBERSTEIN.

(Circuit Court, S. D. New York. December 16, 1909.)

PATENTS (§ 312*)—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

Evidence held insufficient to warrant the granting of a preliminary injunction against infringement of an unadjudicated patent, or to restrain alleged unfair competition.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 312.*]

Grounds for denying temporary injunctions in patent infringement suits, see note to Johnson v. Foos Mfg. Co., 72 C. C./A. 123.]

In Equity. Suit by the Tolman Bros. Manufacturing Company against Albert L. Silberstein. On motion for preliminary injunction. Application denied.

Alan M. Johnson, for complainant.

A. B. Keve, for defendant.

NOYES, Circuit Judge. The patent in suit has never been adjudicated, and the defendant asserts that he intends to contest its validity. The affidavits and earlier patents show that there is a serious question as to its novelty. The proof as to long-continued acquiescence is not sufficient. Regarded as a suit to restrain the infringement of a patent, the case is too doubtful to warrant the issuance of a preliminary injunction.

If it be possible to regard the suit as one to restrain unfair competition, the same conclusion must be reached. The affidavits fail to show imitation of the complainant's article in unessential particulars.

The application for a preliminary injunction is denied.

BOISE CITY IRRIGATION & LAND CO. v. TURNER et al.

(Circuit Court, D. Idaho. July 6, 1905.)

WATERS AND WATER COURSES (§ 254*)—IRRIGATION COMPANIES—VALIDITY OF CONTRACTS.

Private contracts between an Idaho irrigation company and landowners, granting water rights at fixed prices, made in good faith prior to Act Idaho March 7, 1895 (Acts 1895, p. 174), enacted pursuant to article 15 of the state Constitution, which contracts were valid when made, were not affected by such act or subsequent legislation, and remain valid and enforceable.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 311; Dec. Dig. § 254.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Equity. Suit by the Boise City Irrigation & Land Company against Jane E. Turner and others. On demurrer to bill. Demurrer sustained.

Wood & Wilson, for complainant.

W. E. Borah, for defendants.

BEATTY, District Judge. The complainant is the owner of the irrigating system described in the complaint. While the Central Canal & Land Company owned the system, it sold on September 2, 1889, two water rights, to cover 159.65 acres, which now belong to defendant Ash; that on June 15, 1889, it sold another water right, covering 80 acres of land, and on June 10, 1891, another, covering another 80 acres, both of which rights are now owned by defendant Briggs; that on said last date it sold two other water rights, for 160 acres, which are now owned by defendant Turner; that on May 10, 1892, the Boise City & Nampa Irrigation Land & Lumber Company, which had become the owner of said system, sold 1.6 water rights, covering about 160 acres of land, which rights are now owned by defendant Kampner. Such sales were evidenced by an instrument in writing termed "an indenture and agreement," a copy of which is attached to the brief of complainant's counsel, but is not made a part of the complaint. It is, however, accepted as a correct copy of the instrument of conveyance. The complainant now asks that, in view of the constitutional provisions and the statutes in pursuance thereof, the said sales or contracts be set aside.

The Constitution (article 15) provides, by section 1, that:

"The use of all waters now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution, also of all water originally appropriated for private use, but which after such appropriation has heretofore been, or may hereafter be, sold, rented, or distributed, is hereby declared to be a public use, and subject to the regulation and control of the state in the manner prescribed by law."

By section 2:

"The right to collect rates or compensation for the use of water supplied to any county, city, or town, or water district, or the inhabitants thereof, is a franchise and cannot be exercised except by authority of and in the manner prescribed by law."

And by section 6:

"The Legislature shall provide by law the manner in which reasonable maximum rates may be established to be charged for the use of water sold, rented or distributed for any useful or beneficial purpose."

The Constitution was adopted August 6, 1889, ratified by the people November, 1889, and approved by Congress July 3, 1890 (Act, July 3, 1890, c. 656, 26 Stat. 215). The first legislative act in pursuance of the Constitution for the regulation of water rates was March 7, 1895 (Acts 1895, p. 174).

The complainant claims that the disposal of water for irrigation purposes is governed alone by the Constitution and laws, and that all contracts whenever made concerning the same, between the parties, may be held void and subject to the regulations prescribed by law. With-

out further discussion, it may be conceded that, as to all contracts made since the Constitution and laws became operative, such claim is correct; but the defendants maintain that contracts made prior to the enactment of such laws and the Constitution are not controlled thereby and are valid. I can but briefly refer to some of the authorities cited by counsel.

In *Lanning v. Osborne* (C. C.) 76 Fed. 319, it is held that water must be distributed according to law, and not according to contract between the parties; but it appears that the provisions of the California Constitution relating to this subject were adopted in 1879, and the act of the Legislature in pursuance of the constitutional provisions was enacted March 12, 1885, while it was not until 1887 to 1888 that the contract between the parties was made.

In *Boise City Irrigation & Land Co. v. Clark*, 131 Fed. 416, 65 C. C. A. 399, the only question before the court was the application of the irrigation company to have annulled an order of the commissioners fixing the maximum rate. There are statements in the decision which tend to support complainant's position, although this question is not directly involved; but it must be noted that the court acted upon the understanding that the "water in question was appropriated by the predecessors in interest of the appellant under and in pursuance of the constitutional and statutory provisions of the state," which statement is in effect repeated, so that the court acted upon the idea that all contracts involved were subsequent to the Constitution and the laws in pursuance of it.

In *San Diego Flume Co. v. Southern*, 90 Fed. 164, 32 C. C. A. 548, it appears that while the Constitution and laws regulating the use of water were in force, and before any steps had been taken under such laws, a contract was made between the parties. Subsequently a rate was fixed in pursuance of the law. As I understand the ruling, it is that, until a rate is fixed by law, the contract between the parties is valid; but in this case, while a rate had been fixed by law since the contract was made, neither party asked the enforcement of the legally fixed rate, but one party desired the cancellation of the old contract, while the other asked its enforcement, and the court enforced it. It does not directly decide the question involved here.

It appears in *Stanislaus County v. San Joaquin Irrigation Co.*, 192 U. S. 201, 24 Sup. Ct. 241, 48 L. Ed. 406, that in 1862 a law was enacted allowing water companies to so charge as to make not less than 18 per cent. on their investment, under which law the company incorporated, built its works, and furnished water until 1896, when the board of supervisors passed an ordinance changing the rate to not less than 6 nor over 18 per cent. The water company asked the annulment of such ordinance, which the court refused, and held that the law under which the company incorporated was subject to amendment, which should bind all parties, and that the company incorporated under this law, did so with notice that it could be amended; but it is variously suggested that a law so framed as not to imply the power of such amendment as to change contracts made under it would protect such contracts.

There are numerous other citations, state and national, bearing upon this subject, which I shall not take time to review. These decisions, as well as other established principles, considered, I conclude that contracts entered into between parties under a valid law become vested interests, which cannot be annulled, unless there is something in the law itself implying that contracts made under it must be controlled or affected by possible changes in the law. It may be said that all laws, regardless of their phraseology, are subject to amendment, and that all who make contracts under them do so with implied notice of such change; but to concede this would be an admission that no contract can be made which cannot be legislated out of existence. This is repugnant to all constitutional law and cannot be tolerated. It is also concluded that when the law itself, through designated officers, fixes the rate, instead of the parties doing it by contract, such rate is subject to change according to a change of the law or action of such officers; also that, even when the law directs how the rate may be fixed by certain officers, until they so fix it, any contract between the parties is valid.

The next question is as to what law was in operation when these contracts here involved were made. They were severally made in September and June, 1889, June, 1891, and May, 1892. The Constitution was adopted by the people in November, 1889, and approved by Congress July 3, 1890. Whether the Constitution went into effect in 1889 or 1890, two of the contracts were prior, and three were subsequent, to that event. But, without discussion of the authorities cited on the question, I do not think that the Constitution on this subject is self-operating, and did not go into effect until the legislative enactment putting it into motion, which was, as stated, in 1895, long after all the contracts were made. I think the contracts were, under the law, valid when made, and so continue, notwithstanding the subsequent Constitution and laws, and that the demurrer should be sustained.

Certainly it may be argued, as it has been, that the enforcement of these contracts is a hardship to the company, as well as to the other water users, who may have to pay a higher rate to make good to the company its losses on them. It is, however, presumed that when these contracts were made the predecessor in interest of this company received some consideration for making them, which is presumed to inure to the benefit of this company. At any rate, it bought with knowledge of them. If it made an improvident contract, it can hardly ask the court to correct that misfortune, which is not alleged to be the result of either fraud or mistake. The only pretext the court can adopt to annul these contracts would be that a change of facts and circumstances has rendered unconscionable what was once fair and reasonable. I would not feel justified in so doing.

The demurrer is sustained.

In re DAY.

(District Court, M. D. Tennessee. May 8, 1909.)†

No. 1,909.

BANKRUPTCY (§ 140*)—ASSETS—INSURANCE POLICIES—TRUST PROPERTY.

On a petition filed by the trustee in bankruptcy to review an order of the referee holding that the proceeds of certain life insurance policies taken out by the bankrupt in favor of his wife, which did not accrue until after his death, belonged to the wife, *held*, that they did not constitute a trust fund held by her for the benefit of herself and children, free from the claims of the creditors of the firm, in which the husband and wife were partners, under Acts Tenn. 1897, c. 82.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 225; Dec. Dig. § 140.*]

In the matter of Mary Day, bankrupt. On petition of receiver to review an order of the referee. Reversed, with directions.

W. H. Williamson, for trustee.

W. S. Lawrence and W. D. Covington, for bankrupt.

SANFORD, District Judge. I am of opinion that the proceeds of the life insurance policies in question are subject to the claims of the creditors of the firm of which Mrs. Day, the bankrupt, was a partner, and do not constitute a trust fund held by her for the benefit of herself and children, free from the claims of such creditors.

1. It is unnecessary to determine whether the proceeds of the policies taken out by R. E. Day on his life in favor of his wife, which did not accrue until after his death, at a time when she was a feme sole, became her technical separate estate under the doctrine stated in *Southern Insurance Co. v. Booker*, 9 Heisk. (Tenn.) 606, 618, 24 Am. Rep. 344, and *Scobey v. Waters*, 10 Lea (Tenn.) 551, 562, the force of which is perhaps indirectly impaired by the subsequent case of *Handwerker v. Diermeyer*, 96 Tenn. 619, 36 S. W. 869.

Whether the proceeds of such policies constitute either a general or separate estate of Mrs. Day, they are subject to the claims of the firm's creditors under the provisions of chapter 82 of the Acts of Tennessee of 1897. It was held by the Supreme Court of Tennessee in 1893, in *Theus v. Dugger*, 93 Tenn. 41, 23 S. W. 135, that, where a married woman had embarked her separate estate in a mercantile business as a partner, she was not bound by a note executed for partnership purposes in the name of the firm, so that a personal judgment could be rendered against her on such note, over her plea of coverture, or so that her separate estate so embarked in the business could be subjected to the payment of such note in the absence of an express contract to that effect. Shortly afterwards the act of 1897 was passed, which provided that:

"When married women are engaged in the mercantile or manufacturing business in their own names, or by an agent, or as partner, they shall be liable for the debts incurred in the conduct of such business as if they were feme soles, and no plea of coverture will avail in such cases."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes

† Received for publication February 22, 1910.

While this statute is to be strictly construed as one in derogation of the common law, nevertheless, even when thus construed, it plainly makes all the property of a married woman liable for the partnership debts exactly as if she were unmarried, so that not merely her general estate, but also her technical separate estate, is subject to their payment. If it had been intended merely to remove the defense of coverture in a suit upon such debts, and to render only her general estate liable to be taken in satisfaction therefor, manifestly nothing would have been necessary in the act other than the provision that in suits upon partnership debts no plea of coverture would avail, and the further provision that such married women should "be liable for the debts incurred in the conduct of such business as if they were feme soles" would be entirely superfluous.

Clearly, therefore, as all of the property of a feme sole would be liable for the firm debts, by the express terms of the statute all the property of a married woman must be equally liable. This construction is in accord with the rule stated in 21 Cyc. 1466, that:

"When power is given a married woman by statute to carry on a trade or business on her separate account, she may contract debts in relation to such business, and she personally, if the statute so provides, or at least her separate property, will be liable for the same."

The case of *Burk v. Platt*, 88 Ind. 283, 285, which is among those cited in support of this proposition, is directly in point. The question in that case was whether the separate real estate of a married woman was subject to sale upon an execution issued against her under a judgment upon a contract made during coverture in carrying on business as the member of a firm. Under an Indiana statute all lands of a married woman were made her separate estate. The court said:

"The course of legislation is decidedly in the direction of enlarging the property rights of married women, and these enlarged rights necessarily carry with them increased liabilities. By section 5122, Rev. St. 1881, coverture is no bar to a married woman contracting debts in carrying on any trade, labor, or business on her sole and separate account, or as a partner with another. If she can contract such debts, it follows that their collection may be enforced; but if they can be enforced only against her personal property, to the exemption of her real estate, the power to contract debts in her trade or business would be greatly limited. Credit in commercial matters is based largely upon the ability of the debtor to pay his debts. Certainly the Legislature did not intend to confer upon married women the power to contract debts for the purposes of their trade or business, and at the same time greatly to impair their credit by making their personal property only subject to execution to satisfy such debts. We think it must be held, in all cases where a married woman may contract a debt, that her property, real as well as personal, is liable for its payment, the same as if she were unmarried."

By parity of reasoning, it must be held that in all cases where a married woman may under the Tennessee statute contract a business debt, her estate, both general and separate, is liable for its payment, as if she were unmarried.

2. Sections 2294 and 2478 of the Code of Tennessee of 1858 (Shannon's Code, §§ 4030, 4231), providing that any insurance effected by a husband on his own life shall inure to the benefit of the widow and children free from claims of his creditors, do not, where the husband effects the insurance on his own life for the benefit of his wife as bene-

fiary, create a trust fund in favor of the wife and children as a family, which cannot be reached by her creditors. While it is true that in the case of *Harvey v. Harrison*, 89 Tenn. 470, 14 S. W. 1083, in which these statutes were considered, it was said that the purpose of these enactments was to enable the husband or father to provide a fund after his death for his family, the question there involved was merely whether a policy taken out by the husband on his own life in favor of his wife became subject to the claims of his creditors because the children were not also named as beneficiaries in the policy, and the only point decided was that the proceeds of such policy, when collected by the wife, were free from the claims of his creditors. The question as to the capacity in which she held such proceeds, whether as her general or separate estate, or in trust for herself and the children, was neither involved in the case nor referred to in the opinion.

It is clear, however, that the statutes in question relate only to exemption from liability for the debts of the husband, and in no way create any exemption from liability for the debts of the beneficiaries themselves as named in the policies.

3. As it appears that the petition for adjudication in bankruptcy was filed against Mrs. Day, as surviving partner of Day & Co., and neither the stipulated facts nor the referee's certificate show that there are any of her individual creditors whose claims are involved, it is unnecessary at this time to pass upon their rights, if, any, in the proceeds of the policies.

4. An order will accordingly be entered, overruling the order made by the referee in reference to the policies, and directing that the proceeds thereof, now in the hands of the Nashville Trust Company, be turned over to the trustee in this cause, to be distributed for the benefit of the creditors of the firm of R. E. Day & Co.

MILLER V. CHICAGO & A. R. CO.

CHICAGO & A. R. CO. v. MILLER.

(Circuit Court, S. D. New York. December 8, 1909.)

1. CORPORATIONS (§ 591*)—CONSOLIDATION—RIGHTS OF NONASSENTING STOCKHOLDERS.

Allegations that a stockholder in a railroad company purchased the share of an issue of bonds by the company allotted to his stock, that he acquiesced in and accepted a special dividend and also assented to a lease of all the company's property to another company, and that such acts were all done with a view to the consolidation of the two companies and with the stockholders' knowledge and consent, are not sufficient to charge him with knowledge of such purpose to consolidate, or with consenting thereto, which would entitle the company to a decree requiring him to surrender his stock in exchange for stock in the new company.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 591.*]

Rights and liabilities of stockholders of railroads on consolidation, see note to *Bonner v. Terre Haute & I. R. Co.*, 81 C. C. A. 480.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. CORPORATIONS (§ 591*) — SUIT BY STOCKHOLDER AGAINST CORPORATION — PLEADING.

Exceptions to the answer to a bill filed by a stockholder against the corporation considered.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 591.*]

In Equity. Suit by William Starr Miller against the Chicago & Alton Railroad Company. On demurrer to cross-bill and exceptions to answer to original bill. Demurrer sustained, and exceptions sustained in part.

Philbin, Beekman & Menken, for complainant.

Joline, Larkin & Rathbone, for defendant.

LACOMBE, Circuit Judge. A demurrer to the original bill was heretofore considered by this court and overruled. 171 Fed. 253. The facts will be found sufficiently stated in that opinion. The cross-bill is brought to compel plaintiff to give up his shares of stock in the old Alton Railroad for stock of the Consolidated Railroad as and on the terms provided in the agreement of consolidation, upon the theory that the complainant assented to, approved, and participated in said consolidation.

The facts upon which cross-complainant undertakes to establish such assent and participation are these: (A) In 1899, more than six years before consolidation and a year before the Alton Railway was incorporated, the old Alton Railroad issued \$40,000,000 mortgage bonds, to which its stockholders were given the right to subscribe on favorable terms. Miller approved and consented to this issue, and subscribed for and purchased his ratable share of said bonds. (B) In the year 1900 the old Alton Railroad duly declared and paid a special dividend of 30 per cent. on its stock. Miller approved and consented to said dividend and received his ratable share thereof. (C) On April 3, 1900, the old Alton Railroad duly leased all its property to the Alton Railway for a rental amounting to the entire net earnings of the property demised. Miller consented to and ratified such lease and has accepted dividends arising from and in accordance with the terms of the lease.

The cross-bill avers that these three transactions were "each and all done with the purpose of effectuating and as a means of effectuating the consolidation of the old Alton Railroad and the Alton Railway herein described. On information and belief, each of said steps was taken with the knowledge and consent of the respondent and participated in by him." It will be observed that the pleader does not assert, even on information and belief, that Miller himself had any "purpose of effectuating consolidation," or even any knowledge that such was the purpose of the individuals who caused these preliminary steps to be taken. In a subsequent paragraph (14) the cross-bill alleges that "respondent assented to, approved, and participated in said consolidation"; but this allegation is qualified in the same paragraph by the allegation "that by all and singular the acts of acquiescence, ratification, and consent heretofore alleged, and by other and divers acts, the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

respondent herein consented, agreed, and became in duty bound under said articles of consolidation to exchange his said shares of stock in the manner therein provided for such exchange."

On the argument the court was inclined to the opinion that the phrase "other and divers acts" was sufficiently broad to sustain an allegation of full knowledge and acquiescence; but it is now thought that these words must be construed to mean only "acts" similar to those already enumerated. So we are brought merely to A, B, and C, with no averment that Miller ever contemplated or sought to effectuate consolidation, or had the remotest idea that such was the purpose of those who were the controlling spirits in these transactions.

The facts averred are not sufficient to warrant the relief prayed in the cross-bill. As to the suggestion that having purchased stock in a corporation which might, under the statutes of the state which created it, consolidate with another, if two-thirds of the stockholders voted so to do, it is sufficient to refer to the articles of consolidation, which expressly provide for those who are unwilling to surrender their stock in the old company. The views expressed in the former opinion have not been modified by the subsequent argument of this demurrer to the cross-bill.

The demurrer is sustained, and cross-bill dismissed.

Exceptions to Answer to Original Bill.

Certain averments are made in the bill as to the earnings of the Alton Railway lines and the disposition made of income derived by the said railway from stock of the old Alton. The answer asserts these allegations to be immaterial, and for that reason fails to admit or deny them. It is by no means certain that, even if the suit is maintained solely on the terms of the consolidation agreement, the facts as to these matters may not be helpful towards a construction of that contract. The first four exceptions for insufficiency are therefore sustained, and defendant should admit or deny the averments.

The fifth exception is also well-founded. If defendant's books are so kept that it is not possible to determine readily without a long accounting whether or not earnings derived from properties and franchises of the old Alton have been applied to the payment of charges against the properties of the Alton Railway, etc., that fact should be asserted, and will excuse answering the averments of the bill in that regard. But if defendant knows the fact to be as charged, or knows that it is not as charged, the allegations of the bill in that regard should be admitted or denied.

The sixth exception is overruled. The averments criticised seem to state the facts sufficiently to define the issues. It is overruled, and so is the seventh.

The remaining exceptions are to the answers to some of the interrogatories annexed to the bill. Generally speaking, these ask for much fuller details than the complainant is now entitled to have. To answer them would apparently require a long accounting, such as would ensue upon a decree for complainant on the merits.

The ninth exception is overruled, and so is the twelfth. Answer to the latter will be unnecessary after defendant has amended its answer

so as to meet the first four exceptions. The thirteenth and fourteenth exceptions are also overruled.

The seventeenth exception is sustained. Manifestly the interrogatory is not answered fully, and no sufficient reason is shown for not answering it.

The eighteenth, nineteenth, and twentieth exceptions are overruled. The answers to interrogatories 9, 10, and 11 give the information in sufficient detail for the purposes of the trial.

It would seem that the so-called separate defense is not the subject of exception. The three which have been taken thereto are overruled.

UNITED STATES v. BOECKMANN.

(Circuit Court, E. D. New York. January 15, 1910.)

FOOD (§ 12*)—FOOD AND DRUGS ACT—"MISBRANDED."

A food product, labeled "Compound: Pure Comb and Strained Honey and Corn Syrup," is not "misbranded," within the meaning of Food and Drugs Act June 30, 1906, c. 3915, § 8, 34 Stat. 771 (U. S. Comp. St. Supp. 1909, p. 1191), so that its shipment in interstate commerce constituted a misdemeanor thereunder, merely because the percentage of corn syrup in the compound largely exceeds that of honey.

[Ed. Note.—For other cases, see Food, Dec. Dig. § 12*]

Criminal prosecution by the United States against Henry Boeckmann. On demurrer to indictment. Demurrer sustained.

William J. Youngs, U. S. Atty. (William P. Allen, Asst. U. S. Atty.. of counsel), for the United States.

Otto F. Struse, for defendant.

CHATFIELD, District Judge. A demurrer has been interposed to an indictment charging the defendant with having shipped from the state of New York to the state of New Jersey, a certain article of food for man, labeled "Compound: Pure Comb and Strained Honey and Corn Syrup"; that the label was false and misleading, and the contents of the jar misbranded, in that "the said label represented the principal ingredient of the said contents of said glass jar to be pure comb honey," when in fact the contents were "almost wholly glucose and starch sugar, and the said contents of the said glass jar in truth and in fact consisted of a very small percentage of pure comb honey."

It has been called to the attention of the court that under the authority of the statute of June 30, 1906 (Act June 30, 1906, c. 3915, 34 Stat. 768 [U. S. Comp. St. Supp. 1909, p. 1187]), certain regulations for the guidance of the public, and for carrying out the provisions of the law, have been made by the Secretary of Agriculture, and certain rulings or decisions by the Secretary of Agriculture have construed the language of the statute. For instance, Food Inspection Decision No. 75 provides that:

"When both maple and cane sugars are used in the production of syrup, the label should be varied according to the relative proportion of the ingredients,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes

the name of the sugar present in excess of fifty per cent. of the total sugar content should be given the greater prominence on the label; that is, it should be given first."

Also, Food Inspection Decision No. 87 provides that "viscous syrup obtained by the incomplete hydrolysis of the starch of sugar" should be labeled "corn syrup with cane flavor," if a small percentage of the product of the cane is added thereto.

There is no charge of any violation of regulations, or refusal to comply with the rulings of the Commissioner of Agriculture; but the case presents an entirely distinct question, depending upon the provisions of the statute itself.

In the present indictment we have an allegation that the defendant has put upon the market, for interstate commerce, an article which is misbranded, in that the label is misleading, solely because the principal ingredient is alleged to be held out to the public as "pure comb honey," when in reality "glucose and starch sugar" made up almost wholly the actual "principal ingredient."

Under the decision of *In re Wilson* (C. C.) 168 Fed. 566, such a label as is recited would not be contrary to fact, and this court agrees in the opinion that it is impossible to say what portion of the label as printed would signify greater percentage of the product.

The demurrer will be sustained.

MAY v. RHODE ISLAND CO.

(Circuit Court, D. Rhode Island. February 5, 1910.)

No. 2,908.

STREET RAILROADS (§ 90*)—INJURY AT CROSSING—ACTION—CONTRIBUTORY NEGLIGENCE.

Where it was shown by the positive testimony of disinterested and reputable witnesses that a plaintiff, injured while crossing the track of an electric railroad, with nothing to obstruct his view, drove upon the track such a short distance in front of the moving car by which he was struck that the motorman could not stop the car in time to prevent the accident, although he endeavored to do so, a verdict for plaintiff against the railroad company will be set aside as against the evidence.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 209-216; Dec. Dig. § 99.*]

Action by Patrick May against the Rhode Island Company. On petition by defendant for new trial. Granted.

See, also, 72 Atl. 562.

A. B. Crafts, for plaintiff.

J. C. Sweeney, for defendant.

BROWN, District Judge. Upon the whole testimony the plaintiff's negligence is so conclusively shown that it is evident that the jury did not observe the instructions of the court as to the law of contributory negligence. A number of disinterested and respectable witnesses testified that when the plaintiff turned to cross the track the car was so near that a collision was inevitable. According to positive testimony

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the motorman immediately endeavored to stop the car, and his failure to avoid the collision was due, not to the lack of effort or due diligence on his part, but to the nearness of the place at which the plaintiff attempted to cross the track.

The sole testimony tending to show the slightest degree of care on the part of the plaintiff is from the plaintiff himself, who says that he turned to cross behind a car going west, and that his horse's head was about one foot from the rail when he looked up the track, in the direction from which the car that struck him was coming, for a considerable distance. His statement that he looked out is directly contradicted by several witnesses, and by the fact that, if he had looked, he must have seen the car but a short distance away.

Upon a former trial of this case in the state court the plaintiff recovered a verdict, which was set aside by the trial judge, whose action in so doing was affirmed by the Supreme Court of Rhode Island. 72 Atl. 562.

While the fact that two juries have found for the plaintiff should have its weight, this does not relieve this court of the duty of determining whether the testimony affords any reasonable basis for a verdict to the effect that the defendant was proved guilty of negligence, and that the proof failed to show that the plaintiff was guilty of negligence. When carefully reviewed, the evidence shows beyond a reasonable doubt the plaintiff's negligence, and is clearly insufficient to justify a finding that the defendant's motorman was negligent.

Petition for a new trial is granted.

HITNER et al. v. DIAMOND STATE STEEL CO.

(Circuit Court, D. Delaware. February 28, 1910.)

No. 260.

(Syllabus by the Court.)

1. CORPORATIONS (§ 568*)—INSOLVENCY—PAYMENT OF CLAIMS.

One having a pecuniary claim ascertained in amount against an insolvent corporation in the hands of receivers, and holding collateral security for its payment, has a right in equity to receive out of its general assets pro rata dividends calculated on the basis of the amount of the corporate indebtedness to him existing at the time of the declaration of insolvency, including interest thereon, if any, to that time, without regard to such collateral security or any payment or payments he may have received on account of his claim since that time, provided, that he shall not receive and retain from any or all sources more than the real amount of his claim, with interest thereon until paid, aside from any costs, charges and expenses incurred by him in the enforcement of or realization upon such collateral security.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2288; Dec. Dig. § 568.*]

2. CORPORATIONS (§ 568*)—INSOLVENCY—RIGHTS OF SECURED CREDITOR.

One having a pecuniary claim ascertained in amount against an insolvent corporation in the hands of receivers, holding as collateral security for its payment bonds issued to him by it as such collateral, secured by a mortgage of a portion of its property executed by it, has no right in equity to receive out of its general assets pro rata dividends calculated on the basis of the aggregate amount not only of the corporate indebtedness to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

him existing at the time of the declaration of insolvency, including interest thereon, if any, to that time, but also of the face value of such bonds so far as unpaid at that time including the stipulated interest thereon.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2288; Dec. Dig. § 568.*]

3. CORPORATIONS (§ 568*) — INSOLVENCY — DISTRIBUTION OF ASSETS — UNPAID BALANCE.

There is a broad distinction between continuance in force of the contractual relations, notwithstanding insolvency, between lender and borrower where collaterals have been pledged, and ability to contravene the equitable rule of equality, subject to established liens, preferences and priorities, as between creditors with respect to general assets. It is a function of a suit in equity brought for the purpose of administering the affairs, paying the debts, and distributing the assets of an insolvent corporation, through or by means of a receivership, to effect a pro rata distribution of such assets among the creditors, subject to established liens, preferences and priorities, and a creditor, whether secured or unsecured, has obtained full satisfaction of his claim with respect to the general assets, so far as the particular proceedings in equity are concerned, when, aside from any lien, preference or priority held or possessed by him, he has received his full pro rata share of the general assets. If he has not received payment in full of the real indebtedness to him, the unpaid balance still constitutes a claim against the corporation which he may or may not succeed in collecting at some future time. It is as unsound to assume that he may receive from the general assets double dividends by reason and on account of two promises or obligations made for one and the same debt as it would be to assume that in a case of solvency the same creditor could receive double satisfaction by reason of a mere duplication of a promise or obligation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2288; Dec. Dig. § 568.*]

In Equity. Action by Henry A. Hitner and Joseph G. Hitner against The Diamond State Steel Company. Exceptions to report of special master. Exceptions sustained in part.

William Clarke Mason, for exceptant.

John Biggs, for claimants.

BRADFORD, District Judge. This case comes before the court on exceptions to the report of the special master. The Diamond State Steel Company was declared insolvent by this court December 12, 1904, and on the same day receivers were appointed who forthwith qualified and entered upon the discharge of their duties. The steel company then owned a manufacturing plant in Wilmington, including real and personal property, of which the larger part was subject to the lien of a mortgage executed by the company May 1, 1901, to secure an issue of bonds to be made, bearing the same date, of the face value of \$1,000,000, and also a further issue of bonds of the face value of \$750,000, to be made from time to time as should be authorized by the stockholders to secure working capital and extensions to the plant. All of the first mentioned amount of bonds were issued and outstanding either as collateral or in absolute ownership at the time of the declaration of insolvency and known as first mortgage bonds. The property covered by the mortgage has been sold free and discharged from the mortgage lien, the right being secured by order of this court to holders of bonds

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

issued under the mortgage to have recourse against the net proceeds of sale instead of the property mortgaged. Aside from such proceeds of sale there is a fund of general assets in the hands or subject to the control of the receivers applicable to claims against the steel company, whether secured or unsecured. Prior to the filing of the exceptions under consideration there was declared and paid out of the proceeds of sale of the mortgaged property a dividend of forty per cent upon the face value of the first mortgage bonds, and since that time an additional dividend of seven per cent upon such face value has been declared payable from the same source. The only dividend declared and payable out of the general assets, amounting to eight per cent upon the claims, secured and unsecured, against the steel company, was so declared and made payable since the filing of these exceptions. The holders of the first mortgage bonds thus have received or become entitled to dividends out of the proceeds of sale of the mortgaged property amounting to forty-seven per cent of their face value, and a dividend from the general assets amounting to eight per cent of such face value, aggregating fifty-five per cent; while creditors of the steel company, other than holders of its bonds, and not entitled to share in the proceeds of sale of the mortgaged property, and not having priority or preference of any kind, have received or become entitled to a dividend out of the general assets amounting to eight per cent only. The steel company executed and delivered to the Fourth Street National Bank of Philadelphia June 1, 1904, its promissory note dated that day for twenty thousand dollars, payable according to its terms September 1, 1904, in Philadelphia, delivering as collateral security for its payment certain first mortgage bonds of the steel company of the aggregate face value of nineteen thousand dollars, and certain consolidated mortgage bonds of the Lehigh and New England Railroad Company of the aggregate face value of \$6,720. The note was in the following form:

"\$20,000.00

Philadelphia, June 1st, 1904.

On September 1st, 1904, for Value Received, we promise to pay to the order of The Fourth Street National Bank, Philada. Twenty Thousand Dollars, having deposited as collateral security for payment of this or any other liability or liabilities to said holder hereof, due or to become due, or that may be hereafter contracted, the following property, viz:

\$19,000.00 The Diamond State Steel Co. 1st mtge. 4% bonds

\$6,720.00 L. & N. E. R. R. Co. 5% constd. mtge. bonds

with the right on the part of the holder hereof, to repledge the securities above mentioned, or to substitute or exchange for the same other certificates of like tenor and amount, and also from time to time to demand additional collateral security, and upon failure to comply with any such demand, this obligation shall forthwith become due, with full power and authority, to the holder hereof, or assigns, in case of such default, or of the non-payment of any of the liabilities above mentioned at maturity, to sell, assign and deliver the whole, or any part of such securities, or any substitutes therefor or additions thereto, at any broker's board, or at public or private sale, at their option, at any time or times thereafter, without advertisement or notice to the undersigned, and with the right on the part of the holder hereof, to become purchaser thereof at such sale or sales, freed and discharged of any equity of redemption. And after deducting all legal or other costs and expenses for collection, sale and delivery, to apply the residue of the proceeds of such sale or sales so made, to pay any, either or all of said liabilities, as said holder hereof shall deem proper, returning the overplus to the undersigned; and the undersigned will still remain liable for any amount so unpaid. It being further understood

and agreed that The Fourth Street National Bank of Philadelphia shall have a like lien upon any and all funds, stocks, bonds, notes, and other property at any time in the hands of the said Bank belonging to the maker, or endorser or endorsers, or guarantor or guarantors hereof, as security for this note and for any and all liability or liabilities, matured or unmatured, of such maker, endorser or endorsers, guarantor or guarantors to said Bank, which lien shall be enforceable in like manner and shall be subject to all the provisions herein above and before mentioned and set out.

Payable at The Fourth Street National Bank.

The Diamond State Steel Co.,

Frank W. Todd, Assistant Treasurer.

The Diamond State Steel Co.,

H. T. Wallace, President."

The bank presented to the special master a statement of claim, No. 49, sworn to October 10, 1905, referring to the above note as "constituting" its claim against the steel company and "the proceeds of any sale of its real or personal property," and setting forth in substance, among other things, that the steel company was at the time of the declaration of its insolvency and at the time of making claim indebted to the bank in the sum of \$14,624, beside interest as therein stated, that sum being the excess of the \$20,000 specified in the note over and above a credit of \$5,376 representing proceeds of sale of the consolidated mortgage bonds of the Lehigh and New England Railroad Company, and further that the bank at the time of making claim held as collateral security for its payment first mortgage bonds of the steel company of the face value of \$19,000. Subsequently the bank presented to the special master a further statement of claim, No. 209, sworn to February 15, 1906, setting forth in substance that it "is the holder of and owner of the legal title to" first mortgage bonds of the steel company of the aggregate face value of \$19,000 on which interest was due to the bank from May 1, 1904; that the total amount due to the bank on the bonds was \$19,000, with interest as above specified; and that the steel company at the time of the declaration of its insolvency and at the time of making claim was indebted to the bank in the sum of \$19,000, with interest. The statement of claim further set forth as follows:

"This deponent, for and on behalf of the said The Fourth Street National Bank of Philadelphia, the said claimant, expressly and specifically claims that it, the said The Fourth Street National Bank of Philadelphia is entitled to be paid the said sum of nineteen thousand dollars (\$19,000), with interest as aforesaid, as a preferred creditor under the lien of the said mortgage, out of any or all of the proceeds that may be derived from the sale of the property covered by said mortgage (claiming such preference, however, equally with and upon the same basis as other holders of said bonds so as aforesaid actually issued to the extent of one million dollars), and further expressly and specifically claims that it, the said The Fourth Street National Bank of Philadelphia is entitled to be paid the said sum of nineteen thousand dollars (\$19,000), with interest as aforesaid, as a general creditor, out of the proceeds of the sale of all property of the said The Diamond State Steel Company other than the property covered by said mortgage; that nothing has been paid on account of the said claim of it, the said The Fourth Street National Bank of Philadelphia as a bondholder, and there are no offsets or counterclaims of any kind in favor of the said The Diamond State Steel Company to said claim or any part thereof."

It appears from their serial numbers and is not disputed that the first mortgage bonds of the face value of \$19,000 delivered as collateral se-

curity for the payment of the \$20,000 note were the same bonds on which the last mentioned claim was made by the bank. The special master after duly taking evidence allowed, with some modification as to interest, both claims as presented by the bank; and included the aggregate amount of \$39,000, representing \$20,000, the principal sum owing on the promissory note December 12, 1904, the date of the declaration of insolvency, and \$19,000, the face value of the first mortgage bonds delivered as collateral, together with interest on these two sums to that date, in his ascertainment of the basis on which the bank should receive dividends out of the general assets of the steel company in so far as necessary to the payment in full of the real indebtedness of that company to the bank with interest thereon to the time of the declaration of insolvency. Accordingly, in the schedule of "general creditors" entitled to participate by way of dividends in the general assets, and for the purpose of payment in full as above mentioned, the bank was reported by the special master as a creditor of the steel company as follows: "49 & 209. Fourth Street National Bank of Philadelphia, \$39,803.22," the sum of \$803.22 representing interest on \$20,000 and \$19,000 to the date of the declaration of insolvency. The Manufacturers' National Bank of Philadelphia also appears in the schedule of "general creditors" reported by the special master as a creditor in the sum of \$16,453.36. This amount is made up of \$4,158.70, representing the real indebtedness of the steel company to that bank existing at the date of the declaration of insolvency, including accrued interest, and \$12,000, representing the face value of first mortgage bonds of the steel company delivered by it as collateral security for the payment of the debt and interest thereon, and \$294.66 interest on such bonds to the date of the declaration of insolvency. Without entering into details it is sufficient to say that on the exceptions the same questions in principle are presented in the case of the Manufacturers' National Bank of Philadelphia as in that of The Fourth Street National Bank of Philadelphia, and that the decision of the one case will control the other. Both of these banks under and pursuant to the orders of this court and of the special master, for the purpose of sharing in the proceeds of sale of the mortgaged property, made proof before him of the first mortgage bonds of the steel company delivered to them respectively as collateral security as above mentioned; and in common with those holding and owning similar bonds appear in a separate schedule of bondholders reported by the special master; it appearing from the report that The Fourth Street National Bank of Philadelphia was entitled to receive dividends out of such proceeds of sale on the basis of the face value of bonds held by it as collateral, amounting in the aggregate to \$19,000, with interest thereon from May 1, 1904, at the rate of four per centum per annum, as provided in the bonds and mortgage, and that the Manufacturers' National Bank of Philadelphia was entitled to participate in such proceeds of sale on the basis of the face value of the bonds held by it as collateral, aggregating \$12,000, with interest thereon from the same date and at the same rate. It further appears that, aside from dividends out of the proceeds of sale of the mortgaged property, The Fourth Street National Bank of Philadelphia

has received since the declaration of insolvency on account of the indebtedness of the steel company to it \$5,376, being the amount realized on certain consolidated mortgage bonds of the Lehigh and New England Railroad Company pledged by the steel company as collateral security; and that the Manufacturers' National Bank of Philadelphia held in addition to first mortgage bonds of the steel company of the face value of \$12,000, pledged as above mentioned, claims and book accounts to a considerable amount assigned to it by that company as collateral security for the payment of the indebtedness, for which claims and book accounts, or their proceeds, the bank has not yet accounted to the receivers or special master. From the foregoing statement it thus appears that The Fourth Street National Bank of Philadelphia, having a claim against the steel company, including interest, at the time of the declaration of insolvency, of \$20,336.67, and holding at that time as collateral first mortgage bonds of that company of the face value of \$19,000, on which interest had then accrued to the amount of \$466.55, and also certain consolidated mortgage bonds of the Lehigh and New England Railroad Company, has for the purpose of participation in dividends out of the general assets, declared or to be declared, been treated by the special master as a creditor in the aggregate amount of \$39,803.22; notwithstanding the facts that since the declaration of insolvency the bank has received on account of its real claim \$5,376 from the sale of the consolidated mortgage bonds, and has received also on account of its claim the further sum of \$7,600, being a forty per cent dividend out of the proceeds of sale of the mortgaged property of the steel company, and since the filing of the exceptions this court has declared and authorized the payment to the holders of the first mortgage bonds of an additional dividend of seven per cent out of such proceeds of sale and a further dividend of eight per cent out of the general assets; and it further appears that the Manufacturers' National Bank of Philadelphia having a claim against the steel company, including interest, at the time of the declaration of insolvency of \$4,158.70, and holding at that time as collateral first mortgage bonds of that company of the face value of \$12,000 on which interest had then accrued amounting to \$294.66, and also holding at and after that time certain claims and book accounts to a considerable amount assigned to it by that company as collateral, has for the purpose of participation in dividends out of the general assets, declared or to be declared, been treated by the special master as a creditor in the aggregate amount of \$16,453.36, notwithstanding the facts that the bank has not yet accounted for such claims and book accounts or their proceeds to the receivers or special master, and has received on account of its real claim the sum of \$4,800, being a forty per cent dividend out of proceeds of sale of the mortgaged property of the steel company, and since the filing of the exceptions this court has declared and authorized the payment to the holders of first mortgage bonds of an additional dividend of seven per cent out of such proceeds of sale, and a further dividend of eight per cent out of the general assets.

The exceptants have objected to the report of the special master so far as applicable to the two banks above mentioned; first, in that it

finds that they are entitled to dividends out of the general assets of the steel company, computed on the basis of the amount of their claims existing at the time of the declaration of insolvency without regard to the value of the collateral securities held by them at and after that time or the receipt after that time of any moneys realized from their sale or by way of dividends out of the general assets of the steel company or the proceeds of sale of the mortgaged property; and, secondly, that it finds that they are entitled to dividends out of the general assets computed on the basis of an aggregate amount representing not only the real indebtedness of the steel company to them respectively existing at the time of the declaration of insolvency, with interest to that date, but also the face value of the first mortgage bonds of the steel company held by them respectively as collateral including the stipulated interest thereon. The two questions thus raised may be stated generally as follows:

First: Whether one having a pecuniary claim ascertained in amount against an insolvent corporation in the hands of receivers, and holding collateral security for its payment, has a right in equity to receive out of its general assets pro rata dividends calculated on the basis of the amount of the corporate indebtedness to him existing at the time of the declaration of insolvency, including interest thereon, if any, to that time, without regard to such collateral security or any payment or payments he may have received on account of his claim since that time, provided, that he shall not receive and retain from any or all sources more than the real amount of his claim, with interest thereon until paid, aside from any costs, charges and expenses incurred by him in the enforcement of or realization upon such collateral security.

Second: Whether one having a pecuniary claim ascertained in amount against an insolvent corporation in the hands of receivers, holding as collateral security for its payment bonds issued to him by it as such collateral, secured by a mortgage of a portion of its property executed by it, has a right in equity to receive out of its general assets pro rata dividends calculated on the basis of the aggregate amount not only of the corporate indebtedness to him existing at the time of the declaration of insolvency, including interest thereon, if any, to that time, but also of the face value of such bonds so far as unpaid at that time including the stipulated interest thereon, provided, that he shall not receive and retain from any or all sources more than the real amount of his claim, with interest thereon until paid, aside from any costs, charges and expenses incurred by him in the enforcement of or realization upon such collateral security.

Whatever might be the inclination of this court on the subject were it res integra, the first of these two questions has been set at rest by the Supreme Court in *Merrill v. National Bank of Jacksonville*, 173 U. S. 131, 19 Sup. Ct. 360, 43 L. Ed. 640; the court there fully recognizing and approving the following as the chancery rule:

"The creditor can prove for, and receive dividends upon, the full amount of his claim, regardless of any sums received from his collateral after the transfer of the assets from the debtor in insolvency, provided that he shall not receive more than the full amount due him."

I can perceive no force in, and it is unnecessary to discuss, the contention that the bankruptcy rule, and not the chancery rule, is applicable to this case by reason of certain unsuccessful attempts to have the steel company adjudged a bankrupt, or of the refusal by the district court to allow certain proposed amendments of the petitions in bankruptcy. The administration of the assets is on the equity side of this court and the chancery rule necessarily must apply. The first ground of exception must, therefore, be overruled.

Materially different considerations, however, enter into the solution of the latter of the above questions. It is true that each of the two banks had a right to receive dividends from the general assets of the steel company computed upon the amount of its real claim, including interest, as existing at the time of the declaration of insolvency, and also to proceed for the enforcement of any collateral security for such claim until payment in full of the real indebtedness, with interest to the time of payment, as against third persons liable thereon or any mortgaged or pledged property included in such collateral security. But had either of the banks for the purpose of obtaining full satisfaction of its claim a right to receive dividends out of the general assets computed, not only upon the amount of its real claim, but also upon the amount of the face value of the first mortgage bonds of the steel company held by it as collateral security? Undoubtedly the banks were entitled to the full benefit of the collaterals held by them; but how far can the first mortgage bonds so held, aside from the property mortgaged to secure their payment, legitimately be held to constitute collateral security, and as such to enlarge beyond the amount of the real indebtedness the basis for the computation of dividends out of the general assets? These queries bear no necessary relation to the legality or propriety of a resort, under special circumstances, by one holding mortgage bonds of a corporation issued directly to him as collateral security for the payment of a debt owing by it to him, for the purpose of sharing in the general corporate assets, to such bonds as an alternative or cumulative medium of proof of his right to participate in such assets upon the basis of the real indebtedness. Owing to lapse of time or difficulty otherwise arising it may in certain cases be impracticable effectually to proceed upon the original security or evidence of indebtedness for the purpose of receiving pro rata dividends upon a just demand, and it may well be that the creditor in such a predicament will be allowed for that purpose to establish or strengthen his claim to its real amount through the superior efficacy or evidential value of the bonds held as collateral. But with such special circumstances this court has nothing to do in the case under consideration. The real question here is whether a creditor holding such bonds so issued to him as collateral can through their instrumentality entitle himself to receive out of the general assets dividends computed upon a basis larger than the amount of the actual indebtedness to him, including interest, existing at the time of the declaration of insolvency. The proper solution of this question is simplified by a consideration of one of the essential elements of collateral security in the legitimate sense of the phrase. Such security necessarily involves more than the mere personal responsibility of the debtor. It

hardly admits of discussion that the mere duplication or multiplication of a promise to pay or of an acknowledgment of liability to pay a certain sum representing the total real indebtedness to a creditor, whatever may be its effect in furnishing in certain exigencies alternative or cumulative evidence of the real demand, cannot constitute collateral security. If A. makes and delivers to B. his promissory note for \$1,000, representing the full amount of his real indebtedness to the latter, and contemporaneously or thereafter and without any new or further consideration or the intervention of any third person as joint maker, indorser, surety or guarantor, makes and delivers to B. another promissory note in the same amount, unaccompanied by any mortgage or pledge of or charge or lien upon property, or by any assignment or transfer of any chose in action against a third person, calling it "collateral security," such designation of name will not change the nature of the transaction. Notwithstanding the giving of the two notes the real indebtedness still remains at the sum of \$1,000, secured only by personal responsibility on the part of the debtor, which per se is not collateral security. Jones in his work on Pledges and Collateral Securities, § 1, speaking of this phrase, says:

"The term necessarily implies the transfer to the creditor of an interest in, or lien on property, or an obligation which furnishes a security in addition to the responsibility of the debtor; therefore the execution and delivery by the debtor of additional unsecured evidences of his own indebtedness, does not in any legal sense constitute collateral security."

In Colebrooke on Collateral Securities, § 2, it is stated:

"'Collateral security' is a separate obligation, as the negotiable bill of exchange or promissory note of a third person, or document of title, or other representative of value, indorsed (or assigned) where necessary, and delivered by a debtor to his creditor, to secure the performance of his own obligation, represented by an independent instrument. Such collateral security stands by the side of the principal promise as an additional or cumulative means for securing payment of the debt. The transfer, however, of the debtor's own negotiable promissory notes as collateral security for the payment of other notes made by him, does not come within any definition of collateral security."

If A., in the case above supposed, having the ability, should fully pay to B. the amount of the first note, namely, \$1,000, the extent of the real indebtedness, the latter having received satisfaction in full could have no occasion and would not be permitted to collect from A. any further sum; and if A. were unable to pay to B. the amount of the first note, representing the extent of the real indebtedness, he, of course, would be unable to pay the aggregate amount of the two notes. Thus, in the absence of any indebtedness or pecuniary liability of A. to third persons, neither note, whatever name may be applied to it, could perform the function of collateral security for the payment of the other or of the real indebtedness whatever use might be made of it as evidence to establish such indebtedness. The characterization of either or both of the notes by the maker as "collateral security" would be unavailing. The case would not in equity be varied in principle or result if A. were a corporation and not a natural person and, instead of making and delivering promissory notes, directly issued two of its own bonds each for \$1,000 unaccompanied by any pledge, mortgage or other lien, to

secure the payment of its real indebtedness of \$1,000 to B. The substitution of the mere personal responsibility of the artificial entity for that of the natural person could not in any manner, in the absence of indebtedness or pecuniary liability to third persons, differentiate the one case from the other. Now, let it be assumed that A., the corporation, is indebted or under pecuniary liability to third persons. If the corporation be insolvent, with numerous creditors, secured and unsecured, and in the hands of receivers appointed by a court of equity in proceedings instituted for the purpose of winding up its affairs and distributing its assets, on what principle can its two \$1,000 unsecured bonds, or either of them, while in the hands of B. to whom they were directly issued as "collateral security" for the payment of the real indebtedness of \$1,000, entitle him, for the purpose of fully satisfying it, to receive out of the general corporate assets dividends computed upon the face value of such bonds or bond in addition to dividends computed upon the amount of the real indebtedness? B. could not be so entitled in the case supposed unless the issue of the unsecured bonds to him operated to enlarge his claim against the corporation beyond the amount of its real indebtedness to him or to create a lien or charge against the general assets to the amount of pro rata dividends computed upon the face value of such bonds. The mere issue to him of such bonds as "collateral security" could not effect such enlargement of claim absolutely; for beyond dispute and admittedly the receipt by B. of \$1,000, the amount of the real indebtedness, would fully satisfy all claim on his part against the corporation. But it is in substance contended that such issue of bonds to him would effect an enlargement sub modo of his claim beyond the real indebtedness to him and up to the aggregate amount of such indebtedness and the face value of the bonds, namely, \$3,000, for the purpose of enabling him to receive if possible payment in full of the \$1,000 debt actually owing; and it is argued that such must be the case, as the two \$1,000 bonds issued to B. were valid instruments, and the corporation in issuing them must have intended that he should have the full benefit of them as "collateral security," and, not being secured by any pledge, mortgage or other lien, the only conceivable substantial benefit he could derive from them would be the enjoyment of dividends out of the general corporate assets computed upon their face value. But the validity of the bonds issued to B. is not determinative of the question. On the assumption that those bonds are valid and, being of a negotiable nature, would on their transfer for value to a third person confer upon the latter a right, as their absolute owner and, as such, an unconditional creditor of the corporation, to participate with its other unsecured creditors in the pro rata distribution of the general assets, the fact yet remains that the bonds in the hands of B. do not constitute an absolute unconditional indebtedness or liability of the corporation to him, and, not being secured by pledge, mortgage or other lien, though called "collateral security," are not such save in the sense of providing him with alternative or cumulative evidence in support of his real demand. Further, the corporation is chargeable with knowledge of the law, and, therefore, its intention that B. should have the full benefit of the bonds issued to him as "collateral security," though unsecured by pledge, mortgage or other

lien, must in the absence of evidence showing an understanding to the contrary be regarded as an intention merely that those bonds should serve as occasion might require as an alternative or cumulative medium of proof of the actual indebtedness; but not that B.'s claim should be multiplied or enlarged beyond the actual indebtedness of the corporation to him. Nor in the case supposed could the issue to him of the unsecured bonds operate to create a lien or charge against the general assets of the corporation to the amount of pro rata dividends computed upon the face value of such bonds. The creditors of an insolvent corporation are in equity, and in subordination to valid liens, priorities and preferences, severally the owners of its general assets in proportion to the respective amounts of the real indebtedness of the corporation to them respectively. The maxim that equity delights in equality has full application to creditors of an insolvent corporation; and as equality among creditors or a pro rata distribution of the assets among them is, generally speaking, the most equitable result obtainable, no liens or preferences should be recognized unless satisfactorily established. Equality is the rule; liens, preferences and priorities, the exception. If in the supposed case the issue to B. of the unsecured bonds as "collateral security" could create a lien or charge upon the general assets for the whole or any part of the real indebtedness of the corporation to him, such lien or charge would necessarily grow out of some contract on the part of the corporation implied from the fact of the issue to him of such bonds. But certainly no such lien or charge could arise by implication as against other creditors, without notice, entitled to share in the general assets; for as against such creditors, there being no delivery, actual or constructive, by way of pledge or setting apart or segregation of any portion of the general assets to answer the purposes of collateral security, such lien or charge could not be created by mere personal contract even though express. An equitable lien or charge may be created on property, real or personal, without recording or delivery, enforceable between the original parties and also against third persons who are mere volunteers or purchasers with notice, by an agreement on sufficient consideration that the property shall serve as security for a debt or other obligation. *Walker v. Brown*, 165 U. S. 654, 17 Sup. Ct. 453, 41 L. Ed. 865. *Booz v. Philadelphia & L. Transp. Co. (C. C.)* 124 Fed. 430. In the case supposed, even if there were an express agreement between the corporation and B. that the delivery to him of the unsecured bonds as "collateral security" should confer upon him a lien or charge upon the general assets by way of security for the payment of the whole or any part of the actual indebtedness to him, such agreement contemplating an essentially secret lien, would be unavailing as against other creditors entitled to share in such assets, and would be defeated by receivership proceedings instituted for the purpose of winding up the affairs and distributing the corporate assets. In *H. K. Porter Co. v. Boyd*, 171 Fed. 305, 96 C. C. A. 197, it was held that a receiver of an insolvent corporation appointed in proceedings having such a purpose has the rights of an attaching or levying creditor as to corporate property of which he takes possession, and that his possession defeats a secret lien on any of the property which

was purely equitable, although it may have been enforceable as between the parties. The court, among other things, said:

"It is of no importance what term may with most propriety be used to designate the taking and holding possession of the property of the construction company by the ancillary receiver. Whether it be called an equitable execution, an equitable attachment, a sequestration, or an impounding, is a matter of indifference. It does not affect the essential nature of the thing done. The receiver entered into and held possession by virtue of his appointment and the mandate of the court. A sheriff enters into and holds possession of property under an execution or attachment by virtue of his election or appointment and the order or writ of the court. In either case the property is compulsorily taken by judicial authority for the purpose of being applied to the payment of claims, theretofore or thereafter to be ascertained in nature or amount. In case of a receivership for an insolvent corporation procured at the instance of general creditors on the ground of insolvency, we are unable to perceive why a secret lien unenforceable at law should not be defeated by the seizure of the property by the 'hand of the court' as effectually as by the making of an attachment or levying of an execution by a sheriff. The fact that the claims of many creditors may be involved in the former case and perchance only one in the latter does not differentiate the two. Plain justice requires that such a secret lien should be defeated in the former case; for not only does equity delight in equality, but the receivership bars creditors from pursuing the remedy, which otherwise would be open to them by way of attaching or levying on the personal chattels to defeat the lien. We perceive no force in the suggestion that to allow the receiver to defend against the establishment of the asserted lien would be to permit him to take sides as between different creditors or classes of creditors. In such a case as the present, the rule of equity requires the pro rata division of the assets among the creditors, subject to the allowance of costs and expenses and the adjustment and liquidation of priorities and preferences. Equality or a pro rata distribution of the assets among the creditors being the most equitable result attainable, no liens or preferences should be recognized unless satisfactorily established; and it is not only proper, but it is incumbent on the receiver to protect the funds or assets in his hands against all attempts of creditors to defeat equality of distribution, through the assertion of secret liens to which they are not entitled, as against the interests of the general and unsecured creditors."

Thus, if there had been in the case supposed an express agreement for a lien, charge or preference against the general corporate assets, based upon the issue to B. of the unsecured bonds as "collateral security," it would have been unavailing as against other creditors, without notice, entitled to share in such assets. Were this not true the door would be opened wide to gross inequality among and constructive fraud upon creditors. If the corporation for the purpose of securing the payment of its actual indebtedness to B. could by a secret agreement with him create a lien, charge or preference in his favor against the general assets, valid as against creditors, based upon one of its unsecured bonds issued to him as "collateral security," it could equally create a valid lien, charge or preference of the same kind based upon ten or one hundred similar bonds, thereby insuring the payment in full of the indebtedness to B., to the detriment of other creditors and in defiance and nullification of the fundamental rule of equality as between creditors. Nor would knowledge or notice on the part of some only of the creditors at the time they gave credit to the corporation of such agreement for a lien, charge or preference be material. The receiver represents not only creditors who may have had, but also creditors who did not have, such knowledge or notice; but it would be utterly impracticable in the computation of dividends to be paid out of the gen-

eral corporate assets to establish one basis of adjustment for dividends coming to those who had such knowledge or notice, and another for those who had not. The futility of any attempt so to distinguish and the uncertainty and confusion which would be introduced into the ascertainment of the shares to be received by creditors from such assets are palpable. And an arithmetical increase in the number of such agreements for liens, charges or preferences against the general assets could only result, if attempt were made to treat creditors who had such knowledge or notice differently from those who had not, in a geometrical increase in such uncertainty and confusion, rendering impossible any systematic or orderly administration of such assets. It is necessary, therefore, that the same basis of computation of shares or dividends out of the general assets should be applicable both to those creditors who had and those who had not such knowledge or notice, and further, from a consideration of the balance of the equities involved, that such basis should be that which is proper in the absence of any such knowledge or notice on the part of other creditors entitled to share in the general assets. For clearly it is more equitable that creditors entitled to share in the general assets and wholly ignorant of any agreement for a lien, charge or preference against the same should be protected against any diminution in their shares through an allowance of such lien, charge or preference, than that a creditor, claiming such lien, charge or preference should in contravention of the broad and salutary equitable policy of equality among creditors with respect to general assets, be permitted to enforce such an agreement even as against those creditors who had knowledge or notice thereof. The doctrine of equitable lien or charge on property without recording or delivery, arising by agreement on sufficient consideration and enforceable against not only the original parties but volunteers or purchasers with notice, recognized in the cases last above cited, can have no legitimate application in the administration of the general assets of an insolvent corporation in the hands of receivers. If, then, in the absence of delivery, actual or constructive, by way of pledge or of any setting apart or segregation of any portion of the general assets, an express contract for a lien, charge or preference against the same would be unenforceable and invalid, no such lien, charge or preference could arise in the case supposed by a mere delivery to B. of the unsecured bonds as "collateral security." The law will not imply a lien based upon the supposed intention of the parties where the law will not permit the parties by express contract to create such lien. As in the case supposed there was no express contract that B. should have a lien, charge or preference against the general assets, so in the case now to be determined there was no express contract that either of the two banks should have such lien, charge or preference. It was admitted on the part of the banks at the hearing that the mere duplication or multiplication of an unsecured note or bond for a debt does not involve the giving of collateral security in any legitimate sense or serve to enlarge the basis for the computation of dividends in case of insolvency. But it was claimed that if a bond delivered as collateral is secured to any extent, however slight, by a mortgage or pledge of property the bond becomes

"real collateral security," and as such will enlarge the basis for dividends out of the general assets, not covered by such mortgage or pledge. The fact that the steel company executed a mortgage to secure its issue of bonds does not in principle differentiate this from the supposed case so far as the question of the right to resort to the general corporate assets is concerned. The bonds delivered to the banks were undoubtedly collateral security in the legitimate sense of the phrase to the extent to which the proceeds of the mortgaged property were applicable to those bonds, but only to that extent. For only so far did they involve "the transfer to the creditor of an interest in, or lien on property, or an obligation which furnishes a security in addition to the responsibility of the debtor." The bonds as collateral security attached to such proceeds, but whatever may or might be their function as an alternative or cumulative means of establishing the real indebtedness of the steel company to the banks at the time of the declaration of insolvency, they could not serve in any manner to enlarge beyond the amount of such actual indebtedness the basis for the computation of dividends from the general assets. To assume that the mere fact of the execution of a mortgage to secure an issue of bonds would, regardless of the value of the property covered by it, entitle one holding some of them purely as collateral security to receive dividends out of the general assets computed upon both the full amount of his actual claim and the face value of the bonds so held is, in my judgment, to suppose an absurdity. The touch of a magician's wand would be required to impart such potency to the execution of the mortgage and the consequent securing of the payment of some small proportion of the face value of the bond, as to convert such total face value into an additional personal liability of the corporation entering by way of enlargement into the determination of the basis for the computation of dividends from the general assets. That one holding a \$1,000 bond directly issued and delivered to him by a corporation as collateral security, belonging to a series of bonds secured by a mortgage executed by the corporation, should be allowed to enlarge the basis for the computation of dividends payable to him out of the general assets by adding to the amount of the actual indebtedness to him the whole face value of the bond, where the mortgaged property is sufficient to pay only one per cent of such face value, while one holding a \$1,000 bond so issued and delivered to him as "collateral security" not accompanied or secured by any pledge, mortgage or other lien upon the corporate property, but representing only the personal responsibility of the corporate entity, should not be permitted to use such bond to enlarge in any manner whatsoever beyond the actual indebtedness the basis upon which he should receive dividends, is a proposition unworthy of serious consideration. It was suggested rather than seriously argued that the recording of the mortgage of the steel company was notice to the world of the one million dollar issue of bonds, and, therefore, that allowing one holding such bonds as collateral to participate on the basis of their face value, not only in the proceeds of the mortgaged property, but in the general assets by way of dividends, regardless of the receipt of dividends on the real indebtedness, would work no injustice or hardship upon unsecured creditors, as they were chargeable in law at the

time of dealing with the steel company with knowledge of the existence of such bonds. This suggestion is without weight for several reasons of which it will be sufficient to mention only one. While notice to unsecured creditors of the amount of the first mortgage bonds outstanding at any given time would not affect the decision of the questions involved in this case, it is to be observed that the mortgage was executed to secure bonds not then issued, but only thereafter to be issued, and hence knowledge of the existence of the mortgage could not possibly serve as notice of the number or aggregate face value of bonds outstanding whether as collateral or in absolute ownership at any given time. It was argued that if the banks could sell and transfer the first mortgage bonds held by them as collateral to a third person, conferring upon the purchaser a right to participate not only in the proceeds of the mortgaged property, but in the general assets, the banks themselves without such sale and transfer would have the same right to participate in both funds. But this is a fallacy. The bonds in the hands of the purchaser would represent unconditional indebtedness of the steel company and liability to pay its amount, whether they were purchased for more or less than their face value. But while remaining in the possession of the banks purely as collateral security they do not as between the steel company and the banks represent such an indebtedness. It was further contended that if the banks for the purpose of realizing on their collateral had exposed the first mortgage bonds for sale and become bona fide purchasers, they could, equally with a third person purchasing the same, have resorted to both funds. This is true, subject to the qualification that the net purchase price would operate as a payment on account of the original indebtedness for which the bonds had been delivered as collateral. Upon such purchase the bonds would ipso facto cease to be held by the banks as collateral, and would represent actual unconditional indebtedness and liability on the part of the steel company; the consideration for the change being the part payment of the original indebtedness resulting from the purchase of the bonds by the banks, such part payment, other things being equal, increasing the chance of payment in full of the original indebtedness through the application of dividends from the general assets. Both of these considerations are aside from the merits of the case before the court; for neither of them presents a case of double dividends from the general assets upon the same indebtedness or of enlarging the basis for the computation of dividends out of such assets beyond the amount of the real indebtedness of the steel company to the banks. It was further suggested on the part of the banks that if they had after the declaration of insolvency sold the first mortgage bonds held by them as collateral the purchaser would have been entitled to receive dividends from the general assets; that the banks also would have received dividends from such assets computed upon the basis of the full amount of the original indebtedness of the steel company to them regardless of the receipt by them of the purchase money for the bonds; and that, therefore, the allowance to them of dividends out of the general assets computed on both the face value of the bonds held by them as collateral and the amount of the real in-

debtedness of the steel company to them would not be prejudicial to the rights of unsecured creditors. With respect to this suggestion it may be observed, first, that the case it assumes is different from that before this court, and, secondly, that the only practical deduction to be made from it is that the banks might commit a fraud in receiving not only the purchase money for the bonds but dividends on the original indebtedness of the steel company to them to such an extent as to work an overpayment of their real claims. If the supposed case does not mean this it has no significance; for the banks beyond question would, short of overpayment of their claims, have a right to receive dividends computed upon their full amount without regard to the proceeds of the collateral sold by them. Fraud is not to be presumed but strictly proved. But if there are circumstances raising doubt whether the receipt of a dividend out of the general assets by a creditor, who is known or supposed to have received collateral security would not work an overpayment of his original claim, the court having the administration of the assets has full power to investigate the matter and do justice in the premises. It is contended that the contractual relations between lender and borrower, where collaterals have been pledged, remain "unchanged although insolvency has brought the general estate of the debtor within the jurisdiction of a court of equity for administration and settlement," and hence it is argued that each of the banks is entitled for the purpose of obtaining satisfaction in full to receive dividends out of the general assets of the steel company computed upon the basis of the aggregate amount of the real indebtedness to it, and also the face value of the bonds delivered as collateral security for such indebtedness. The difficulty here is not with the premise, but the conclusion. The fallacy arises from failure to distinguish between continuance in force of the contractual relations notwithstanding insolvency, and ability to contravene the equitable rule of equality, subject to established liens, preferences and priorities, as between creditors with respect to general assets. It is not the function of a suit in equity brought for the purpose of administering the affairs, paying the debts and distributing the assets of an insolvent corporation, through or by means of a receivership, to extinguish without full satisfaction the claims of creditors, secured or unsecured; but it is the function of such a suit to effect a pro rata distribution of the corporate assets among the creditors, subject to established liens, preferences and priorities, and when a creditor has received his full proportionate share of the general assets he has obtained satisfaction of his claim so far as in the very nature of the case it can in those proceedings be satisfied out of such assets. If a creditor, whether secured or unsecured, has not received payment in full of the real indebtedness to him, the unpaid balance still constitutes a claim against the corporation which he may or may not succeed in collecting at some future time. But he has obtained full satisfaction of his claim with respect to the general assets so far as the particular proceedings in equity are concerned, when, aside from any lien, preference or priority held or possessed by him, he has received his full pro rata share of the general assets. It is as unsound, unreasonable and inequitable to assume that in the case of insolvency a creditor may receive from the general assets double divi-

dends by reason and on account of two promises or obligations made for one and the same debt, as it would be to contend that in a case of solvency the same creditor could receive double satisfaction by reason of a mere duplication of a promise or obligation. This conclusion, far from militating against the sanctity of contractual relations between lender and borrower by reason of the occurrence of insolvency, accords them full recognition and enforces them as far as possible under conditions existing at the time.

The case of the banks cannot be distinguished in principle from that of B. to whom A. has made and delivered a promissory note for \$1,000, the amount of his real indebtedness, and has indorsed and delivered by way of collateral security a promissory note made by C. to the order of A. Responsibility or an obligation on the part of a third person equally with a pledge or lien upon property, real or personal, may constitute collateral security. In the case supposed the latter note is in the hands of B. collateral security inasmuch as it represents an obligation on the part of C. which furnishes a security to B. in addition to the responsibility of A. The promise, however, of A. implied from his indorsement of C.'s note is not collateral security but merely a promise, additional to that contained in the note made by him, to pay the whole or a part of the real claim of B., and cannot enlarge beyond the amount of the real indebtedness the basis for the computation of dividends from A.'s insolvent estate. But the additional promise of A. arising from his indorsement of the second note to B. can be treated as collateral in so far and only in so far as necessary to obtain the benefit of C.'s promise or obligation.

There are many judicial decisions and dicta from which a deduction fairly can be made to the effect that the banks are entitled to share in the general assets of the steel company only on the basis of the amount of the actual corporate indebtedness to them at the time of the declaration of insolvency, including in such basis interest, if any, to that time. In *Third National Bank v. Eastern Railroad*, 122 Mass. 240, the court held that a creditor of a railroad company who held its promissory note and, as collateral security for the same, three other notes of the corporation, with coupons attached, could prove only to the amount of the original note against the corporation, the coupons not being accompanied by any charge or lien upon the property. The court said:

"The coupon notes in question cannot, in the original creditor's hands, be regarded as existing debts and liabilities within the meaning of the act or as securities which can be availed of by the creditor so as to give him any advantage over others. A debtor's liability to his creditor, where other creditors are concerned, is not increased by increasing the number of his promises to pay the same debt, in whatever form he may make them. To hold otherwise would be to enable the debtor to incumber his assets by a new method, greatly to the prejudice of all other creditors."

In *People v. Remington & Sons*, 54 Hun, 480, 8 N. Y. Supp. 31, it was held by the Supreme Court of New York that where a corporation gave to a creditor certain promissory notes indorsed by third persons and also gave to the same creditor as collateral security its own obligations, called coupon notes and not secured by any lien or mortgage, the creditor could not share in the assets of the debtor on the basis of the

amount of the original claim and also the coupon notes. The court said:

"The question is, can the bank by reason of its holding the coupon notes as collateral security for any obligations against the Remington Agricultural Company or P. Remington, prove the amount of such notes in addition to the debts for which they are held as collateral? This would, in effect, prove the actual debt twice. The coupon notes carried with them no lien on the property of the corporation. * * * The coupon notes were only personal obligations. The bank had certain obligations against the insolvent corporation, partly as maker and partly as indorser, which it has proved for the full amount of its debt. It has another form of obligation against the same corporation for the same debt. This does not increase, as against other creditors, the amount of the indebtedness. Being once proved the right of the claimant in that regard is exhausted. It is not a question as to the adjustment of specific liens, but simply to ascertain the amount, in fact, of the debts of the corporation preparatory to a 'just and fair distribution of the property of the corporation, and of the proceeds thereof, among its fair and honest creditors.' Code Civ. Proc. § 1793. As said in *Third National Bank v. Eastern Railroad*, 122 Mass. 242, 'A debtor's liability to his creditor, where other creditors are concerned, is not increased by increasing the number of his promises to pay the same debt, in whatever form he may make them. To hold otherwise would be to enable the debtor to incumber his assets by a new method, greatly to the prejudice of all other creditors.'"

This decision was affirmed by the Court of Appeals of New York on the strength of the opinion of the lower tribunal. 121 N. Y. 675, 24 N. E. 1095. In the case of *In re Waddell-Entz Co.*, 67 Conn. 324, 35 Atl. 257, it appeared that in consideration of a loan of \$4,500 to a corporation the lender received its demand note for that amount, and also ten bonds issued by the corporation for \$1,000 each, referred to in the note as collateral security. The bonds were not secured by a lien on property or obligations of third persons. In default of payment of the principal of the note the payee sold the bonds to himself after the corporation had become insolvent and presented his claim against the estate then in the hands of the receiver for \$14,500 on which he claimed dividends. It was held that the bonds were not collateral security and did not justify the claim made. The court said:

"Proctor's claim (aside from the thirteen bonds Nos. 32 to 44, about which no question arises) is based on the loan to the Waddell-Entz Company of \$4,500. As evidence of the debt he received a demand note for that amount (Ex. C). He also received ten notes or bonds (in the form of Ex. D) for \$1,000 each, and claims that the debt on which he is entitled to a proportionate dividend from the trust fund is \$14,500. If he had received a demand note for \$14,500, or if he had received 145 notes under seal for \$100 each, it would hardly be claimed that he could prove more than his actual debt of \$4,500; whatever advantages possession of evidences of debt in such form might secure to him in enforcing his rights against his debtor, the possession of such advantages does not alter the fact that his real debt is \$4,500, and that fact must control his right to a dividend from the insolvent estate. The amount of his debt is not altered because in the demand note the ten bonds delivered to him are called 'collateral security.' They are not collateral security for the payment of the original debt. The demand note itself is in a sense a security dependent for its value on the credit and property of the borrower; another note or fifty other notes furnish a similar security; they might aid the creditor in enforcing speedy payment by the debtor, but in case of insolvency it is the actual debt and not the multiplication of evidences of debt that defines the creditor's interest in the trust fund. 'Collateral security' necessarily implies the transfer to the creditor of an interest in some property or lien on property, or obligation which furnishes a security in addition to the responsibility of the debtor.

The law regulating this subject rests on the assumption of such transfer to the creditor of property in some form, on which he relies for security, and which he is entitled to apply instead of resorting to the debtor's own property towards the satisfaction of his debt, by virtue of a contract implied or expressed as the case may be, but collateral to the contract of indebtedness. A debtor's additional promises to pay cannot, from the very nature of the case, be treated as collateral security for his debt, unless such additional promises are themselves secured by a lien on property or by the obligations of third persons; under such circumstances, they may be treated as collateral security so far as is necessary to obtain the benefit of the lien or obligation. This self-evident proposition has rarely been discussed in reported cases. The principle, however, has been clearly stated by the courts of New York and Massachusetts."

In *Freeman's Appeal*, 74 Conn. 247, 50 Atl. 748, the court cited with approval *In re Waddell-Entz Co.*, saying:

"When a creditor holds an unsecured note of the debtor simply as collateral to a principal obligation, a dividend cannot be allowed, in case of insolvency, upon any greater indebtedness than that existing independently of such note."

In the case of *In re Oriental Bank, Ex parte European Bank*, 7 L. R. Ch. App. 99, the court through Sir G. Mellish, L. J., in reversing the decision of the Vice Chancellor, said:

"The principle itself—that an insolvent estate, whether wound up in chancery or in bankruptcy, ought not to pay two dividends in respect of the same debt—appears to me to be a perfectly sound principle. If it were not so, a creditor could always manage, by getting his debtor to enter into several distinct contracts with different people for the same debt, to obtain higher dividends than the other creditors, and perhaps get his debt paid in full. I apprehend that is what the law does not allow; the true principle is, that there is only to be one dividend in respect of what is in substance the same debt, although there may be two separate contracts."

The case just referred to arose under the Companies Act of 1862; but the decision did not turn on any provision in that act, for the court said:

"The case of *Rigby v. Macnamara* [2 Cox, 415] tends to show that this rule against double proof applies in the Court of Chancery as well as in the Court of Bankruptcy, and therefore would apply equally where companies are being wound up."

International Trust Company v. Union Cattle Co., 3 Wyo. 830, 31 Pac. 408, 19 L. R. A. 640, decided by the Supreme Court of Wyoming, strongly supports the proposition that a creditor of an insolvent corporation is entitled to a dividend only on what is actually due him and has no right to an allowance on account of negotiable bonds of the corporation, representing no actual indebtedness to him, which he claims to hold as collateral security, and, further, that one personal obligation cannot constitute collateral security for another obligation of the same debtor. The court said:

"The Union Cattle Company, one of the defendants, is an insolvent corporation. Frederick P. Voorhees, the other defendant, is sole receiver, in possession and control of all the assets, of the insolvent company, for the purpose of winding up its affairs under direction of the district court, which, on petition of certain creditors, appointed him as receiver. He reports \$168,000 on hand for distribution among the creditors. The plaintiffs in error are creditors, holding the promissory notes and negotiable bonds of the company to large amounts as evidence of the indebtedness of the company to them. They also hold the negotiable bonds of the insolvent company for further large amounts, but not representing any further actual indebtedness, but, as they claim, as col-

lateral security for the payment of the actual indebtedness. Plaintiffs claim dividends upon these bonds, as well as upon the bonds and notes representing actual indebtedness, until such indebtedness is fully paid. The district court denied the claim for dividends on the so-called collateral security. By several assignments of error the plaintiffs in error raise in this court the sole question of the correctness of this order of the district court. This is a case of insolvency, and the object of the suit, as authorized by the law, is to wind up the affairs of the insolvent company, convert its assets into money, and apply the money, pro rata, in payment of the debts. Plaintiffs seek more than a pro rata payment on the actual indebtedness of the company to them. The mere statement of the case would seem to exclude plaintiffs' claim, in the absence of any lien upon or pledge of specific assets. * * * A debtor's own personal obligation is no part of his personal property or assets. The so-called collateral security in the case at bar is in the form of bonds of the debtor. But they are not secured in any manner. They are the mere obligations of the debtor, and there is no reason apparent for exempting them from the operation of the rule announced by *Colebrooke*. They do not constitute a lien upon the assets of the debtor, or upon any portion of them. 'Collateral security imports a security in addition to the personal obligation of the borrower.' * * * Cases cited to the contrary are either where there is a mortgage or other lien upon specific assets to be enforced, or where the collateral paper has been transferred by the creditor and pledgee for value."

The case of *In re Sherry*, 101 Wis. 11, 76 N. W. 611, is in principle identical with that before this court. One Sherry made a voluntary assignment for the benefit of his creditors. At that time he was indebted to a national bank in the sum of \$1,500 for which it held his note in that amount. The bank also held as collateral security for the payment of that note a note of a corporation in an equal amount, payable to the order of Sherry, and by him indorsed. The bank made proof of its claim against Sherry's estate for \$1,500 on his own note, and also sought to make proof of the further sum of \$1,500 on account of his indorsement of the note of the corporation. The assignment law of Wisconsin contemplated, as do the general principles of equity, subject to established liens, priorities and preferences, an equal or pro rata distribution of the assets among creditors. The court below held that such double proof could not be made. The Supreme Court on appeal affirmed this decision and said:

"Sherry owed the bank absolutely \$1,500, and put up the note of a corporation for the same amount, indorsed by himself, as collateral to his indebtedness. The bank has proved its claim against Sherry's estate for the \$1,500 debt, and now desires to prove a claim for a like amount by reason of the indorsement of the collateral note. * * * Sherry owed the bank \$1,500, and no more, nor did he increase that debt when he indorsed to the bank the collateral note of \$1,500. True, he entered into a distinct obligation, but he did not increase his debt. The new and distinct obligation was practically another promise to see that his previous debt was paid, because Sherry's indorsement amounted simply to a promise that the bank would realize enough out of the collateral to pay his (Sherry's) debt. Thus the bank then held two promises made by Sherry to pay the same debt. As between Sherry and the bank, the situation was practically the same as if Sherry had given his own note as collateral to the first note. We apprehend that none could claim that under such circumstances both notes could be proven as debts, and share in the dividends. If so, then an easy way has been found to evade the provisions of the assignment law, and provide for the payment of one creditor in full, while others receive but a percentage. However we look at it, the substantial fact remains that both of Sherry's promises held by the bank, though different in form, represent but one debt, and both will be discharged by the payment of that debt. Nor would the situation of the bank be different if it had obtained judgments against Sherry on both claims, and were attempting to prove them both against his es-

tate. Both judgments would represent but one debt, and would be satisfied by payment of that debt. Now, as before stated, the object and purpose of the assignment law are to apply the insolvent's estate equally so far as it will go to the payment of his debts. It nowhere says, either directly or by implication, that a creditor who holds two promises by the insolvent to pay the same debt shall have the right to prove both of them. It says that 'debts due or to become due' may be proven, but does not say that several promises to pay the same debt, if different in form, may all be proven. Certainly, the law should not be construed so as to permit one creditor, who holds two promises of his debtor to secure the same debt, to receive twice as much from the estate as another creditor to the same amount who is so unfortunate as to hold but one promise, unless such construction is a necessary result from its plain provisions. We do not find any provisions that make such a result necessary or even proper; hence the purpose and spirit of the law, which is to afford an equal distribution of the estate to all creditors in proportion to their honest claims, can be carried out."

Nor is a creditor entitled in bankruptcy, aside from some established lien, preference or priority, to receive a double dividend on the same claim out of a single fund. This does not result from any doctrine peculiar to bankruptcy, but from equitable principles applied in the administration of the bankruptcy system. The case of *In re Sterling, Aherns & Co.* (D. C.) 1 Fed. 167, arose under the bankruptcy act of 1867 (Act March 2, 1867, c. 176, 14 Stat. 517) but was decided on equitable principles. Judge Morris, delivering the opinion of the court, said generally and without qualification:

"One sound and well established rule applicable to the settlement of insolvent estates is that the estate must never pay two dividends in respect of the same claim."

In *First National Bank of Beaumont v. Eason*, 149 Fed. 204, 79 C. A. 162, a bank sought to make proof in bankruptcy on a note made by the bankrupt and on a note indorsed by the bankrupt and given to secure the payment of the first note. The Circuit Court of Appeals for the Fifth Circuit held that this could not be done, saying:

"The appellant has two obligations of the bankrupt, one is on a note for \$15,000, of which the bankrupt was maker, the other is on an indorsement on a forged note for \$15,000, given as collateral to secure the first-mentioned note. The appellant seeks to prove both obligations against the bankrupt's estate. There was only one consideration, really only one debt, and the appellant is entitled to only one satisfaction. The payment of either obligation would extinguish the other. The district court held that the appellant could not prove both and thus establish a double liability against the bankrupt's estate. The decree appealed from is affirmed."

It is undoubtedly true, as held in *Board of County Com'rs v. Hurley*, 169 Fed. 92, 94 C. C. A. 362, that "the obligee in a bond, or the holder of a claim, upon which several parties are personally liable, may prove his claim against the estates of those who become bankrupt and may at the same time pursue the others at law, and, notwithstanding partial payments after the bankruptcy by other obligors or their estates, he may recover dividends from each estate in bankruptcy upon the full amount of his claim at the time the petition in bankruptcy was filed therein until from all sources he has received full payment of his claim, but no longer." But this proposition does not in any way involve the allowance of double dividends to an unsecured creditor out of one and the same fund upon one and the same claim. The distinction is

between receiving such double dividends on the one hand and, on the other, proving the claim against and receiving dividends from several distinct funds respectively liable for its payment.

The counsel for the banks referred at the hearing to certain dicta in *Murphy v. Murphy*, 74 Conn. 198, 50 Atl. 394, and *Allen v. Dallas & W. R. Co.*, 3 Woods, 316, Fed. Cas. No. 221, as tending to support his contention. In *Murphy v. Murphy* a promissory note for \$600 secured by a mortgage on real estate was made and delivered by a debtor to secure the payment of a real indebtedness of \$175. Action was brought on the note for \$600 against the maker and it was held that, the plaintiff being innocent of fraud, a recovery properly could be had thereon for the amount of the real debt of \$175, with interest, the court saying:

"We think the facts fairly justify treating the note secured by the mortgage as a collateral security for an existing indebtedness of \$175. Such a security gave the plaintiff not only the right to appropriate the land pledged for the satisfaction of the principal indebtedness, but also the right to whatever advantage there might be in the ability to sue the defendant upon the note given as security as well as upon the principal debt. In *re Waddell-Entz Co.*, 67 Conn. 324, 334 [35 Atl. 257]."

The decision in *Murphy v. Murphy* was in line with the suggestion in the case of *In re Waddell-Entz Co.*, at page 334 of 67 Conn., at page 258 of 35 Atl. of "advantages possession of evidences of debt in such form might secure to him [the creditor] in enforcing his rights against his debtor," and with the statement on the same page that the multiplication of notes for the same demand "might aid the creditor in enforcing speedy payment by the debtor." The decision is not in the least inconsistent with the views, already quoted, expressed in the earlier case as follows:

"In case of insolvency it is the actual debt and not the multiplication of evidences of debt that defines the creditor's interest in the trust fund."

In *Allen v. Dallas & W. R. Co.* it appeared that a railroad company had executed a mortgage of all its property, real and personal, acquired and thereafter to be acquired, to secure an issue of two hundred and fifty of its bonds, each for \$1,000. The company being indebted to one Calder in the sum of \$20,000 caused sixty of such bonds to be transferred to him as collateral security for the payment of his claim, and thereafter, having made default in its payment, the bonds were in conformity with the terms of the contract of pledge duly exposed to sale and bought by Calder who thereby became their absolute owner. The remaining 190 bonds were delivered by the railroad company to the contractor for the construction of the road and were transferred to an agent of the Kansas Rolling Mill Company as trustee as collateral security for the payment of certain notes given by the contractor for iron furnished for the road. The contractor having made default the bonds were exposed to sale and purchased by one Doane. The court said:

"Even if the bonds were still held by Alexander Calder and the Kansas Rolling Mill Company as collateral security, they would be bona fide holders for value and entitled to enforce the payment of the bonds, as long as the debts for which they were hypothecated were unsatisfied."

No question of double dividends on the same claim was presented, considered or suggested, nor did or could any question arise as to participation in general assets in contradistinction to the proceeds of mortgaged property, for all the property, both real and personal, was covered by the mortgage securing the bonds. The dictum has no conceivable bearing on the present case. No case or unambiguous dictum lending aid to the contention on the part of the banks has been presented to the court, nor after diligent search am I aware of the existence of any such case or dictum.

If the first mortgage bonds held by the banks had been validly transferred to them as collateral security by a third person the case would have presented a totally different aspect and the banks would have been entitled by way of collateral security to participate pro rata not only in the proceeds of the mortgaged property but, subject to established preferences and priorities, in the general assets. For in such case the transferred bonds, while collateral security as between the banks and such third person, would have represented absolute indebtedness and liability to pay on the part of the steel company. But such is not this case. The banks still hold the first mortgage bonds of the steel company as collateral, and the question here presented is in principle purely one of double dividends on the same claim from the same fund; for there is no room for a distinction between such double dividends and the receipt of dividends from the general assets computed upon both the face value of the bonds and the amount of the real indebtedness of the steel company to the banks.

But wholly aside from the foregoing considerations and cases the contention made on behalf of the banks cannot be sustained. It is irreconcilable with the doctrine and reasoning of *Merrill v. National Bank of Jacksonville*, 173 U. S. 131, 19 Sup. Ct. 360, 43 L. Ed. 640. The court, in reaching the conclusion that a creditor of an insolvent corporation is entitled in equity to share in its general assets on the basis of the amount of his real claim as existing at the time of the declaration of insolvency, regardless of any collateral security for the debt held or realized on by him since that time, said:

"Doubtless the title to collaterals pledged for the security of a debt vests in the pledgee so far as necessary to accomplish that purpose, but the obligation to which the collaterals are subsidiary remains the same. The creditor can sue, recover judgment, and collect from the debtor's general property, and apply the proceeds of the collateral to any balance which may remain. Insolvency proceedings shift the creditor's remedy to the interest in the assets. As between debtor and creditor, moneys received on collaterals are applicable by way of payment, but as under the equity rule the creditor's rights in the trust fund are established when the fund is created, collections subsequently made from, or payments subsequently made on, collateral, cannot operate to change the relation between the creditor and his co-creditors in respect of their rights in the fund. * * * We repeat that it appears to us that the secured creditor is a creditor to the full amount due him, when the insolvency is declared, just as much as the unsecured creditor is, and cannot be subjected to a different rule. And as the basis on which all creditors are to draw dividends is the amount of their claims at the time of the declaration of insolvency, it necessarily results, for the purpose of fixing that basis, that it is immaterial what collateral any particular creditor may have. The secured creditor cannot be charged with the estimated value of the collateral, or be compelled to exhaust it before enforcing his direct remedies against the debtor, or to surrender it as

a condition thereto, though the receiver may redeem or be subrogated as circumstances may require. * * * Our conclusion is that the claims of creditors are to be determined as of the date of the declaration of insolvency, irrespective of the question whether particular creditors have security or not. When secured creditors have received payment in full, their right to dividends, and their right to retain their securities cease, but collections therefrom are not otherwise material."

In *Corbett v. Joannes*, 125 Wis. 370, 381, 104 N. W. 69, 73, the court in referring to the doctrine of the *Merrill* case on this point, said:

"In applying the doctrine thus established courts treat the right of a secured creditor in the trust fund as a thing somewhat distinct from the indebtedness itself. The debt as it existed at the time of the creation of the trust is regarded as the measure of the proportional interest of the creditor as a cestui que trust in the trust fund, while it has a separate existence as regards the security till it is paid or the security exhausted. Payments thereon whether from the trust fund or from the security reduce the same but do not change in any respect the basis of the beneficiary right so long as any part of the indebtedness remains unpaid."

It thus appears that the secured and the unsecured creditor stand in equity on precisely the same ground with respect to participation in the general assets of an insolvent corporation. The former "is a creditor to the full amount due him, when the insolvency is declared, just as much as the unsecured creditor is, and cannot be subjected to a different rule. And as the basis on which all creditors are to draw dividends is the amount of their claims at the time of the declaration of insolvency, it necessarily results, for the purpose of fixing that basis, that it is immaterial what collateral any particular creditor may have." The contention by the banks that, although the first mortgage bonds of the steel company admittedly were delivered to and are held by them solely as collateral security, they are entitled to dividends computed on the basis, not of the amount of the real indebtedness to them at the time of the declaration of insolvency, but of that amount plus the face value of the collateral bonds, is directly in the teeth of the language of the Supreme Court, and would involve, if sustained, a repudiation by this court of the underlying principle of the *Merrill* case. Further, in that case it was declared, as has already appeared, not only that "the secured creditor cannot be charged with the estimated value of the collateral, or be compelled to exhaust it before enforcing his direct remedies against the debtor, or to surrender it as a condition thereto," but that, "as under the equity rule the creditor's rights in the trust fund are established when the fund is created, collections subsequently made from, or payments subsequently made on, collateral, cannot operate to change the relations between the creditor and his co-creditors in respect of their rights in the fund." Here is the clearest recognition of the right of the secured creditor to enforce his collateral at his election either before or after participating in the general assets on the basis of the real indebtedness existing at the time of the declaration of insolvency. Now, if it be assumed that the first mortgage bonds of the steel company held by the banks are collateral security attaching to the general assets, the idea of the existence of an election to enforce such collateral against such assets before or after participation therein on the basis of the amount of the real indebtedness practically becomes

an absurdity. On the above assumption the collateral security with respect to the general assets would be the pro rata share computed upon the face value of such first mortgage bonds. The banks would not realize from the general assets on such security without the declaration of a dividend applicable at once to the real indebtedness to them of the steel company as well as to the collateral; for it is not to be supposed that they would abstain from proving the amount of such indebtedness and claiming a dividend thereon merely for the sake of first enforcing the collateral. Nor on the above assumption is it reasonable to suppose that the banks would, at the peril of wholly losing the benefit of their collateral with respect to the general assets, omit to present and prove such collateral until after the declaration and payment of dividends out of such assets upon the real indebtedness. The repugnancy between the views of the Supreme Court in the Merrill case and the contention of the banks is palpable and it is unnecessary to dwell longer on this branch of the subject.

The banks have not sought to use the first mortgage bonds held by them as collateral as an alternative or cumulative medium of proof to establish or support their actual claims against the steel company, but to enlarge the share of the general assets to be received by them in the shape of dividends.

The Supreme Court certainly has not leaned against the interests of the collateral-holding creditor in deciding that in case of insolvency he is entitled to "prove for, and receive dividends upon, the full amount of his claim, regardless of any sums received from his collateral after the transfer of the assets from the debtor in insolvency, provided that he should not receive more than the full amount due him." But here the court is asked to go much farther and hold that the creditor may not only enforce the collateral bonds against the proceeds of the mortgaged property, without which the bonds would not constitute collateral security at all, and prove and receive dividends from the general assets upon the full amount of his real claim, but receive in addition from such assets dividends computed upon the face value of the bonds. To do this I am satisfied on both reason and authority would not only work an injustice to unsecured creditors but be repugnant to settled principles of equity applicable to insolvent estates. The latter of the two general questions arising in this case must, therefore, be answered in the negative, with the result that in the case of The Fourth Street National Bank of Philadelphia the basis for the computation of dividends from the general assets must be reduced from \$39,803.22, as reported, to the sum of \$20,336.67, the amount of the actual indebtedness of the steel company to that bank, including interest, on December 12, 1904, the date of the declaration of insolvency, and in the case of the Manufacturers' National Bank of Philadelphia the basis for the computation of such dividends must be reduced from \$16,453.36, as reported, to the sum of \$4,158.70, the amount of the actual indebtedness of the steel company to that bank, including interest, at the last mentioned date. Let an order be prepared in accordance with this opinion.

F. H. PEAVEY & CO. et al. v. UNION PAC. R. CO. et al.
 DIFFENBAUGH et al. v. INTERSTATE COMMERCE COMMISSION
 (CHICAGO & A. R. CO. et al., Interveners).

(Circuit Court, W. D. Missouri, W. D. March 3, 1910.)

Nos. 3,405, 3,437.

(Syllabus by the Court.)

1. COMMERCE (§ 93*)—INTERSTATE COMMERCE ACT—PARTIES TO SUITS TO AVOID ORDERS OF COMMISSION NOT NECESSARILY PARTIES TO PROCEEDINGS BEFORE COMMISSION—INTERVENTION.

Parties injuriously affected by the orders of the Interstate Commerce Commission may lawfully institute suits in the Circuit Courts to enjoin, suspend, or annul such orders, although they were not parties to the proceeding before the commission on which the orders are based.

Parties similarly situated may intervene in such suits.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 93.*]

2. COMMERCE (§ 91*)—INTERSTATE COMMERCE COMMISSION—JURISDICTION OF COURTS TO RELIEVE FROM ITS ORDERS.

The wisdom or expediency of the lawful discharge of the administrative duties of the Interstate Commerce Commission is not reviewable by the courts.

But the courts may relieve from orders of the commission which deprive complainants of their property without due process of law, or take it without just compensation, from those which are beyond the delegated power of the commission and from those which evidence so unreasonable an exercise of its power as to be substantially without, though formally within, it.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 91.*]

3. COMMERCE (§ 85*)—INTERSTATE COMMERCE COMMISSION—ORDERS PROHIBITING PAYMENT OR ALLOWANCE FOR ELEVATION AND TRANSFER IN TRANSIT BEYOND THE POWER OF THE COMMISSION.

Orders of the commission which prohibit the allowance or payment by carriers of all compensation to owners and operators of elevators for elevation and transfer in transit are beyond the delegated power of the commission.

An order which forbids a carrier to allow or pay to the owner of an elevator any compensation for elevation in transit of grain which he ships, unless he refuses to clean, clip, mix, inspect, or grade the grain while it is passing through the elevator, is beyond the power of the commission.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 85.*]

Bills by F. H. Peavey & Co. and others against the Union Pacific Railroad Company and the Interstate Commerce Commission, and by Harry J. Diffenbaugh and others against the Interstate Commerce Commission, the Chicago & Alton Railroad Company and others, intervening. Decrees for complainants.

Frank Hagerman (M. B. Koon, George T. Bell, and John Barton Payne, on the brief), for complainants.

Arba S. Van Valkenburgh and P. J. Farrell, for Interstate Commerce Commission.

F. C. Dillard and Edson Rich (N. H. Loomis and R. W. Blair, on the brief), for Union Pac. R. Co.

Frank Hagerman and John Barton Payne, for interveners.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

SANBORN, Circuit Judge. Has the Interstate Commerce Commission the power to prohibit railroad companies from paying to the owners and lessees of elevators all compensation for the elevation of grain in transit?

Until June 29, 1908, repeated decisions of the commission and the practice of carriers and shippers had been consonant with a negative answer to this question. In the Matter of Allowances to Elevators by the Union Pacific R. R. Co. (June 25, 1904) 10 Interst. Com. R. 309, 324, 325, 326; In re Hearing on Petition of Chicago Great Western Ry. Co. et al. (April 9, 1907) 12 Interst. Com. R. 85, 89; City Council of Atchison v. Missouri Pacific Railway Co. (April 29, 1907) 12 Interst. Com. R. 112, 114; Consolidated Forwarding Company v. Southern Pacific Company (April 19, 1902) 9 Interst. Com. R. 182, 206e; American National Live Stock Ass'n & Cattle Raising Ass'n of Texas v. Texas Pacific Ry. Co. (March 7, 1907) 12 Interst. Com. R. 32, 36; Central Yellow Pine Ass'n v. Vicksburg, Shreveport & Pacific Ry. Co. (March 19, 1904) 10 Interst. Com. R. 193, 211, 213; In the Matter of Unlawful Rates and Practices in the Transportation of Cotton by the Kansas City, Memphis & Birmingham R. R. Co., 8 Interst. Com. R. 121, 136, 139, 140; Merchants' Cotton Press & Storage Co. v. Interstate Commerce Commission (June 24, 1909) 17 Interst. Com. C. R. 78, 99, 101, 103, 105; Kentucky Railroad Commission v. L. & N. R. R. Co., 10 Interst. Com. R. 173.

On June 29, 1908, the commission gave an affirmative answer to the question before us, and issued orders which in terms forbade the Chicago, Burlington & Quincy Railroad Company, the Missouri Pacific Railway Company, the St. Louis & San Francisco Railroad Company, the Chicago, Rock Island & Pacific Railroad Company, and the Missouri, Kansas & Texas Railroad Company, and in effect forbade the Union Pacific Railroad Company, to pay or allow to the owners or lessees of elevators at Omaha, Kansas City, and other cities on the Missouri river, any compensation whatever for the elevation of grain in transit at those points, and on October 16, 1908, announced that the principle of the decision upon which these orders are based applies everywhere, and that the commission expects that it will be universally accepted by carriers throughout the nation. In the Matter of Allowances to Elevators by the Union Pacific R. R. Co., 14 Interst. Com. C. R. 315; Traffic Bureau Merchants' Exchange of St. Louis v. Chicago, Burlington & Quincy R. R. Co., 14 Interst. Com. R. 317, 331, 510.

Mindful of the fact that this ruling and these orders were subversive of former decisions and of an approved course of business thereunder in reliance upon which hundreds of thousands of dollars had been invested in elevators and facilities for the transfer of grain, that great grain markets had been established near the producers upon the Missouri river at the termini of railroad systems, and that the parties in interest desired a review of the legal issue presented, the commission postponed the effective date of the orders until the suits in hand could be brought to final hearing.

It may not be unprofitable, before entering upon the discussion of the question at issue, to call to mind a few general propositions of law, the general situation of the parties, the business, and the transportation out of which this issue arises.

Every railroad company has the right to insist that its cars shall be unloaded at the termini of its railroad and that their contents destined to points beyond shall be loaded into cars or other vehicles of the connecting carriers. Elevation and weighing in the elevator are indispensable means of the transfer of grain from the cars of one carrier to those of another under the existing conditions and methods of transportation through our large cities. There is neither time nor space nor labor for the shovel or any other method of transfer, or for weighing in the car or any other method of weighing. The operators of elevators weigh and certify to the weight of grain as it passes through their elevators, or it is weighed in the elevators, and its weight is certified by some official of the state or of some grain exchange or other association, and these certificates are accepted as conclusive evidence by carriers, shippers, and dealers alike. Elevation consists of the unloading of grain from cars or vessels into elevators and the loading of the grain out again into cars or into other vehicles. As elevation is indispensable to weighing in the elevator, if the prohibition of compensation for elevation in transit shall prevent the elevation of the grain at the Missouri river, it will also prevent the weighing there, so that the inhibition at issue in these cases really involves transportation services both in elevation and in weighing in transit.

"All services in connection with the * * * elevation * * * of the property transported" are transportation. Act June 29, 1906, c. 3591, §§ 1, 2, 4, 34 Stat. 584, 586, 589 (U. S. Comp. St. Supp. 1909, pp. 1150, 1153, 1158), to amend Interstate Commerce Act Feb. 4, 1887, c. 104, §§ 1, 6, 15, 24 Stat. 379, 380, 384 (U. S. Comp. St. 1901, pp. 3154, 3156, 3165). Railroad companies are required to furnish these services upon request (section 1); to state separately in their schedules their charges therefor (section 6 as amended), and if such services are rendered by the owner of the property transported the charge and allowance therefore may not be more than is just and reasonable (section 15 as amended). The allowance for the elevation of grain here in question was three-fourths of a cent per hundred pounds. It was separately stated in the schedules of the carriers, and was allowed only upon grain received into the elevators from cars coming from the west which was shipped out of the elevators into cars bound east, north, and south. The same services in elevation were offered to all shippers, and the same allowance was made to all operators of elevators, whether they were or were not the owners of the grain transported.

More than 90 per cent., nearly all, of the grain brought to the Missouri river passes on to destinations east, north, and south. This grain takes the local rate from points west of the Missouri river to the river and from the Missouri river to the Mississippi river, and to points beyond it takes the proportional rate, which is less than the local rate upon a certificate that it has come from points west of the Missouri river.

In 1907, 209,728,650 bushels of grain were handled in and out of

Omaha, Kansas City, Atchison, and St. Joseph. Since January 1, 1904, more than \$3,000,000 have been invested in elevators in those cities for the purpose of handling this grain.

The Union Pacific Railroad Company has railroads extending into and through the grain fields of Kansas and Nebraska, and its eastern termini are at Kansas City and Council Bluffs, which for the purpose of this opinion is included in the general term "Omaha." The greater volume of the grain moves from the fields in Kansas and Nebraska each year to the Missouri river in a few months in the autumn and winter. The portion of that grain which a railroad company can haul depends upon the number of box cars it can use for this purpose during this small portion of the year. The Union Pacific Company has the short haul. It is in competition with companies that have railroads from these grain fields through Missouri river points to and beyond the Mississippi river. They can carry this grain profitably on their own cars and rails east as well as west of the Missouri river without elevation; but it is requisite to the profitable use by the Union Pacific Company of its equipment that the grain be elevated out of its cars at the Missouri river, and that the cars be sent back west for new loads promptly. If it permits these cars to pass on east over connecting lines, they will be absent when their use upon its railroads is most needed and is most profitable; it will lose a large share of the traffic in this grain and of the revenue which it could earn by the use of its cars upon its own tracks. Thus the elevation of the grain at Omaha and Kansas City is necessary to the reasonable competition and participation of the Union Pacific Company in this transportation.

The Chicago Great Western Railroad Company, and other companies, whose western termini are at Missouri river points, are in a like situation. The elevation of the grain at those cities is equally indispensable to their participation in this traffic. They can get no grain into their cars at Omaha and Kansas City unless it is first taken out of the cars which bring it from the west to the river.

On the other hand, carriers that have railroads from the grain fields of Nebraska and Kansas through the Missouri river cities to the north, east, and south are interested to prevent elevation at the river, because the companies whose railroads terminate there cannot compete with them successfully in the absence of this facile means of transfer of the grain from the cars of the company west of the river to those of the company east of it.

But perhaps the parties most deeply interested in the issue before us are the owners, lessees, and operators of the elevators at the Missouri river cities and at all other cities in the nation where great terminal elevators have been constructed. For years carriers have used these elevators and have paid their owners and lessees for the transfer of the grain through them, and the latter have invested large amounts of money in the construction of these buildings, and in the establishment of markets near the grain fields that may be seriously affected if this practice is declared to be unlawful and is henceforth prohibited.

In 1899 the Union Pacific Company, mindful of the necessity of unloading its cars of grain at the eastern termini of its roads and of

promptly returning them westerly for new loads, requested Mr. Frank H. Peavey to construct and operate an elevator for this purpose at Council Bluffs. He consented and made a contract with the company to build and operate an elevator with a capacity of 1,000,000 bushels, and to unload, store for 48 hours, and reload grain to the capacity of his elevator for the Union Pacific Company, and that company contracted to pay him not exceeding $1\frac{1}{4}$ cents per 100 pounds for the first 10 years and 1 cent per 100 pounds for the second 10 years for this service. He built an elevator of the capacity specified in the year 1899, at an expense of \$200,000, in reliance upon this contract, and this elevator has ever since been operated thereunder by reason of this agreement. Mr. Peavey assigned his contract to the complainant Omaha Elevator Company, a corporation, and an average of over 600,000,000 bushels of grain passes through the elevator annually. Another elevator now owned and operated by the complainant the Midland Elevator Company, through which an average of more than 2,500,000 bushels of grain passes annually, was built, and is operated at Kansas City, under a like contract. The complainant F. H. Peavey & Co. is a corporation. It owns nearly all the stock of the two elevator companies, and henceforth the contracts, the elevators, and their rights and interests will be treated as those of Peavey & Co. Peavey & Co. owns many country elevators on the railroads of the Union Pacific Company and is a purchaser and shipper of most of the grain which passes through its terminal elevators.

On June 25, 1904, after an investigation of these contracts and of the practice of the Union Pacific Company to allow Peavey & Co. $1\frac{1}{4}$ cents per 100 pounds for the elevation of its own grain, as well as that of others, and after consideration of the contentions then made that this allowance gave it opportunities to violate the prohibition of rebates (10 Interst. Com. R. 320), that it secured thereby the commercial advantages of treating the grain, that is, of cleaning, clipping, inspecting, mixing, and grading it during its elevation, which shippers who had no terminal elevators did not receive (page 325), the commission held that the contracts were made in good faith, that the allowance was reasonable, and that no requirement of the law had been disregarded in their making or their performance (pages 321, 326).

On April 9, 1907, after a rehearing on the petition of the Chicago Great Western Railway Company and others, the commission held that an allowance to the owner of an elevator of more than the cost of elevation for the service of elevating his own grain wrought a preference and a rebate, that three-fourths of a cent per 100 pounds was not in excess of the cost of elevation and would return no profit to Peavey & Co., and it ordered the allowance made to it by the Union Pacific Company reduced to that amount. 12 Interst. Com. R. 85. In all other respects the commission adhered to and reaffirmed its former ruling. It held that elevation is a facility which a carrier may provide for the benefit of shippers if it finds it to its interest so to do, that this facility must be open to all on equal and reasonable terms, that a railroad company may construct elevators itself or make an arrangement with the owner of an elevator to furnish elevation facilities (page 87), and that

the commission has no power under the acts of Congress to forbid a railroad company from contracting with an owner of an elevator, who is also a shipper, for such facilities, but that its authority extends to such regulation and control of the relations between them as will protect the rights of others and enforce the observance of the law (page 89).

The Union Pacific Company, in 1906, extended to all elevators at Omaha and Kansas City the allowance it made to Peavey & Co. Its official published schedules have provided since June 27, 1906, that "to expedite the movement and to secure the prompt release and return of equipment an allowance of (1¼ cents prior to June 1, 1907, and ¾ of a cent since that date) per hundred pounds will be made by the Union Pacific Company to the elevators performing the service on grain in car loads transferred by the elevators at South Omaha, Omaha, Council Bluffs and Kansas City, subject to the following conditions": (1) All grain must originate west of these cities upon the railroads of and be transported to these cities by the Union Pacific Company; (2) the allowance will be made on grain which moves to points beyond Council Bluffs or Kansas City only; (3) no allowance will be made when more than 48 hours elapse between the time of delivery of loads by the Union Pacific Company to the elevator or connecting lines and the release and return of the empty cars to the Union Pacific Railroad. It will be noticed that the schedules and practice of the company offered this allowance to all elevators at the eastern termini, and this elevation to all shippers whose grain went beyond its termini for the same rate of compensation, whether they were owners of elevators or not, and that it made this offer to induce the prompt return of its cars to the western grain fields.

On June 29, 1908, upon a second rehearing, the commission held that any allowance to Peavey & Co. for the elevation of the grain which it shipped through its terminal elevators was an undue preference, and therefore unlawful, because by the use of these elevators it secured at the same time with the elevation the commercial advantages of cleaning, clipping, inspecting, mixing, and grading the grain, which were no part of transportation. 14 Interst. Com. C. R. 315, 316. It, accordingly, ordered that the Union Pacific Company cease "from paying any allowance to Peavey & Co. on grain belonging to them, or in which they have any direct or indirect ownership or interest, that has been mixed, treated, weighed, or inspected in any of their said elevators at Kansas City and Council Bluffs." Under this order it will be seen that Peavey & Co. may collect the allowance for the elevation of its grain from the Union Pacific Company on condition that it uses its terminal elevators for the purpose of elevating this grain alone. It may treat its grain at other elevators, then ship it through Omaha and Kansas City, elevate it there, and receive the allowance for elevation on condition that it does not again treat it there. Peavey & Co. and its elevator companies have continued to elevate the grain which they shipped through the termini of the Union Pacific Company, and to return the empty cars in accordance with their contracts and the schedules of the Union Pacific Company; but the latter corporation has re-

fused to allow or to pay them anything for these services which have been rendered since the last order of the commission, and the complainants have brought and prosecuted their suit to enjoin the enforcement of this order and to recover of the Union Pacific Company compensation for this elevation.

Late in the year 1907, the Traffic Bureau, a department of the Merchants' Exchange of St. Louis, an association operating under the laws of Missouri, to promote the commercial interests of that city, filed petitions against Chicago, Burlington & Quincy Railroad Company, Missouri Pacific Railway Company, St. Louis & San Francisco Railroad Company, and Missouri, Kansas & Texas Railway Company, corporations which own through lines of railroad from the grain fields of Kansas and Nebraska to points east of the Missouri river, and which were interested to prevent elevation of grain at Missouri river points, but were making the same allowances for elevation there that were made by the Union Pacific Company in order to meet the latter's competition, and prayed that the commission would abolish this allowance for elevation, and on June 29, 1908, the same day that it made the order in the case of the Union Pacific Company, the commission ordered these railroad companies to abstain "from giving or paying three-fourths of a cent per hundred pounds, or any other sum, as an allowance or compensation for service rendered in the elevation of grain at Kansas City, Mo., and other Missouri river points." 14 Interst. Com. R. 317, 331. Parties who represented the complainants in the second case under consideration applied to the commission to grant them a hearing, but this was denied them, and the commission said.

"A cardinal consideration in our conclusion was the belief that in no way could discrimination and preference be prevented except by a complete prohibition of these payments and privileges. The principle of our decision applies everywhere. We expect that the decision will be universally accepted." 14 Interst. Com. R. 510.

The interstate commerce act authorizes incorporated boards of trade of cities and associations of like character to apply to the commission for relief (24 Stat. 383, § 13), and such corporations and members representing such associations may likewise apply to the court for relief from injuries unlawfully inflicted by the commission.

Thereupon Harry J. Diffenbaugh, Edmund D. Bigelow, and Charles W. Lonsdale, the president, secretary and chairman, respectively, of the transportation committee of, and who were authorized to represent, the Board of Trade of Kansas City, which is an association of 200 members consisting of operators of grain elevators, millers, and dealers in grain who handled a total of 11,334,050 bushels of grain of the value of \$70,739,930 in the year 1907, the Omaha Grain Exchange, a corporation whose members are engaged in the same business and interested in this order in the same way at Omaha, the St. Joseph Board of Trade, a corporation, and certain individuals representing the Atchison Board of Trade, exhibited their bill against the commission, wherein they set forth the material facts which have been recited, alleged that this order of the commission was violative of the Constitution, beyond the powers of the commission, and that its enforcement would depre-

ciate the value of their elevators and their investments in these and other facilities for the transfer, purchase, and sale of grain in their cities by depriving them of compensation for its transfer, would draw away from their cities to eastern, northern, and southern marts a large volume of their grain business, and would tend to diminish the grain markets in their cities to their irreparable injury, and prayed for equitable relief. The commission demurred to this bill, and the argument on the demurrer was submitted at the final hearing of these cases.

At this final hearing a motion was made by the Chicago, Milwaukee & St. Paul Railway Company, the Wabash Railroad Company, the Chicago Great Western Railroad Company and the Chicago & Alton Railroad Company for leave to file intervening petitions in this Diffenbaugh Case, and this motion was submitted for decision. The petitions of these companies show that they own railroads whose western termini are at the Missouri river cities; that if they are denied the right to provide for the transfer and weighing of grain by making compensation therefor to the operators of elevators at these cities their railroad terminals and the elevators there, some of which are owned by one of these companies, will be greatly depreciated in value, the shippers and producers of grain on lines of railway which have their eastern termini at the Missouri river cities, in the shipment of their grain to points east, north, and south of that river, will be compelled to pay large sums of money for transferring and weighing their grain at the river, while producers and shippers of grain located on lines of railroad extending through those cities to the east, north, and south will incur no such expense, and will thus secure an undue preference; that the volume of grain which under the present allowance passes over the petitioners' lines of railroad will be diverted from their railroads to the through lines and from the markets at the Missouri river cities to eastern, northern, and southern cities; and that a similar depreciation of the values of terminal and elevator property and business and like diversion of grain and the traffic therein from established grain markets in the region between the Allegheny Mountains and the Missouri river will be effected if the prohibitive order of the commission is put into operation throughout the nation, and they ask that the prayer of the complainants in the Diffenbaugh Case be granted.

The demurrer to the bill of Diffenbaugh and his associates presents two objections: That the complainants were not parties to the proceeding before the commission upon which the order challenged is based; and that there is no equity in the bill. But this is a controversy between competitors in transportation and in trade, between the Traffic Bureau of St. Louis and the owners of the lines of railroad which extend from the grain fields of Kansas and Nebraska through the Missouri river cities upon one side, and the Boards of Trade, the owners of elevators and dealers of grain in the Missouri river cities and the railroad companies whose termini are at those cities on the other. The former are interested in opposition to the transfer of grain at those cities and to any allowance therefor; the latter are interested to promote the transfer of grain in those cities and to secure an allowance therefor. One of the parties opposed to this transfer, upon notice

to other parties who are equally opposed to it, and without any notice to any party in favor of it, has procured this final order of the commission, which prohibits the railroad companies from making any allowance for the elevation, necessarily deteriorates the value of the property, diminishes the volume and the profit of the business, strikes down profitable contracts, and destroys the right of parties in favor of the transfer to make such contracts. These parties have no remedy at law. Are they deprived of the right to equitable relief because those opposed to them did not cause them to be made parties to the proceeding or to be notified of the hearing before the commission upon which this order is founded? If so, parties may easily deprive those injuriously affected by such orders of all relief by making, as in this case, those having a like interest parties to the proceeding and excluding those who are interested in opposition to their interest. In such a case none of the parties to the proceeding may successfully maintain a suit to challenge the order, because none of their interests are irreparably or at all injured, and, if those whose interests are injuriously affected may not assail it, the order is impregnable.

This cannot be the true rule of right or of practice. A careful search of the interstate commerce act discloses no limitation of the parties who may maintain suits to enjoin, set aside, annul, or suspend an order of the commission to those who were parties to the proceeding before it upon which the order was based. The proceeding in the court is not an appeal; it is a plenary suit in equity. "The jurisdiction to hear and determine such suits" is vested in the Circuit Courts. Section 16, as amended (34 Stat. 592 [U. S. Comp. St. Supp. 1909, p. 1162]). The determination of the question what parties may maintain such suits is left by the interstate commerce act to the general rules and practice in equity, and under them any party whose rights of property are in danger of irreparable injury from an unauthorized order of the commission may appeal to a federal court of equity for relief. Such an order, issued without notice to the parties injuriously affected and without opportunity to them to present meritorious defenses, is not more conclusive than a judgment of a court, and Chief Justice Marshall declared in *Marine Insurance Company v. Hodgson*, 7 Cranch 332, 336, 3 L. Ed. 362, that:

"Any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law, and of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery." *Hendrickson v. Hinckley*, 17 How. 443, 444, 15 L. Ed. 123; *Hungerford v. Sigerson*, 20 How. 156, 161, 15 L. Ed. 869; *Galnes v. Fuentes*, 92 U. S. 10, 22, 23 L. Ed. 524; *Barrow v. Hunton*, 99 U. S. 80, 85, 25 L. Ed. 407; *Johnson v. Waters*, 111 U. S. 640, 667, 4 Sup. Ct. 619, 28 L. Ed. 547; *Arrowsmith v. Gleason*, 129 U. S. 86, 97, 98, 9 Sup. St. 237, 32 L. Ed. 630; *Marshall v. Holmes*, 141 U. S. 589, 596, 12 Sup. Ct. 62, 35 L. Ed. 870; *National Surety Company v. State Bank*, 120 Fed. 593, 598, 56 C. C. A. 657, 662, 61 L. R. A. 394.

The complainants in the *Diffenbaugh* Case are entitled to challenge the order of the commission in this court. The allegations in their bill that this order was beyond the power of the commission and will irreparably injure their property and their business present good ground

for equitable relief, and the demurrer of the commission must be overruled. For the same reasons, the petitions of the railroad companies that seek to intervene present substantial equities and their motion for leave to file them and to become parties to this suit must be granted.

The Interstate Commerce Commission is an administrative tribunal, and the wisdom and expediency of the lawful exercise of the discretion delegated to it under the Constitution and the statutes is not reviewable by the courts. But the power is vested in and the duty is imposed upon the Circuit Courts to relieve from orders of the commission which deprive complainants of their property without due process of law or take it without just compensation in violation of the fifth amendment to the Constitution, from orders which are beyond the limits of the power delegated by the acts of Congress to the commission and from orders which, though in form within its delegated power, evidence so unreasonable an exercise of it that they are in substance beyond it. *Interstate Commerce Commission v. Illinois Central Railroad Company* (Jan. 10, 1910) 215 U. S. 452, 30 Sup. Ct. 155, 54 L. Ed. —; *Interstate Commerce Commission v. Stickney* (Nov. 29, 1909) 215 U. S. 98, 30 Sup. Ct. 66, 54 L. Ed. —; s. c. (C. C.) 164 Fed. 638, 644; *Missouri, Kansas & Texas Ry. Co. v. Commission* (C. C.) 164 Fed. 645, 648.

Laying aside the question of the constitutionality of the orders challenged in these cases, let us consider this question: Has the commission been empowered to prohibit allowances and payments of compensation for the transfer by elevators of grain in transit? The statutes under which the commission acts require the rates for transportation, and hence for the elevation of grain in transit, to be just and reasonable. Elevation is a part of transportation which the law requires the carriers to provide, and for which it authorizes them to pay others reasonable compensation. The three-fourths of a cent per 100 pounds which the carriers now pay for this service at the Missouri river cities is a just and reasonable compensation for it. Whence comes the power of the commission to forbid this payment? From the facts, says the commission, that those who receive this compensation generally own the grain which they transfer and the elevators by means of which they transfer it, that they derive pecuniary advantages which those who do not own the elevators and also the grain transferred do not secure by treating, that is, by cleaning, clipping, mixing, and grading the grain as it passes through the elevators, thereby enhancing its value, and that there is danger that they may use the practice of allowing this compensation to violate the acts of Congress, to secure rebates and effect unjust discrimination. That although other considerations are mentioned in the opinions of some members of the commission, the facts above stated are the only ones upon which the commission relied to sustain their authority to make the orders in question, let its opinion upon the motion for another hearing (14 Interst. Com. R. 510), and the order in the case of the Union Pacific Company which permits it to make this allowance to Peavey & Co. on condition that the latter separates its elevation or transfer in transit from its treatment of the grain, witness.

But the legal presumption is that parties will obey the law and discharge their duties. Reasonable compensation for transfer services

may not be denied lawfully because there is a possibility that those who receive it may at some future time violate the law and secure rebates or effect discrimination. There is no more power in the commission to forbid carriers from paying or allowing for the elevation and transfer of grain in transit reasonable compensation because there is a possibility that a future violation of the law may arise out of such an allowance than there is to prohibit carriers from charging and receiving reasonable rates for transportation of all property, because there would be less danger of future rebates and discriminations if they were compelled to conduct transportation without compensation.

The treatment of the grain in the elevators, the cleaning, clipping, mixing, inspecting, and grading of it, is a trade service; it is no part of transportation and is not a transportation service. No power has ever been granted to the Interstate Commerce Commission to regulate, to prohibit, to separate by miles from the service of elevation and transfer in transit or from any other transportation service, or to interfere with this trade service. The advantages derived from it are of the same nature as those which the owners of mills enjoy who manufacture into flour in transit the wheat which they own and ship, who saw into lumber in transit the logs which they own and ship, and who dress in transit the rough lumber which they own and ship. They are of the same nature as those which the owners and shippers of cotton who practically own the compresses derive from compressing the cotton in transit, and yet in all these cases the carriers maintain, and the commission sustains, the same rates of transportation for the shippers who own the mills, the compresses, and the articles transported and the shippers who own none of these facilities of trade and derive none of the advantages thereof. See the authorities cited at the opening of this opinion. They are of the same nature as those which the owners of cars leased to a railroad company who are shippers of the articles transported therein may derive from that ownership. *Consolidated Forwarding Co. v. Southern Railway Company*, 9 Interst. Com. R. 182, 206e.

It is no part of the duty, nor is it within the power, of the commission to see that all shippers of like commodities derive the same measure of profit from their trade in and treatment of the articles which they ship, to see that a shipper who owns a warehouse, an industrial track, and private cars derives no greater profit from dealing in the groceries or other articles he ships than a shipper who has none of these facilities, to see that a shipper of coal who owns a tippie from which he loads it gains no greater profit from the handling of his coal than one who loads it from a wagon. *Harp v. Choctaw, Oklahoma & Gulf R. Co.*, 125 Fed. 445, 61 C. C. A. 405. Pecuniary advantages derived by shippers from the ownership or use of such facilities of trade are attributable to that ownership, and not to the transportation of the articles shipped, and the consideration and regulation of these advantages are without the scope of the commission's power.

The truth is that trade advantages of this nature do not condition the questions of reasonableness of rates, of rebates, or of discrimination. The shipper who owns warehouses, tipples, spur tracks, cars, mills,

and by their use derives greater profit from the dealing in the articles which he ships over a railroad, is entitled to the same rate of charge for transportation and the same reasonable compensation for transportation services which he renders that the shipper who owns less or no such trade facilities and derives less profit is entitled to. The reasonableness of and the discrimination by the charge and the compensation is conditioned by the reasonable value of the service, not by the gain or the loss which the shipper derives from the use of the trading facilities he owns in the handling of the articles transported. The pecuniary advantages that result to the owners of elevators, who are also shippers of the grain, from its treatment in their elevators, are derived, not from the transportation of the grain nor from its elevation or transfer in transit through their elevators, but from their ownership or their operative control of the elevators, and their use of them in the conduct of their trade. They are therefore ultra vires the commission and immaterial to the issues whether or not the compensation or allowance to the owners of elevators who are also shippers is reasonable, unjustly discriminatory, or violative of the prohibition against rebates, and when these advantages are laid aside this compensation or allowance is neither.

That the commission is without power to prohibit carriers from paying or allowing to the owners of elevators reasonable compensation for elevating grain in transit which they own and ship is demonstrated by the course of decision and legislation that is crystallized in the amended interstate commerce act. Prior to 1906, that act contained no declaration that elevation or transfer in transit was a part of transportation, or that compensation might be charged or allowed therefor. After the commission had decided, in 1904, that the allowance by the Union Pacific Company of $1\frac{1}{4}$ cents per 100 pounds to Peavey & Co. for the elevation of the grain in transit, the larger portion of which Peavey & Co. owned and shipped, in the year 1905, the commission made this report and recommendation to Congress:

"Terminal roads, elevator charges and private cars.

"There is an important class of cases in which the owner of the property performs a part of the transportation service, where the carrier, by paying such owner an extravagant sum for the service rendered, thereby prefers him to other shippers of like property. This may happen in any case where the shipper is the owner of any of the facilities of transportation or performs any part of the transfer service. Such performance may take the form of an excessive division to a terminal road owned by the shipper, the payment of an excessive elevator charge to the owner of the grain; the payment of an excessive mileage upon the private car which conveys the property of the owner of the car. Our investigations leave no room for doubt that all these methods are at the present time more or less resorted to for the purpose or with the effect of preferring one shipper to another. It has been suggested that the Congress should prohibit railways from employing any agency or using any facility in the transportation of property which is furnished by the owner of the property. We hesitate to recommend at this time so drastic a measure as that. Assuming that such a law would be a constitutional exercise of authority, it would seriously interfere with property rights which have grown up under the present system. Moreover, there are many instances in which the services can be rendered or the facility furnished more advantageously both to shipper and railway and without injury to the public, if provided by the shipper itself. We do think, however, that the commission

should be empowered in a case of this kind, to determine whether the allowance to the property owner is just and reasonable compensation for the service rendered and to fix a limit which shall not be exceeded in the payment made therefor. Such a remedy would not be altogether adequate, and any remedy is extremely difficult of application, but nothing better appears to be available."

Thereupon the Congress amended section 1 of the act so that it provides that transportation shall include "all services in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration, icing, storing and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this act, to provide and furnish such transportation upon reasonable request therefor." 34 Stat. 584. Section 6, so that it provides that the schedules of rates required of the carriers shall "state separately all terminal charges, storage charges, icing charges and all other charges which the commission may require, all privileges or facilities granted or allowed." 34 Stat. 586. And section 15, so that it provides:

"If the owner of property transported under this act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the commission may, after hearing on a complaint, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the service so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for in this section." 34 Stat. 590.

The contract of the Union Pacific Company with Peavey & Co., the decision of the commission thereon in 1904, and the report of the commission in 1905, had informed the Congress, and when these amendments were enacted the members of Congress were aware, of the trade advantages which naturally and necessarily resulted to a shipper from the ownership of cars, elevators, industrial tracks, compresses, and other facilities by which he transports his own property for a carrier and the danger of discrimination and of rebates from an "excessive division to a terminal road owned by a shipper, the payment of an excessive elevator charge to the owner of the grain and the payment of an excessive mileage upon the private car which conveys the property of the owner of the car"; and in the light of all this knowledge it prescribed the remedy and fixed its limit. It is that the charge and allowance to the owner of the elevator, who is also the shipper of the grain, shall be no more than is just and reasonable, and the limit of the power of the commission is to determine what is a reasonable charge as the maximum to be paid by the carrier for the service. Counsel argue that this view ignores the power vested in the commission to prevent rebates under section 2, and to repress regulations and practices of carriers that are unjustly discriminatory or unduly preferential under section 3 and section 15 of the amended act. But the permission granted by the amendment of 1906, to continue the known regulation and practice of allowing reasonable compensation for elevation and transfer in transit to shippers who were also the owners of elevators, and the clear limitation in that amendment of the power of the commission to the determination of the reasonableness of the allowances thus made,

was, in view of the knowledge of the Congress and of the common knowledge of the pecuniary advantages derived by such shippers from this practice, a conclusive legislative determination that, when the allowances were reasonable, neither the fact that the shipper of the grain was the owner of the elevator, nor the fact that he enhanced the value of his grain by treating it during the elevation and transfer in transit, constituted a rebate, an unjust discrimination, an undue preference, or a repressible danger of either. It was not only a clear withholding from the commission of the power, but an implied and effective prohibition of the commission, to forbid the allowance to such shippers and owners of reasonable compensation for the elevation and transfer in transit of their grain through their elevators.

Again, the allowance here in question was not a rebate because it was not a concession from the published schedules, but an allowance in accordance with them. If it had been discriminatory, it would have been because the entire rate of transportation charged by the carrier after this allowance was deducted would have been unduly preferential. But the allowance was only reasonable compensation for the service rendered, and the lawful remedy, if such discrimination existed, could not have been to deprive the owner of the elevator of such compensation for the service of transportation it was rendering and thereby of a beneficial use and of a portion of the value of its elevator. In *Interstate Commerce Commission v. Stickney* (Circuit Court, November 29, 1909) 164 Fed. 638, 643, 644, the Supreme Court affirmed an injunction against an order of the commission which reduced a reasonable terminal charge of \$2 per car to \$1 per car on the ground that the rate of the carrier plus the terminal charge was in its opinion unreasonably high, and held that the commission's remedy was to reduce the carrier's rate, and that it was beyond its power to reduce the terminal charge below reasonable compensation for the service. By the same mark it was beyond the power of the commission to prohibit the allowance or payment to the owners and operators of elevators of reasonable compensation for elevation because the carriers' rate, together with that payment or allowance, was discriminatory. The result is that the orders in these cases were beyond the power of the commission, and that they cannot be sustained.

Counsel have presented arguments upon which the orders of the commission and its announcement that the principle upon which they are founded will result in universal prohibition of payment to owners and operators of elevators throughout the land of any compensation for elevation obviously do not rest. But these arguments have also been carefully considered.

It is said that the grain upon which the allowance is made is not elevated or transferred in transit because it is shipped from points of origin in Kansas and Nebraska to the Missouri river upon local rates and local waybills. But a proportional rate is the balance of a through rate. There are proportional rates from the Missouri river to the Mississippi river and to points east, north, and south which are less than the local rates between those points, and this grain which comes from points west of the Missouri river takes, not the local, but these pro-

portional, rates east of the river upon the certificates or expense bills of the companies west of the river which show whence it came. Ninety per cent. of the grain which comes to the Missouri river points passes through them to points east, north, and south. The schedules of the carriers and their practice limit this elevator allowance or payment to grain coming into the elevators from the west which is actually loaded out into cars sent north, south, or east, and this service of unloading grain out of cars which have brought it from the west and loading it into cars which carry it to points east, north, and south is "elevation" and "transfer in transit" within the meaning of the amended interstate commerce act.

The rate of transportation from points west of the Missouri river through the cities upon that river to St. Louis and other eastern points is the same to all shippers. All shippers are offered the option of sending their grain through these cities with or without elevation for the same price. The railroad company pays out of the amount it receives from this uniform rate three-fourths of a cent per 100 pounds to the elevator men at the river for the elevation of that part of the transported grain which is elevated in transit there in consideration of a prompt return and full use of its cars. It is insisted that this constitutes a rebate and an unjust discrimination because the net amount retained by the carrier is three-fourths of a cent less on grain elevated than on that which is not elevated, and because the shipper who elevates his grain receives a service that he who does not elevate it fails to obtain. But this is not a rebate because there is no concession from the published rate here, but an allowance in accordance with that rate (section 2), and because the same service of elevation is offered to all shippers at the same price, and they are all able to accept it, and there is neither rebate nor unjust discrimination where such an offer is made, although some accept and others reject its advantages. *Nicholson v. Great Western Railway Company*, 1 Nev. & McN. 121, 125, 149.

Much is said in argument of discrimination and preference. While general expressions may be found in the opinions of the courts to the effect that there must be no difference in charges not based on difference in service and that the interstate commerce act was passed to secure equality of rates and to destroy favoritism (*New York, New Haven & Hartford R. R. Co. v. Interstate Commerce Commission*, 200 U. S. 361, 26 Sup. Ct. 272, 50 L. Ed. 515), the legal effect of the act is that declared by Judge Jackson, afterwards Mr. Justice Jackson of the Supreme Court, in *Interstate Commerce Commission v. Baltimore & Ohio R. R. Co.* (C. C.) 43 Fed. 37, in these words, which have been three times affirmed and adopted by the Supreme Court as the true interpretation of the law:

"Subject to the two leading prohibitions, that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate, so as to give undue preference, or disadvantage to persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at the common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are regarded as sound, and

adopted in other trades and pursuits." *Interstate Commerce Commission v. Cincinnati, New Orleans & Texas Pacific Ry. Co.*, 167 U. S. 479, 493, 17 Sup. Ct. 896, 42 L. Ed. 243; *Cincinnati, New Orleans & Texas Pacific Ry. Co. v. Interstate Commerce Commission*, 162 U. S. 184, 196, 197, 16 Sup. Ct. 700, 40 L. Ed. 935; *Interstate Commerce Commission v. Baltimore & Ohio R. R. Co.*, 145 U. S. 263, 12 Sup. Ct. 844, 36 L. Ed. 699; *Interstate Commerce Commission v. Alabama Midland Ry. Co.*, 168 U. S. 144, 173, 18 Sup. Ct. 45, 42 L. Ed. 414.

The act does not prohibit all preferences or advantages, or the production of all prejudices and disadvantages, but only those that are undue and unreasonable. Section 3, 24 Stat. 380; section 15, as amended, 34 Stat. 589.

It is contended that the allowance of the three-fourths of a cent to the owners of terminal elevators for elevation at the river constitutes a discrimination against the owners of elevators at St. Louis and points east and west of the river to whom no such allowance is made and who cannot treat the grain during this elevation in transit. But to the companies whose termini are at the Missouri river elevation in transit there is a commercial necessity for which they have a right to pay in order that they may secure their share of the transportation and the full use of their cars. For this service they pay three-fourths of a cent per 100 pounds. The owners of elevators at other places cannot render this service and cannot treat this grain at these points; but they may do both and receive the compensation and benefit thereof by constructing elevators at the termini of the railroads at the Missouri river as those have done who do receive these benefits. The difference in allowance and in advantage is the just result of a difference in location and in the natural advantages of terminal elevators and cities upon the Missouri river, and it constitutes neither unjust discrimination nor undue prejudice. The Union Pacific Company and the Chicago Great Western Company, which have no railroads at St. Louis, certainly cannot be required to give to the owners of elevators and dealers in grain there the same advantages which they bring to those at the termini of their railroads. The Supreme Court, after a review of authorities, said:

"In short, the substance of all these decisions is that railways are only bound to give the same terms to all persons alike under the same conditions and circumstances, and that any fact which produces an inequality of conditions and a change of circumstances justifies an inequality of charge." *Interstate Commerce Commission v. Baltimore & Ohio R. R. Co.*, 145 U. S. 263, 283, 12 Sup. Ct. 844, 36 L. Ed. 699; *Harp v. Choctaw, Oklahoma & Gulf R. Co.* (C. C.) 118 Fed. 169, 175; *Id.*, 125 Fed. 445, 450, 453, 61 C. C. A. 405.

Railroad companies carrying wheat out of St. Louis allow for elevation at that city three-fourths of a cent per 100 pounds on grain shipped out to the south and to the southeast, and one-fourth of a cent per 100 pounds on grain shipped out to the east; but they allow and pay nothing for elevation upon grain shipped into St. Louis from the west. Complaint is made that the payment by the carriers of three-fourths of a cent per 100 pounds for elevation at Omaha and Kansas City works a discrimination between the dealer in grain who owns an elevator at St. Louis and the dealer who owns one at Omaha, in this, that if the former purchases grain west of the Missouri river, ships it through Omaha

to his elevator at St. Louis, and then out to some eastern point, it costs him three-fourths of a cent per 100 pounds more at that point than it would cost the dealer at Omaha who has passed the grain through his elevator. The answer is that the two dealers are not similarly situated: The Union Pacific Company and the Chicago Great Western Company neither reach St. Louis nor have their termini there. Their need for elevation in transit and their competition for transportation which constitute a controlling factor at Omaha and Kansas City do not exist at St. Louis, and that city is many hundred miles farther distant from the grain fields. These facts extract from this difference every element of unjust discrimination or undue prejudice. *East Tennessee, V. & G. Ry. Co. v. Interstate Commerce Commission*, 181 U. S. 1, 12, 21 Sup. Ct. 516, 45 L. Ed. 719; *Interstate Commerce Commission v. Alabama Midland R. R. Co.*, 168 U. S. 144, 171, 175, 18 Sup. Ct. 45, 42 L. Ed. 414; *Louisville & Nashville R. R. Co. v. Behlmer*, 175 U. S. 648, 671, 674, 20 Sup. Ct. 209, 44 L. Ed. 309.

The allowance for elevation at the Missouri river points has not been made to millers who own elevators and are engaged in milling in transit there, and it is said that from this fact arises a discrimination in favor of millers at St. Louis who own elevators at Omaha or Kansas City and pass their grain through them. There is no discrimination here in favor of millers in St. Louis who have no ownership or operative control of an elevator at one of the Missouri river cities. There is no evidence that there is any miller in St. Louis who has such an ownership or control, and this suggested discrimination is too theoretical and improbable to persuade. If, however, it exists, the remedy is to grant reparation to the millers who elevate their grain in transit in accordance with the schedules of the carriers at the Missouri river points, as the commission has done in the cases of the operators of other elevators there (*Nebraska Iowa Grain Company v. Union Pacific R. R. Co.* [Jan. 6, 1909] 15 Interst. Com. R. 90), not to forbid all compensation for elevation in transit.

This brief review of the suggestions of counsel in support of the action of the commission discloses no rebate, no unjust discrimination, no undue prejudice—nothing that may bring the sweeping orders before us within the delegated powers of that body. On the other hand, the enforcement of these orders cannot fail to cause great losses and to entail much discrimination. It will strike down the practice of a decade in reliance upon which elevators have been built, terminal grounds in large cities have been bought and equipped, contracts have been made, business and markets have grown up, and business relations have been established. If the carriers whose roads terminate at the Missouri river cities may not pay for this elevation in transit, they must furnish it themselves free, or the producers and consumers whose grain passes over their roads must ultimately bear the expense of it. If they furnish it free, or if they construct elevators and charge a reasonable compensation for it, the owners of the terminal elevators at the river must lose the use which in large part induced their construction and must lose a portion of their value. If the carriers charge for it, producers and consumers of grain, which on account of its origin

must pass, or for other reasons does pass, over their railroads, must bear this charge, while those whose grain may pass over the through roads may be free from it, and this fact will necessarily have the effect to divert grain and the business in it from the Missouri river cities and to diminish the value of all investments therein in facilities for conducting it.

While these facts bear upon the wisdom and expediency of the orders, they are not unworthy of serious consideration in the determination of the question whether or not the power of the commission to affect so radically the property rights and interests of the parties to these suits really exists. The conclusion of the whole matter is that the sweeping orders under consideration were beyond the delegated power of the commission, and for that reason they must be annulled, and their enforcement must be enjoined. Peavey & Co. pray for a recovery from the Union Pacific Company of compensation for services rendered by it between December 17, 1906, and October, 1908, when the bill in its case was filed in the elevation of grain at Omaha and Kansas City at the agreed rate of $1\frac{1}{4}$ cents per 100 pounds. But on April 9, 1907, the commission reduced the rate of compensation for these services to three-fourths of a cent per 100 pounds. 12 Interst. Com. C. R. 85, 90. Reasonable compensation for such services includes not only the cost of the services but reasonable reward therefor in addition; but the evidence fails to convince that three-fourths of a cent per 100 pounds then was or now is less than a reasonable compensation for these services. Peavey & Co. may therefore recover of the Union Pacific Company for elevation services rendered prior to April 9, 1907, at the rate of $1\frac{1}{4}$ cents per 100 pounds and for such services rendered since that date at the rate of three-fourths of a cent per 100 pounds.

Let decrees be entered in accordance with the conclusions announced in this opinion.

In re SMITH.

(District Court, N. D. New York. February 1, 1910.)

1. BANKRUPTCY (§ 161*)—PREFERENCES—TRANSFER OF PROPERTY WITHIN FOUR MONTHS—EFFECT OF PRIOR AGREEMENT.

Where a mortgage was executed by an insolvent within four months prior to the filing of a petition in bankruptcy against him to secure an existing debt, the fact that it was made pursuant to a prior oral agreement will not prevent the transfer from being held a preference.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 161.*]

2. BANKRUPTCY (§ 58*)—ACTS OF BANKRUPTCY—GIVING PREFERENCE.

Where an insolvent after the return of a verdict against him in an action at law, but before the entry of judgment, sent for a creditor and executed a mortgage to him to secure the debt, the preference thus given to the mortgagee over the judgment creditor must be presumed to have been intentional and constituted an act of bankruptcy under Bankr. Act July 1, 1898, c. 541, § 3a (2), 30 Stat. 546 (U. S. Comp. St. 1901, p. 3422).

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 58.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. BANKRUPTCY (§ 315*)—INVOLUNTARY PROCEEDINGS—PETITIONING CREDITORS.

A judgment creditor who instituted proceedings supplementary to execution under Code Civ. Proc. N. Y. § 2432 et seq., and obtained an injunction restraining the debtor from disposing of his property, on discovering that the debtor had given a preference or transferred his property, had the right at his election to abandon such proceedings and file a petition in bankruptcy against his debtor within four months, and the fact that by such proceedings he had secured a lien did not prevent his claim from being provable in bankruptcy, inasmuch as an adjudication would invalidate his lien, and place him on an equality with all other creditors.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 315.*]

4. BANKRUPTCY (§ 76*)—INVOLUNTARY PROCEEDINGS—INTERVENING CREDITORS.

A creditor who files a petition in bankruptcy has the right to ask other creditors to intervene when such intervention becomes necessary to preserve the proceedings.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 76.*]

In the matter of Alfred Smith, alleged bankrupt. Review of finding of referee that petition should be dismissed. Order of adjudication.

Irving Bacon, for petitioning creditors.

J. T. Gridley, for alleged bankrupt.

RAY, District Judge. April 12, 1907, the petitioner, John L. Alnutt, filed a petition in involuntary bankruptcy against said Alfred Smith, alleging that Smith owed debts in excess of \$1,000, was insolvent, and neither a wage earner nor person engaged chiefly in farming or the tillage of the soil; also, that Smith's creditors were less than 12 in number. The petition also alleged that Alnutt was a creditor of said Smith having a provable claim against him "which amounts in excess of the value of securities held by him to over \$500, and that your petitioner is not entitled to priority of payment of his said claim within the meaning of section 64b of the bankruptcy law of 1898, nor has your petitioner received a preference within the meaning of section 60a-b of such law as amended." The petition then set forth that such indebtedness consisted of a judgment for \$1,048.93 entered and docketed in Cayuga county clerk's office February 7, 1907, transcript thereof filed in Tioga county February 8, 1907, and that such judgment and interest were wholly unpaid. The petition then alleged as an act of bankruptcy by Smith that February 2, 1907, he executed a mortgage of \$2,020 on his real estate, and that same was recorded in the county where such property was located on the same day, and that same was given to secure the payment of a note held by one Charles F. Gridley and accrued interest thereon, and that such mortgage was given with intent to prefer such creditor over his other creditors; that on the same day said Smith committed an act of bankruptcy by transferring and conveying to his wife, Adelaide M. Smith, by warranty deed of that date and duly recorded, all his interest in his real estate, describing it, with intent to hinder, delay, or defraud his creditors or some of them. To this petition Smith interposed an answer, not denying the giving of the mortgage and deed, or insolvency at the time or at the time the petition was filed, but denying that such transfers were made with intent to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

hinder, delay, or defraud his creditors, or any of them, or with intent to prefer one creditor over any other, and also alleging that Alnutt was a preferred creditor and entitled to priority of payment; that he was a judgment creditor having a judgment of record for the amount of his claim; and that he had more than 12 creditors.

A replication to the answer was duly filed, and, as the creditors were more than 12 in number, Henry A. Hompe and George Sweeting intervened as petitioning creditors, alleging themselves to be such, and filed an intervening petition. In giving his list of creditors Smith did not name either Hompe or Sweeting. He did name Alnutt. The referee to whom this matter was duly referred has found (1) that the creditors of Smith are more than 12 in number, of which there is no question; (2) that Sweeting is not the owner of a claim against Smith provable in bankruptcy and that his claim is not valid; (3) that the claim of Hompe, a judgment of \$14.35 against Smith, was assigned to Hompe by Alnutt for the purpose of making him a creditor of Smith, and thus securing three creditors as petitioners in this proceeding; (4) that the claim of Alnutt, the original sole petitioner, consisted of a judgment unpaid, and that a proceeding supplementary to execution had been commenced and the usual injunction in such a proceeding obtained, and therefore is entitled to priority of payment and has and had, when the petition was filed, a specific lien, and cannot, therefore, be a petitioner herein; (5) that the mortgage referred to was not given with intent to prefer Gridley, the mortgagee, and is valid; and (6) that Smith's wife paid a full and fair present consideration for the real estate conveyed to her, and that same is valid. He makes no finding in the question of fraudulent intent, etc., as to the deed.

Alnutt, the petitioner, had sued Smith on a just claim, which Smith defended, and February 1, 1907, the action was tried and a verdict rendered in favor of Alnutt against Smith, and judgment was entered thereon February 7, 1907. On the evening of the same day, February 1st, Smith proposed to his wife, who was present at the trial, to sell his interest in all his real estate to her for \$100, or she offered that on his proposal to sell to her, and Smith accepted, and there is no evidence that she did not pay the money. It is perfectly apparent that this was done for the purpose of hindering, delaying, and defrauding creditors, or Alnutt at all events. No sane man can doubt that fact. On the same day, or the next, February 2, 1907, Gridley, who then held and who for some time had held Smith's note for about \$2,020, principal and interest, was sent for, and the mortgage referred to was given. It is contended that this was done in execution of a prior oral agreement to give a mortgage, but the facts remain that there was no agreement to execute it at that particular time or immediately after the rendering of the verdict in the suit referred to. It is obvious that the giving of the mortgage at that time was for the purpose of giving and securing to Gridley a preference over Alnutt, a lien in advance of the judgment to be entered, and that this was the intent and purpose of Smith. Intelligent and sane men are presumed to intend the well-known and obvious consequences of their own voluntary acts, and it cannot be rationally concluded that in sending for Gridley and executing that mort-

gage the day after the verdict referred to was rendered and which verdict was to be followed by a judgment and a lien on the real estate, Smith, well knowing he was insolvent, did not intend to prefer Gridley. A person has committed an act of bankruptcy who has (within the time fixed by the bankruptcy act) "conveyed, transferred, concealed, or removed, any part of his property with intent to hinder, delay or defraud his creditors or any of them; or (2) transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors." Section 3, subds. 1, 2, of act entitled "An act to establish a uniform system of bankruptcy throughout the United States, approved July 1, 1898" (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]), as amended February 5, 1903 (chapter 487, 32 Stat. 797), and June 15, 1906 (chapter 3333, 34 Stat. 267 [U. S. Comp. St. Supp. 1909, pp. 1308, 1317]). Section 60a provides that:

"A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition and before the adjudication * * * made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

Subdivision "b" of the same section (section 60) provides that such preference may be recovered by the trustee when the person to be benefited thereby "shall have had reasonable cause to believe that it was intended thereby to give a preference." The intent of the one receiving the deed or mortgage (transfer of property, subdivision 25, § 1, of the act) is entirely immaterial on the question whether or not an act of bankruptcy has been committed. So a person may transfer his property for a full and fair consideration, and receive that consideration, but, if it is done with intent on his part to hinder, delay, or defraud his creditors, the one making the transfer has committed an act of bankruptcy. Whether the transfer can be set aside or held to be a preference under sections 3 and 60 referred to, as to the grantee or mortgagee, is determined by other facts as we have seen. So, if the giving of the mortgage or deed was within the four months and the effect will be as stated in section 60, and the one receiving it had reasonable cause to believe a preference was intended, the fact that it was executed and delivered within the four months in execution of a prior oral agreement to execute it does not change the result or prevent the transfer being held a preference. In re Great Western Mfg. Co., 152 Fed. 123, 127, 128, 81 C. C. A. 341, where the court said:

"An agreement to mortgage or transfer is not a mortgage or a transfer. The title remains in the owner unincumbered by the mortgage until the mortgage or transfer is effected. When the agreement is made before, and the mortgage or transfer within, the four months, the title stands unincumbered by the latter at the commencement of the four months, and the proceeds of that title are pledged under the bankruptcy law for the benefit of all the creditors pro rata. Any subsequent mortgage or transfer withdraws that title or a portion of its value from these creditors, and a just and fair interpretation and execution of the act demands that such a mortgage or transfer should be adjudged voidable if it is otherwise so, and that the mortgagee or transferee should be remitted to his original agreement. In this way the property at the commencement of the four months and its value may be preserved for the general creditors, and the

mortgagee or transferee may retain every lawful advantage his earlier contract confers upon him. Any other course of decision opens a new and enticing way to secure preferences, nullifies every provision of the law to prevent them, and invites fraud and perjury. Hold that transfers within four months in performance of agreements to make them before that time do not constitute voidable preferences, and honest debtors would agree with their favored creditors before the four months that they would subsequently secure them by mortgages or transfers of their property, and just before the petitions in bankruptcy were filed they would perform their agreements. Dishonest men who made no such contracts might falsely testify that they had done so, and thus by fraud and perjury sustain preferential transfers and mortgages made within the four months to relatives or friends. The great body of the creditors would be left without share in the property of their debtor and without remedy, and a law conceived and enacted to secure a fair and equal distribution of the property of debtors among their creditors would fail to accomplish one of its chief objects. This court will hesitate long before it approves a rule so fatal to the most salutary provisions of the bankruptcy law, and our conclusion is: A mortgage or transfer of his property by an insolvent debtor within four months of the filing of a petition in bankruptcy against him, which otherwise constitutes a voidable preference, is not deprived of that character or made valid by the fact that it was executed in performance of a contract to do so made more than four months before the filing of the petition. *Wilson v. Nelson*, 183 U. S. 191, 198, 22 Sup. Ct. 74, 46 L. Ed. 147; *In re Sheridan* (D. C.) 98 Fed. 406; *In re Dismal Swamp Co.* (D. C.) 135 Fed. 415, 417, 418; *In re Ronk* (D. C.) 111 Fed. 154; *Pollock v. Jones*, 124 Fed. 163, 61 C. C. A. 555; *Anniston Iron & Supply Co. v. Anniston Rolling Mill Co.* (D. C.) 125 Fed. 974; *Johnston v. Huff, Andrews & Moyler Co.*, 133 Fed. 704, 66 C. C. A. 534; *In re Mandel* (D. C.) 127 Fed. 863. *In Wilson v. Nelson*, 183 U. S. 191, 198, 22 Sup. Ct. 74, 46 L. Ed. 147, the debtor had given an irrevocable power of attorney to the creditor to confess judgment many years before. Judgment was confessed under it within the four months, and the Supreme Court held it to be a voidable preference. *In re Sheridan* (D. C.) 98 Fed. 406, *In re Ronk* (D. C.) 111 Fed. 154, and *In re Dismal Swamp Co.* (D. C.) 135 Fed. 415, 417, 418, mortgages executed within the four months in performance of agreements to give them made more than four months before the filing of the petitions in bankruptcy were held to be voidable preferences, and this view seems to be sustained by the terms of the bankruptcy act, by the more cogent reasons, and by the weight of authority."

It is clear that Smith committed an act of bankruptcy within the four-month period. The referee went beyond his power when he decided that the deed and mortgage were both valid. The question was: Had Smith committed an act of bankruptcy?

The question remains, however, whether or not three creditors of Smith united in the petition as it finally stood. In other words, did two creditors of Smith having provable claims intervene and join in the proceeding as petitioning creditors? If this question is answered in the negative, it is immaterial whether or not Alnutt was a proper, or in a position to become a, petitioning creditor. The referee finds that the petitioner, Sweeting, one of the intervening petitioners, had no valid claim against Smith. March 19, 1907, Horace N. Humiston, by a writing duly acknowledged, assigned to said George Sweeting an account or claim of \$9 for extra work, etc., alleged to have been performed by him for Smith and furnished him on or shortly before July 2, 1904. September 3, 1904, said Humiston filed a lien for work, labor, etc., done and furnished Smith between April 11, 1904, and August 5, 1904, amounting less payments to \$359, and this included an item of \$9 for extra work and material; the precise date of this item not being mentioned. It appears that Humiston was on the premises and doing

work in July, 1904. Thereafter, and about August, 1904, a suit was brought by Humiston for the foreclosure of such lien. The complaint set out that the main work and also extras were to be paid for when all work was completed. Both Smith and Alnutt were parties defendant and both answered. Smith's answer went generally to nonperformance and made no specific denial of the \$9 item, and there was no special defense as to it. Later, and on or about the 27th day of January, 1906, that suit was settled, and Humiston executed and acknowledged and delivered to Alnutt a satisfaction of such lien, and same was discharged of record accordingly. Whether the claim against Smith for \$9 in favor of Humiston has been paid so as to release Smith depends on the relation of the parties, and it is an important question whether or not it is merged in the large judgment in favor of Alnutt.

February 4, 1904, Alnutt contracted with Alfred Smith in writing to build a house on the premises mentioned, for which he was to receive \$4,100, and \$1,300 of which sum was payable on the completion of the contract by Alnutt. Humiston was a subcontractor to the knowledge of Smith and his wife. As Smith did not pay, or for other reasons, or at least as Humiston did not get his pay, he filed the lien on the premises mentioned. Smith did not pay, and thereupon Alnutt paid Humiston the amount of his lien, and the satisfaction thereof mentioned was executed and recorded. Smith had nothing to do with this. Thereafter, and March 14, 1906, Alnutt sued Smith in the Supreme Court, county of Cayuga, N. Y., to recover the balance due him on the contract and also certain extras, including an item of \$9 for deadening felt, which was not the item of \$9 for extra work, etc., of July 2, 1904, before referred to. Smith's answer, to which attention has been called, referred to the item of \$9 set forth in the complaint. The first \$9 item may have been furnished by Humiston under his agreement with Alnutt, and may have been the \$9 item of his lien. It may be Humiston had nothing to do with that item. The complaint in that suit alleged a settlement as to amount due and an agreement between Smith and Alnutt that Smith would pay the amount when Alnutt had procured the lien to be satisfied or canceled. Alnutt paid Humiston the amount for which he had filed a lien, and this covered all items for work, etc., done by him as subcontractor under and pursuant to the contract. It did not necessarily include extra work done by Humiston in July, 1904, as it appears that Humiston got through his work in executing his contract with Alnutt in or about May, 1904. The work ordered by Smith in July and performed by Humiston was a personal matter between them, and could not be properly included in the notice of lien. Smith defended the suit brought by Alnutt, but was defeated, and the large judgment mentioned resulted. I do not think the evidence shows that Humiston did not perform the work and furnish the material in July he says he did. I am of the opinion it shows the work was performed and the material furnished at the request of Smith, and that it is a just and a valid claim. I therefore hold that Humiston had a valid claim of \$9 against Smith provable in bankruptcy, and that his assignee, Sweeting, was a proper petitioning creditor. It is conceded that Alnutt had another judgment against Smith for \$14.35, perfected

January 11, 1907, provable in bankruptcy, and it is shown that on the 11th day of April, 1907, Alnutt, for value, duly assigned same to Hompe. This was no part of the larger and subsequent judgment, and, as it was so assigned prior to the execution and filing of the petition in bankruptcy and is unpaid, I am unable to see why Hompe is not a proper petitioning creditor. We come, then, to the question whether or not Alnutt himself could file a petition. He was the owner of this judgment of \$1,048.93, which after trial he had obtained against Smith. Execution was issued February 18, 1907, and returned wholly unsatisfied. Thereupon Alnutt instituted supplementary proceedings against Smith under section 2432, etc., Code Civ. Proc. N. Y., and he was examined and the situation developed. The order of reference was made April 2, 1907, and Smith was directed to appear before the referee appointed by the order on the 18th day of April, 1907. The order contained this clause:

• "And the said Alfred Smith is hereby forbidden from making or suffering any transfer or other disposition of or interference with the property of which he is possessed, or in which he has any interest, legal or equitable, and not exempt from levy and sale on execution until further directions in the premises."

Smith had already and within four months sold and conveyed all his real estate, all his property. Alnutt could have pursued the matter and secured a receiver—probably—who could then have brought an action to set aside the deed and the mortgage on the ground they were made with intent to hinder, delay, or defraud creditors. But he could not in that way have secured the benefit of the bankruptcy act as to preferences. But the petitioner, Alnutt, had the right to abandon that proceeding supplementary to execution and file a petition in bankruptcy. He had a provable claim. Section 63a, Bankr. Act.

Even if he has a claim secured in part, which this judgment is not, he may prove for the debt above the security and deducting the security have it allowed for the balance. Sections 57e, 57g. Even a preferred creditor may be a petitioner, prove his claim, surrender his preference, and have the claim allowed. *Stevens v. Nave-McCord M. Co.*, 17 Am. Bankr. Rep. 609, 615-617, 150 Fed. 71, 80 C. C. A. 25; *In re Douglass Coal & Coke Co. (D. C.)* 12 Am. Bankr. Rep. 539, 551, 131 Fed. 769; *In re Hornstein (D. C.)* 10 Am. Bankr. Rep. 308, 321, 122 Fed. 266; *Collier on Bankruptcy (7th Ed.)* 634, 635. Here Alnutt on the hearing before the referee expressly offered to surrender any lien or preference he had obtained, if any. Again, the moment Smith is adjudged a bankrupt the lien, assuming there is one, falls, having been obtained within four months of the filing of the petition. See section 67f of the act, which so far as material reads as follows:

"That all levies, judgments, attachments, or other liens obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid."

Hence, assuming that under the authority of *Duffy v. Dawson*, 2 Misc. Rep. 401, 21 N. Y. Supp. 978, the proceedings supplementary to execution gave Alnutt, as a vigilant judgment creditor, a lien on all the equitable assets of Smith, with the right to pursue the remedies given by the Code of Civil Procedure, including an equity action through a receiver to set aside the deed to the wife and the mortgage referred to, he, Alnutt, well knew that other creditors of Smith could defeat his whole proceeding and the lien of his judgment at any moment by filing a petition in bankruptcy, and he elected to file one himself well knowing that his supplementary proceedings and any lien created or preference gained thereby as well as the lien of his judgment would fall the moment an adjudication in bankruptcy was made. The referee, as evidenced by the section of the bankruptcy act referred to by him in the findings or conclusions of law, proceeded on the theory that as section 64b, subd. "5," and which section relates to "debts which have priority," provides that the debts to have priority of payment by the trustee in bankruptcy are (5) "debts owing to any person who, by the laws of the states or the United States are entitled to priority," this debt on this judgment owing by the bankrupt to Alnutt would be entitled to priority of payment. This theory absolutely ignores the fact that the judgment and all proceedings to enforce it, including the supplementary proceedings, would fall, as a lien or debt entitled to priority, by virtue of the provisions of section 67f of the act above quoted. I am not disposed to hold that judgment creditors who have obtained judgments within four months on discovering that their debtors in fraud of the bankruptcy act have disposed of their property may not abandon remedies by execution and supplementary proceedings in aid thereof and themselves institute bankruptcy proceedings, inasmuch as their liens, if any, fall the moment an adjudication in bankruptcy is pronounced. In view of the fact that all liens created within four months of the filing of the petition fall of their own weight under the provisions of the section quoted, reason and justice dictate that creditors having such liens, on discovering the true condition of the alleged bankrupt, and that the pursuit of remedies under their liens and to enforce same would be unavailing, may institute proceedings in bankruptcy and enforce the provisions of the bankruptcy act. If they have reduced their claims to judgment duly docketed, and have thereby created a lien on the real estate of their creditor, are they compelled to proceed to issue execution, levy and advertise a sale with full knowledge that other creditors may institute bankruptcy proceedings, and make their efforts and expense fruitless? I think not. Having such a lien, they may file a petition in bankruptcy and proceed under that law. They know their lien as such is made void by the very act they invoke in case adjudication is made. It is not an experiment with the law, or an attempt to evade it, or to enforce their lien and the bankruptcy act at one and the same time. From the necessities of the case, in view of the bankruptcy act, it is the honest method to pursue. In this case Alnutt entered his judgment, issued execution, and found it returned unsatisfied. He instituted proceedings supplementary to execution, which in one aspect is a bill of discovery, and found that on

the day following the verdict of the jury on which the judgment was entered Smith had first mortgaged his property to secure an old debt, and then deeded it away to his wife for the nominal consideration of \$100. Thereupon he abandoned that proceeding and instituted this. He could only pursue his remedy against Smith in that proceeding by procuring the appointment of a receiver and having a suit commenced to set aside the mortgage and the deed. See *Ward v. Petrie*, 157 N. Y. 301, 51 N. E. 1002, 68 Am. St. Rep. 790; *Stephens as Receivers v. Meriden Co.*, 160 N. Y. 178, 54 N. E. 781, 73 Am. St. Rep. 678. That he did not do for the reasons stated, but immediately resorted to the bankruptcy law where, as he knew, all creditors except lienors having liens more than four months old would share equally.

I find nothing in the bankruptcy act which, even by implication, denies the right to a secured creditor or a judgment creditor to file a petition in bankruptcy against the one owing the debt. The language of the act and the plain inferences to be drawn are to the contrary.

Section 59a and b of the act provide:

"Who may file and dismiss petition. (a) Any qualified person may file a petition to be adjudged a voluntary bankrupt.

"(b) Three or more creditors who have provable claims against any person which amount in the aggregate, in excess of the value of securities held by them, if any, to five hundred dollars or over; or if all of the creditors of such person are less than twelve in number, then one of such creditors whose claim equals such amount may file a petition to have him adjudged a bankrupt."

Here is no exclusion of creditors having a lien on the property of the alleged bankrupt. All claims may be proved, unless of a class or classes of which this is not one, and, if there be a partial security by way of lien or otherwise, same may be allowed for the balance over the security, and in certain cases the lien or incumbrance or preference must be surrendered before the claim can be allowed. All this is made plain by the provisions of section 57a-g.

The alleged bankrupt by his attorney now raises the question that, the assignment of the small judgment to Hompe shows on its face that the date has been changed. Inspection indicates that this is true, but no such question was raised before the referee, acting as special master. Mr. Hompe was asked if he purchased the judgment on or about the date of the assignment, which is dated April 11, 1907. The attorney for the bankrupt objected, and thereupon the assignment itself bearing that date was put in evidence without question that it was executed and delivered the day it bears date. No evidence whatever was given that it was not in fact executed and delivered the day it bears date. No such question was raised and no opportunity was given to explain the erasure, if one was made, and the placing of the figures "11" and the word "April" in the assignment. I must assume, in the absence of evidence to the contrary, that the paper was executed and delivered on the day it bears date. The change creates suspicion, but suspicion is not evidence, and does not rise to the dignity of proof. The alleged bankrupt seemed content at the time to rest upon the paper itself. Mr. Hompe intervened in May, 1907, as is conceded, and this fact negatives the claim that the judgment was not assigned until June 10, or June 20, 1907. The attorney for the petitioning creditor

sought to go into the actual facts as to the purchase and assignment, but was prevented by the objection of the alleged bankrupt. I find no justification in the evidence for a holding that Hompe did not purchase and take an assignment of that judgment on the 11th day of April, 1907. Clearly, there is no evidence to support a finding that Alnutt split up any claim he had as it is proved beyond all question that he never owned that judgment although it stood in his name. It was a judgment for costs, and belonged to Mr. Bacon. He was the creditor until it was assigned to Hompe. A creditor who files a petition in bankruptcy has the right to request others to intervene when such intervention becomes necessary to preserve the proceeding.

The result is that the findings of the referee or special master are disapproved, reversed, and set aside. There will be a finding and decision that the alleged bankrupt, Alfred Smith, committed an act of bankruptcy as charged in the petition; that Alnutt, Sweeting, and Hompe were creditors having provable claims aggregating over \$1,000 at the time the petition was filed; and that Alnutt was a proper petitioning creditor, and that Sweeting and Hompe were proper intervening creditors and duly intervened.

There will be an order of adjudication accordingly.

E. G. BEECHWOOD ICE CO. v. AMERICAN ICE CO.

(Circuit Court, D. Maine. February 9, 1910.)

No. 44.

1. WATERS AND WATER COURSES (§ 296*)—ICE—RIGHTS OF RIPARIAN PROPRIETORS—ARTIFICIAL PONDS.

An owner of land on a stream which is flowed by a dam on the land of a lower proprietor, built with his consent, but for the benefit of the lower owner, is the owner of the ice formed on his land.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 333; Dec. Dig. § 296.*]

2. WATERS AND WATER COURSES (§ 298*)—CUTTING ICE ON LAND OF ANOTHER.

An owner of land on a stream which built a dam forming an ice pond, which extended over land of an upper proprietor, *held* on the evidence to have committed a willful trespass in cutting ice on the land of the other owner.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 335-337; Dec. Dig. § 298.*]

3. WATERS AND WATER COURSES (§ 298*)—MEASURE OF DAMAGES—CUTTING AND REMOVAL OF ICE.

Plaintiff was lessee of an ice pond in Maine, from which defendant willfully harvested the ice, and afterward shipped it to New York City. *Held* that, the trespass being willful, plaintiff had the right to fix the time of the conversion at its election, and that, on demand for the ice after its arrival in New York, it could maintain trover for its value there.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 335; Dec. Dig. § 298.*]

Action by the E. G. Beechwood Ice Company against the American Ice Company. Judgment for plaintiff.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Benjamin Thompson, for plaintiff.
Charles F. Johnson, for defendant.

HALE, District Judge. In this action of trover the plaintiff seeks to recover the value of 4,000 tons of ice, alleged to have been willfully and intentionally converted by the defendant to its own use, at New York City, on the 9th day of August, 1906. The plea is the general issue. The parties have filed a written stipulation, waiving a jury.

The case shows that the ice in question was cut from the upper part of Barberry creek, an indentation of Portland Harbor upon the South Portland side. The defendant company owns the land on both sides of this creek near the outlet. In order to make it available as an ice pond, under legislative authority, the former owner of the privilege, and a predecessor in title to the defendant company, built a dam across the mouth of the creek, near the Boston & Maine Railroad location, in such a way as to exclude the salt water, and create a pond on this property of about 18 acres in extent. Above this property is land owned by Thomas B. Haskell. Before the dam was built at the outlet of the creek, the Haskell portion of Barberry creek had been used for a long time for the purpose of harvesting ice; and, when so used, a dam was maintained across the creek near the old Kennebec Railroad crossing, which was very near the dividing line between the Haskell and the American Ice Company properties. In consequence of the dam at the outlet, built by the defendant company, the fresh water flows back over the Haskell property to the depth of five or six feet, and makes a pond over this property covering an area of about 10 acres. In 1895 Thomas B. Haskell entered into a lease or agreement with the predecessor of the American Ice Company, giving the company the right to flow the land with fresh water, together with the right to build and maintain its dam at the outlet, and to take off the ice for five years. Since the expiration of the lease the defendant company has never claimed a right to the ice on the Haskell part of the pond, and does not now claim it. In 1904 Mr. Haskell leased to the plaintiff corporation the exclusive right to take off the ice from his property for five years.

The plaintiff's title to the ice cut in 1906 is unquestioned. Although the dam which caused the flowing of the property was not on the Haskell property, but was at the outlet of the pond, this fact does not affect the title of Haskell's lessee to the ice formed on this part of Barberry creek. The plaintiff company had the right of possession of the land, of the water over the land, and of the water after it had frozen into ice. *Barrett v. Ice Co.*, 84 Me. 155, 156, 24 Atl. 802, 16 L. R. A. 774; *McFadden v. Ice Co.*, 86 Me. 319, 29 Atl. 1068; *Paine v. Woods*, 108 Mass. 160, 173; *Stevens v. Kelley*, 78 Me. 445, 449, 6 Atl. 868, 57 Am. Rep. 813; *Richards v. Gauffret*, 145 Mass. 486, 488, 14 N. E. 535; *U. S. v. Loughrey*, 172 U. S. 206, 19 Sup. Ct. 153, 43 L. Ed. 420. Four thousand tons of ice were taken by the defendant company from this property in March, 1906. The taking is not denied. A sharp contention is made as to the character of the taking.

1. Was the taking of the ice on the part of the defendant company a willful trespass? The defendant says that the ice was taken with the honest belief on its part that it had rights in the ice on the Haskell part of Barberry creek. It therefore claims that the taking was done in good faith, under the reasonable belief that its conduct was right-ful. The fact of taking having been shown, the burden of proving good faith rests upon the defendant. *Trustees of Dartmouth College v. International Paper Co.* (C. C.) 132 Fed. 92, 97. On the question of the character of the trespass, whether willful or not, there is a conflict of testimony. There is no necessity for discussing the evidence bearing upon this subject. The court comes to the conclusion that the defendant has not met the burden of showing good faith in the taking. There may be some question as to whether the original entry upon plaintiff's property by the defendant was with full knowledge that it did not have a right there. But from the whole evidence the court finds that afterwards, and before the removal of the ice, the defendant had unmistakable knowledge of plaintiff's ownership of the ice. The testimony shows it was warned not to continue to cut, and not to remove what had been cut. The whole evidence leads me to the conclusion that from the first the defendant unreasonably refrained from inquiring as to the nature of its supposed rights. I think it may be said in this case, as was said in the *International Paper Company Case*, to which I have referred, that the defendant acted without reasonable care and investigation. The inevitable conclusion of the court, drawn from the full evidence, is that the defendant's trespass late in March, 1906, was willful.

2. The plaintiff made his demand upon the American Ice Company on August 9, 1906, in New York City, and brought suit alleging a conversion of the ice in New York City on that day. This is an action in trover, the gist of which is the conversion by the defendant of goods to which the defendant had then and there the right of possession. The plaintiff invokes the theory of the law that in unlawfully taking the plaintiff's ice the defendant did not acquire any title to it, or ownership in it; but that, on the contrary, the plaintiff still continued to own the property, and hence had the right to retake it wherever it could be found; that if the plaintiff found the property in the city of New York it could there claim it, and there retake it, and could replevy it there if necessary; that it could do this, even though greater value had been put upon the property by a complete change in its form and character; and that if it could replevy goods, even though they had been changed and improved in their character, it might clearly make its demand and pursue its remedy by an action of trover, instead of by an action of replevin. This gives the plaintiff the right to determine the form of action which it shall adopt in order to secure redress for a willful trespass. The leading case in the federal courts upon the question of damages for willful trespass is *Bolles Wooden Ware Company v. U. S.*, 106 U. S. 432, 1 Sup. Ct. 398, 27 L. Ed. 230, which holds that a willful trespasser is liable for the full value of the property at the time and place of demand or suit brought, and with no deduction for his labor and expense put upon it. This, at first,

seems a hard rule; but, if a defendant were held for only the actual value of the property which he has willfully taken, the ends of justice would not be met. An unprincipled ice manufacturer might willfully take a competitor's ice, and be glad to suffer the consequence of paying merely a fair value of the ice at the place of taking. Such a result would be neither just nor salutary. If that were the rule of damages in case of willful trespass, the logical result would be that large corporations might drive their rivals out of business by simply harvesting the ice in the ponds upon which their competitors depend for their source of supply; for such corporations would suffer only the damage of paying what they would have paid if they had purchased the ice in the open market. And so the courts have generally, although not invariably, followed the rule of the *Wooden Ware Company Case*. For illustration, if trees are willfully cut from a person's lot, and afterwards manufactured into expensive commodities, the plaintiff may retake the goods, even after the improvements have been put upon them; or he may sue in trover for their value at the date which he fixes upon as the time of the conversion. *U. S. v. Mills* (C. C.) 9 Fed. 684. If corn has been willfully taken from a person's field, and afterwards manufactured into whisky, the whisky may be retaken, or its value may be sued for in trover; and the time of the conversion may be fixed by the plaintiff. *Silisbury v. McCoon*, 3 N. Y. 379, 53 Am. Dec. 307. The theory is that the defendant gets no title to the thing which he obtains by willful trespass; that the property still belongs to the owner, who may seize it wherever he finds it. The defendant is a wrongdoer, and cannot complain if he loses the property unlawfully taken, and loses also the added value which has been placed upon it. The plaintiff may fix the time of the conversion after the property has been improved, and may thus have the added value of the property. *Wooden Ware Case*, *supra*; *Trustees of Dartmouth College v. International Paper Company*, *supra*; *U. S. v. Mills* (C. C.) 9 Fed. 684; *U. S. v. Heilner* (C. C.) 26 Fed. 80, 82; *U. S. v. Bitter Root Development Company*, 133 Fed. 274, 278, 66 C. C. A. 652; *Adams v. Blodgett*, 47 N. H. 219, 221, 90 Am. Dec. 569; *Foote v. Merrill*, 54 N. H. 490, 491, 20 Am. Rep. 151; *Final v. Backus*, 18 Mich. 218; *Pine River Logging Company v. U. S.*, 186-U. S. 279, 294, 22 Sup. Ct. 920, 46 L. Ed. 1164. The federal courts recognize the *Wooden Ware Case* as of final authority.

In the case at bar the defendant urges that this may be the proper rule of damages as applied to timber and hides, but, as applied to ice, it is grossly inequitable, and exposes the defendant to undue severity. The court cannot think so. A defendant who has unlawfully taken timber may be exposed to very greatly increased damages from the added value that the unlawfully converted timber may have when manufactured into pulp and fine grade paper. But from the nature of the product ice cannot be changed into very expensive commodities. The increased value of the ice comes from the fact that suit may be brought at a distant point, in a large city, where a greater price may be obtained from the added expense of freight and of other expenditures. But, on the other hand, the owner of the ice can retake or sue for only

the ice that he can find; and in many cases the ice, from its nature, has melted or wasted, and the owner is thereby put to some disadvantage in pursuing his remedy.

3. What was the value of the ice in New York on the 9th day of August, 1906? It is necessary first for the court to inquire what ice was in New York, for which the demand was made, and for which the suit was brought. The case shows that 4,000 tons of ice were cut. The case shows, also, that the ice taken from the plaintiff's pond was stored in the top tiers of the rooms of the icehouses in which it was placed, and where it would be subject to great waste. The testimony convinces the court that it was soft ice, cut in the spring, and that there would be large waste. I understand the plaintiff to admit that not more than 2,400 tons of ice would remain after it was taken in New York. From the whole testimony I think this is certainly not allowing too much for waste. What was the character of this ice? The testimony shows that it was of an inferior character; that it had cinders and dirt in it; that it was soft; and that it was not of a merchantable character. There is testimony as to the value of the best marketable ice in New York at the time of the demand; but the price of good ice affords very little assistance to the court in coming to a conclusion as to what was the value of the ice in question. There is, however, some evidence as to the character of the ice. It clearly could have been no better ice in New York than it was at the ice pond. If it was soft ice at Barberry creek, it certainly was not less soft in New York. If there were cinders and dirt in it at the ice field, it would be subject to the same conditions in New York. The plaintiff urges that the omission of the defendant to offer evidence within his reach as to the value of this ice is entitled to consideration, and may be regarded as in the nature of an admission. I do not think that this can be said to be a case where evidence has been held back, and where there should be a presumption against the defendant for this reason. Here there is evidence touching the character, and, to some extent, as to the value, of the ice in New York. The testimony as to the value of marketable ice in New York cannot control; and, while the whole evidence as to the value of this ice is unsatisfactory, it is of some value. In my opinion it would be a gross exercise of arbitrary power for me to say that it had a value approaching the value of first-class marketable ice. It had a small value at the pond. At the point where demand was made it had the added value of packing, shipping, and of carriage to New York. After carefully examining all the testimony in the case upon this point, I fix the value of the ice in New York at the time of the demand at \$2.50 per ton. The value of the 2,400 tons is, then, \$6,000. To this should be added interest from August 9, 1906, to February 9, 1910, \$1,260. The whole value of the ice, with interest, then, is \$7,260, and for this sum the plaintiff is entitled to judgment. Judgment may therefore be entered for the plaintiff for the sum of \$7,260.

S. S. PIERCE CO. v. UNITED STATES.

(Circuit Court, D. Massachusetts. February 12, 1910.)

No. 114 (1,775).

1. CUSTOMS DUTIES (§ 30*)—CLASSIFICATION—PICKLED CAPERS—"PICKLES AND SAUCES OF ALL KINDS."

Capers pickled in vinegar, which are used as a condiment and in flavoring sauces, are dutiable under Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 241, 30 Stat. 170 (U. S. Comp. St. 1901, p. 1649), relating to "pickles and sauces of all kinds."

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 30.*]

2. CUSTOMS DUTIES (§ 30*)—CLASSIFICATION—DRUGS—SUBSTANCES WITH MEDICAL PROPERTIES.

Articles are not to be removed from a provision for pickles and sauces, and placed in a provision for drugs, simply because a medical or therapeutic property may be extracted from them.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 30.*]

3. CUSTOMS DUTIES (§ 30*)—CLASSIFICATION—PICKLES AND SAUCES—USE.

Articles are not to be excluded from the provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 241, 30 Stat. 170 (U. S. Comp. St. 1901, p. 1649), for "vegetables * * * including pickles and sauces of all kinds," on the ground that they are not palatable or desirable as a distinct and separate eatable, or are not known as garden vegetables. The use, rather than strict botanical classification, is the determinative factor; and capers, which are flower buds, but are used as pickles or as a sauce, are included in said provision.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 30.*]

On Application for Review of a Decision by the Board of United States General Appraisers.

For decision below, see G. A. 6,201 (T. D. 26,849), in which the Board of General Appraisers affirmed the assessment of duty by the collector of customs at the port of Boston.

Searle & Pillsbury (William E. Waterhouse, of counsel), for importers.

D. Frank Lloyd, Deputy Asst. Atty. Gen. (Thomas M. Lane, of counsel), for the United States.

ALDRICH, District Judge. The question here is whether capers pickled in vinegar and imported in bottles and casks are dutiable under paragraph 241 of the tariff act of 1897. So far as that paragraph concerns this case it is as follows:

"* * * All vegetables, prepared or preserved, including pickles and sauces of all kinds, not specially provided for in this act, and fish paste or sauce, forty per cent. ad valorem."

This statute must be accepted as one to be interpreted according to the common meaning of the words employed, and the contention of the government is that capers are covered by that part of the paragraph containing the following words: "Including pickles and sauces of all kinds"—while the contention of the importer is that they are either drugs in a crude state, such as buds, etc., provided for in paragraph 548, or drugs advanced in value or condition under paragraph

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

20, or raw or unmanufactured articles not specially provided for, or articles manufactured in whole or in part not specially provided for, under section 6 of the act of 1897.

Capers are imported in bottles and casks, preserved or pickled in vinegar, and are used for flavoring sauces and otherwise as condiments, as, for instance, in the sauce served with boiled mutton and in soups, and, as commonly known, in a combination of anchovies, lemons and capers as a preliminary relish, or as a stimulus to appetite, but they are not used as a separate and distinct food dish. They are, however, as said by the Board of Appraisers, edible in about the same sense that any pickle is edible, and, therefore, are hardly like the blistering, burning and strangulating dried chillies or burnt peppers of the *Cruikshank Case*, 59 Fed. 446, 8 C. C. A. 171, which are largely used by manufacturing druggists for making capsicum plasters.

If I understand the contention of the importer correctly, no question is made that the capers were not pickled; but they say they are not vegetables, and therefore not within paragraph 241 in question.

In support of this contention they rely on *Nix v. Hedden*, 149 U. S. 304, 13 Sup. Ct. 881, 37 L. Ed. 745, which makes the question whether tomatoes are vegetables, although strictly a fruit, turn upon the common understanding that such things as are grown in a kitchen garden and are served at dinner as an article of food are vegetables. This would hardly seem to be an authority for the importer, because it is not contended that the articles enumerated include all vegetables, and because it makes an article which is a fruit, strictly speaking, a vegetable by reason of its association and the common understanding. Without going into botanical or therapeutic investigations, the common understanding in respect to capers is probably well enough shown by Webster's Dictionary, which is in more common use than books on therapeutics or botany, where the caper is described as "the pungent crushed green flower bud of the European and oriental caper, much used for pickles."

It would not seem that the construction of this statute ought to depend upon the question whether the caper is palatable or desirable as a distinct and separate eatable, and, if not, that it necessarily must be excluded from paragraph 241 because not included in what Mr. Justice Gray in *Nix v. Hedden*, 149 U. S. 304, 13 Sup. Ct. 881, 37 L. Ed. 745, enumerates as garden vegetables. In the sense of that part of the paragraph which provides for pickles of all kinds, we are not dealing with eatable vegetables or side-dish vegetables, but with something which associates itself with condiments which are not used as side dishes, but used to give flavor to the thing with which it is associated and a resulting zest to the appetite. It is, of course, true enough that capers are not a vegetable in the sense of a garden or side-dish vegetable used as a distinct article of food, but they are in the vegetable kingdom and are used for the general purpose for which pickled condiments are ordinarily used. Therefore their intended use associates them, not with the vegetables used as eatables, but with pickles used as condiments.

According to Webster, and it is something generally understood, a condiment is something "used to give relish to food and to gratify the

taste; a pungent and appetizing substance, as pepper or mustard; seasoning"; and in *Bogle v. Magone*, 152 U. S. 623, 14 Sup. Ct. 718, 38 L. Ed. 574, pickles and sauces of all kinds are accepted as broadly including condiments to give flavor and make food more palatable, and not as applying to anything which is eaten alone. Under the reasoning of *Nix v. Hedden* the botanical character of a thing may be changed in a statutory sense by common use and by association, because there the controverted tomato, "considered as provisions," though botanically a fruit, by reason of its association and use was held to be a vegetable within the meaning of the tariff act; and according to the same reasoning, if considered not as "provisions" but as a condiment prepared as a pickle, capers may become a pickle within the meaning of paragraph 241; and by virtue of the same reasoning green tomatoes, which, as generally known, are quite commonly pickled, would become pickles, and this would be so without regard to whether they are botanically and technically fruit or vegetables, by association, under another phase of the paragraph.

Under the reasoning of *Nix v. Hedden*, the canned tomato, which is much upon the market and much used as a side-dish food, would, by reason of its associations, or considered as a provision, be a vegetable within paragraph 241, while if pickled as the pickled green tomato is and much in use, it would not be an eatable side-dish, but a pickle or condiment, under the other part of the same section, and this would result without regard to its being a statutory vegetable or an article of food, and without regard to its botanical status as a fruit.

A statute of this kind ought not to be construed with reference to the precise question whether an article is strictly and technically one thing or another, because treatment may change the thing from an eatable as a distinct and separate dish to a condiment to give relish to other eatables and to gratify the taste. Radishes are unquestionably a vegetable, but, according to *Bacon*, they are not for nourishment but for condiment. It would seem clear that Mr. Justice Gray had in mind as a controlling view the use for which the thing in its imported state was intended and for which it was suitable, because he says:

"The single question in this case is whether tomatoes, considered as provisions, are to be classed as vegetables or as fruit."

And I give considerable weight to this view, because the raw or preserved tomato as an article of food, though strictly speaking a thing to be classified as fruit, by reason of its treatment and intended use, under rules of construction, became, what it was strictly not, a vegetable; and, because by virtue of the same reasoning, as has already been stated, it follows that pickled tomatoes would become pickles, according to the common understanding of the community, and therefore would reasonably fall within the statutory provision "all vegetables prepared or preserved, including pickles and sauces of all kinds."

In the mushroom case (*A. Zanmati & Co. v. United States*, 153 Fed. 880, 82 C. C. A. 626), the mushrooms, though sliced and dried, were accepted as vegetables in their natural state rather than vegetables prepared or preserved; and thus again the treatment to which

the thing is subjected, and the state in which it is found for use is accepted as something to be considered upon the question of its classification.

I was rather impressed at the argument with the truffle and the walnut cases in the Second circuit, but a more careful examination makes it appear that the questions there were not so closely like the one here as to warrant accepting the decisions as controlling this case.

In the truffle case (*Von Bremen, MacMonnies & Co. v. United States*, 168 Fed. 889, 94 C. C. A. 301) truffles preserved in tins were accepted by the court as belonging to the vegetable kingdom, and the word "vegetables" was accepted as a word used in the ordinary rather than the botanical sense; and yet it was held that truffles were something not to be classed as vegetables prepared or preserved, because they are used solely as a condiment in cooking and never served as a table dish. Thus again we have the use of the article, rather than its strict botanical classification, accepted as the determinative factor. And it follows by parity of reasoning that if there are such things as pickled mushrooms or truffles, or mushroom or truffle sauces used as condiments, this decision would in no sense be accepted as holding that such pickles or sauces would not be properly classified under the provision as to "pickles and sauces of all kinds," because truffles are a condiment, and so are pickles and sauces which are put up as a relish.

The walnut case (*United States v. Acker, Merrill & Condit Co.*, 171 Fed. 77, 96 C. C. A. 181) was affirmed by the Court of Appeals without opinion. The importation was assessed as pickles under paragraph 241. The Circuit Court in that case accepted *In re Johnson*, 56 Fed. 822, as establishing that an article to be assessed under paragraph 241 must be a vegetable. In the *Johnson* case the court was dealing with the question whether herring packed and treated in various ways should be classified under a provision with reference to fish in cans or packages or as herring pickled or salted, and the incidental and general observations in that case with reference to "pickles and sauces of all kinds" could hardly be accepted as a decision that all articles to be assessed under paragraph 241, notwithstanding their treatment and intended use, must have been strictly and technically vegetables in their natural condition. It is difficult to read the *Johnson* case as deciding that all pickles must be strictly of vegetables. Moreover, the walnut case in the Circuit Court was put upon the distinct ground that the walnut is in no sense regarded as a vegetable.

The argument that capers, for more than a hundred years, under uniform customs practice, have been placed in the dutiable class of pickles is something to be considered upon the question as to what the phrase "including pickles and sauces of all kinds" is intended to cover.

The argument that capers should be treated as a drug or as an unmanufactured article, or as an article manufactured in part would seem not to be one which should hold in this case. It would be rather extreme to hold that the statute in dealing with pickles and sauces, to be used as condiments, intended to exclude all growing products from which might be extracted a medical or therapeutic property, and it would require extreme argument to make the paragraphs with respect

to unmanufactured articles and articles manufactured in part apply to capers preserved in vinegar and intended for use in flavoring sauces and as a condiment to be used in connection with table foods.

Without regard to their therapeutic or botanical characterization, capers, when pickled in vinegar, become a condiment, and, when considered as condiments, rather than "as provisions," they are fairly and reasonably within the provision of paragraph 241.

The decision of the Board of Appraisers is affirmed.

UNITED STATES v. HILLEGASS.

(District Court, E. D. Pennsylvania. January 27, 1910.)

No. 81.

1. BANKS AND BANKING (§ 256*)—NATIONAL BANKS—OFFENSES—AIDING AND ABETTING OFFICER TO MISAPPLY FUNDS.

To authorize the conviction of a defendant of the statutory offense of aiding and abetting an officer of a national bank in the misapplication of the funds of the bank, in violation of Rev. St. § 5209 (U. S. Comp. St. 1901, p. 3497), it is not necessary to aver or prove a conspiracy, nor that the principal offender had been convicted; the offenses of the principal and accessory both being misdemeanors of the same grade.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 256.*]

2. BANKS AND BANKING (§ 257*)—NATIONAL BANKS—OFFENSES—INDICTMENT FOR AIDING OFFICER TO MISAPPLY FUNDS.

An indictment charging that defendant knowingly, willfully, and unlawfully, with intent to injure and defraud a national bank, aided and abetted the cashier in misapplying the funds of the bank, by drawing checks on the bank when he had no funds on deposit to meet the same, which checks were paid by the cashier, charges an offense under Rev. St. § 5209 (U. S. Comp. St. 1901, p. 3497), and the question whether the criminal intent averred is properly inferable from the facts proved is for the jury.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 122; Dec. Dig. § 257.*]

3. BANKS AND BANKING (§ 257*)—NATIONAL BANKS—OFFENSES—PROSECUTION FOR AIDING OFFICER TO MISAPPLY FUNDS—EVIDENCE.

On the prosecution of a defendant, charged under Rev. St. § 5209 (U. S. Comp. St. 1901, p. 3497), with aiding and abetting the cashier of a national bank to misapply the funds of the bank, the misapplication of such funds by the cashier with criminal intent is a material issue, and any competent evidence relevant to such issue is admissible.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 257.*]

4. BANKS AND BANKING (§ 257*)—NATIONAL BANKS—OFFENSES—AIDING OFFICER TO MISAPPLY FUNDS.

Evidence considered, in the prosecution of a defendant under Rev. St. § 5209 (U. S. Comp. St. 1901, p. 3497), for aiding and abetting an officer of a national bank to misapply its funds with intent to defraud it, and held sufficient to sustain a verdict of conviction.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 257.*]

Criminal prosecution by the United States against De Witt C. Hillegass. On motions for new trial and in arrest of judgment. Overruled.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Index.

J. Whitaker Thompson and Walter C. Douglas, Jr., for the United States.

John McClintock, Jr., and A. Florence Yerger, for defendant.

HOLLAND, District Judge. The defendant was indicted under section 5209, Rev. St. (U. S. Comp. St. 1901, p. 3497), for aiding and abetting Morris L. Hartman, the cashier of the Farmers' National Bank of Boyertown, to misapply its funds, which section, so far as material to this cause, is as follows:

"Every * * * cashier * * * or agent of any association who * * * willfully misapplies any of the moneys, funds or credits of the association * * * with intent * * * to injure or defraud the association, * * * or any individual person; * * * and every person who with like intent aids or abets any officer, clerk or agent in violation of this section, shall be deemed guilty of a misdemeanor."

There are 136 counts in the indictment, all alike in the statement of the offense charged, except that count 1 is general, charging the unlawful misapplication by means of divers checks drawn by the defendant and paid by the cashier of the bank, and counts 2 to 12, inclusive, charge similar misapplications by means of a number of checks, all drawn to the same payee by the defendant, and paid by the cashier to the persons named in the count. Counts 13 to 136, inclusive, are special counts, and identical, except as to the date, amount, and name of the payee. Count 13, which may be taken as a type of the rest is as follows:

"And the grand inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations as aforesaid, do further present that at all the times herein alleged the Farmers' National Bank of Boyertown, Pennsylvania, was a national banking association which had been theretofore duly incorporated, created, organized, and established under and by virtue of the acts of Congress in such case made and provided, and was then and there existing and doing a banking business at the borough of Boyertown, state of Pennsylvania, in the Eastern district of Pennsylvania, and at all the times herein alleged one Morris L. Hartman was the cashier of the said Farmers' National Bank of Boyertown, Pennsylvania. And that heretofore, to wit, upon the twenty-fourth day of May, in the year of our Lord one thousand nine hundred and six, one De Witt C. Hillegass, late of the district aforesaid, at the district aforesaid, and within the jurisdiction of this court, to wit, at the city of Philadelphia, in the state of Pennsylvania, did knowingly, willfully, fraudulently, and unlawfully, and with intent in him, the said De Witt C. Hillegass, to injure and defraud the said banking association, aid and abet the said Morris L. Hartman, being then and there cashier as aforesaid, then and there willfully to misapply certain of the moneys, funds, and credits of the said banking association for the use, benefit, and advantage of him, the said De Witt C. Hillegass, and for the use, benefit, and advantage of a person and persons other than the said banking association, the name and names of the said person and persons being to this grand inquest unknown, to wit, the sum of and of the value of forty dollars, then and there belonging to and being the property of the said banking association; that is to say, the said Morris L. Hartman heretofore, to wit, on the day and year last aforesaid, at Boyertown aforesaid, in the district and within the jurisdiction aforesaid, being then and there cashier as aforesaid, aided and abetted by the said De Witt C. Hillegass, did knowingly, unlawfully, and fraudulently, and with intent to injure and defraud the said banking association, willfully misapply certain of the moneys, funds, and credits of the said banking association, amounting to the said sum of forty dollars, in manner and by the means following, that is to say: That he, the said De Witt C. Hillegass, did then and there make, draw, and sign, and did then and there present and

cause to be presented for payment by the said banking association, a certain check then and there in printing and writing, dated the eighteenth day of May, A. D. 1906, authorizing and directing the said banking association to pay to the order of George E. Cummings the sum of forty dollars; and the said Morris L. Hartman, being then and there cashier as aforesaid, and by virtue of the official relation of the said Morris L. Hartman as cashier of the said banking association, and by virtue of the power of control, direction, and management which the said Morris L. Hartman, as cashier as aforesaid, possessed over the moneys, funds, and credits of the said banking association, did then and there pay and cause to be paid to National Bank of Pottstown, and to a person and persons to the grand inquest unknown, upon and pursuant to the direction and authorization contained in the check aforesaid made, drawn, and signed by him, the said De Witt C. Hillegass, from and out of the moneys, funds, and credits then and there belonging to and being the property of the said banking association, and without the knowledge and consent of the said banking association, its board of directors and committees, the said sum of and of the value of forty dollars, a more particular description of the said moneys, funds, and credits so paid and caused to be paid being to this grand inquest unknown, which said sum so drawn, paid, and caused to be paid as aforesaid was then and there in excess of all amounts which the said De Witt C. Hillegass was then and there lawfully entitled to draw and have paid out of the moneys, funds, and credits of the said banking association, as they, the said De Witt C. Hillegass and Morris L. Hartman, and each of them, then and there well knew; that on the said date, when the said check was paid and caused to be paid as aforesaid, he, the said De Witt C. Hillegass, then and there had no moneys, funds, and credits on deposit to his credit with the said banking association; that there was not then and there due and owing to him, the said De Witt C. Hillegass, from the said banking association any moneys, funds, and credits whatever; that the repayment of the said sum to the said banking association was not then and there in any way or manner secured, all of which they, the said De Witt C. Hillegass and Morris L. Hartman, and each of them, then and there well knew, and the said sum was then and there willfully, wrongfully, and unlawfully appropriated and converted to the use, benefit, and advantage of the said De Witt C. Hillegass, and to the use, benefit, and advantage of a person and persons other than the said banking association, the name and names of the said person and persons being to this grand inquest unknown; and the said De Witt C. Hillegass knowingly, willfully, fraudulently, and unlawfully aided and abetted the said Morris L. Hartman, cashier as aforesaid, with intent in him, the said De Witt C. Hillegass, to injure and defraud the said banking association—contrary to the form of the act of Congress in such case made and provided, and against the peace and dignity of the United States of America."

This indictment was found by the grand jury on the 11th day of March, 1909, was called for trial on September 27, 1909, and on October 15th a verdict of guilty was rendered by the jury. The reasons for which a new trial is now urged are 33 in number, the first two of which, however, are more properly questions to be considered on a motion in arrest of judgment, and, as they were filed in due time, they may be so considered in this case.

1. It is objected that the indictment does not contain an averment of conspiracy or confederacy between the defendant and an officer of the bank in violation of the section. The defendant was indicted, not for conspiracy, but for the statutory offense of aiding and abetting an officer of the bank in a misapplication of the funds. The commission of this crime may have its origin in a conspiracy or confederacy between the aider and abettor and an officer of the bank, although it is not necessary to establish such a conspiracy in order to convict of the offense charged. A conspiracy may or may not have existed at the beginning of the defendant's overdrafts, or it may have developed in

the course of his transactions in this regard before he ceased business connections with the bank; but it was not necessary to either aver or establish a conspiracy in order to convict of the offense of aiding and abetting, and in this particular the court, in the point submitted by the defendant, charged the jury much too favorably to him.

2. It is not necessary to aver that the alleged principal offender, to wit, Hartman, the cashier, had been convicted prior to the trial of Hillegass. It is a rule in common law that in felonies an accessory could not be tried before the principal; but in misdemeanors all are regarded as principals and tried as such. Congress has declared the offense with which the defendant stands charged to be a misdemeanor, and under the rule as to misdemeanors he is regarded as a principal, and can be tried either before or after the officer whom he aided and abetted in the misapplication. In the commission of the offense of the misapplication of the funds of a bank under this section, the only part an outsider can play in accomplishing the result is to aid and abet some officer of the bank who has control of the funds. The offense of the officer in misapplying the funds is of the same grade as that of the person aiding and abetting. Both are graded by the same section, and declared to be misdemeanors subject to the same penalty, and under the common-law rule all are regarded as principals, and triable either together or separately. *Gallot v. United States*, 87 Fed. 446, 31 C. C. A. 44; *Bliss v. United States*, 105 Fed. 508, 44 C. C. A. 324.

3. It is objected that the averments of the indictment, if proved to the satisfaction of the jury, would in law amount to no more than an overdraft. The averments in the indictment are that the overdrafts of Hillegass were made by him in aid of the unlawful misapplication, fraudulently, and with intent to injure and defraud the bank, so that proof of these averments would establish the defendant's guilt. The uncertainty as to whether the jury would draw the necessary inference to sustain the averments from the evidence which the government might produce was no reason why the court should sustain a demurrer or quash the indictment, and the refusal to do so is no valid reason for an arrest of judgment after the government's evidence has been submitted, and the jury, by its verdict of guilty, indicated that the evidence submitted by the government was sufficient to sustain the averments in the indictment. *United States v. Heinze* (C. C.) 161 Fed. 425. The other matters raised as to the sufficiency of the indictment need not be considered.

Reasons 3 to 20, inclusive, of the reasons for a new trial, are grounded upon an alleged erroneous admission or rejection of evidence; and reasons 21 to 30, both inclusive, are alleged errors committed in the charge to the jury. In the remaining 3 reasons it is urged: (1) The verdict is against the law; (2) against the evidence; (3) and against the weight of the evidence. Hillegass is charged with the offense of having aided and abetted one Morris L. Hartman, the cashier, to unlawfully misapply the funds of the Farmers' National Bank of Boyertown. Hartman became an employé of the bank in 1887, and continued with it, either as clerk or cashier, from that time to May 20, 1907, a short time before it closed. The defendant had business trans-

actions with it from the time of its incorporation, first in connection with his father, who was a director, and upon the death of the latter, which occurred on August 1, 1890, he continued his business connections with the institution. At the death of his father, Hillegass gave his notes and became personally responsible for an indebtedness to the bank of about \$27,000, for which both he and his father had been responsible prior to that date. The defendant continued his connections with the bank as a borrower and depositor from that time until the time of its close, some time in July, 1907, when his total indebtedness amounted to something over \$130,000. This amount was made up of "discounted notes," amounting to \$75,935.97, which had been regularly passed by the board; "bond account," amounting to \$22,750, some of which bonds had been accepted by the board as collateral for notes, and others taken by Hartman in substitution for overdrafts against the instructions of the board to the contrary; "overdrafts," amounting to \$32,838.66, which were checks drawn upon the bank by Hillegass and paid by Hartman out of the funds of the bank; "protested paper account," which was an account in which many of the overdrafts were placed when that account became too unwieldy for the cashier to continue it in his cash drawer.

It appeared from the government's evidence that Hillegass continued to present notes for discount to the board of directors and matters were regularly conducted until September, 1905, at which time his "discounted notes" had increased very materially, and at that time the "overdrafts" began to appear. The board of directors were unaware of any indebtedness of the defendant to the bank, other than what he owed upon his "discounted notes." Without the knowledge of the board, Hartman had permitted Hillegass to overdraw his account, so that on or about March 28, 1906, his overdrafts amounted to \$24,000, \$11,000 of which Hartman placed in the statement book under the head of "protested paper account," and it was through this entry that the president of the bank became aware of the overdrafts, as a result of which Hillegass and Hartman were called before the board, and on April 10, 1906, a settlement was had, and the board was left under the impression that the whole of the overdrafts had been provided for. On the latter date Hillegass presented ten \$1,000 absolutely worthless Carrolton Coal Company bonds as collateral security for \$10,000 of his notes, and an additional amount, making a total of \$10,800, which was substituted for the protested paper account, and the board was informed by Hartman in the presence of the defendant that this amount was the total of Hillegass' overdrafts, when at the same time there was an overdraft, of which the board was not informed, amounting to about \$13,000. This settlement was to go into effect on April 18, 1906, and, notwithstanding the fact that the board had given positive directions to both the cashier and the defendant at the board meeting on April 10th that no further overdraft would be permitted or the acceptance of any securities allowed without the approval of the board, Hartman permitted Hillegass to increase his overdrafts to the amount of over \$6,000 between April 10th, at the time the settlement was made, and April 18th, when it was to go into effect. Some time

after the date of this settlement, in addition to the overdrafts allowed Hillegass, Hartman, without the knowledge of the board, accepted from him more of these worthless Carrolton Coal Company bonds and other worthless bonds of the Alexander & Rich Mountain Company.

All these checks mentioned in the indictment are alleged overdrafts at the time they were paid, and the account showed that at no time did the defendant have a deposit of more than \$2,000, and on all this indebtedness the bank subsequently succeeded in collecting less than \$8,000. The defense was that Hillegass did not know he was over-drawing his account, and that in fact during the time of the statute of limitations, to wit, from March 10, 1906, to the time when Hillegass' operations with the bank ceased, he had deposited more money than he had drawn out. The court, in charging the jury, called attention to the evidence offered both by the government and the defense. We do not think it necessary to go into a detailed consideration of the reasons for a new trial. Those filed to the charge of the court fail to point out any error committed in that regard, and there are only one or two objections to the admission and rejection of evidence which need any attention.

1. Hartman, the cashier, whom it is alleged the defendant aided and abetted in the misapplication of the funds, was permitted to testify as to the information he gave to the board of directors and the president of the board, in the absence of defendant, in regard to the overdrafts of Hillegass, and to this testimony the defendant took an exception. The defendant is charged with aiding and abetting an officer of the bank in the misapplication of the funds. The misapplication of the funds with criminal intent by the officer whom the defendant aided and abetted were fundamental issues, and necessary to be established to the satisfaction of the jury by evidence pertinent to those issues, without regard to its connection with the defendant. It was very important in this case to know whether or not Hartman was authorized by the board of directors, either expressly or by implication, to cash the checks of the defendant, in order that it might be ascertained whether or not the payment of the overdrafts was a misapplication of the funds with criminal intent. See *Brown v. United States*, 142 Fed. 1, 73 C. C. A. 187.

2. We do not think the objections to the statements of Hillegass' accounts, made by Hartman, which had been handed to Hillegass quite a considerable time before the trial, to which he had made no objection, have any merit in them at all. At any rate, subsequently, counsel for the defendant practically withdrew any objection, and stated that it was their desire to have this paper go to the jury.

3. The question of whether or not the bank had received instructions from Washington not to declare dividends at any time during the period of Hillegass' transactions with it clearly has nothing to do with the case.

4. Hartman, who was the cashier charged with having made a misapplication of the funds, when testifying in this case, had before him a statement taken from the books of the bank, in which he had lumped many of the entries in the Hillegass account. Upon cross-examination, the defendant's counsel asked the witness to explain "what he

would have to do to unravel one of these lump charges." In other words, as will be seen from the record following this question, the cross-examination was directed toward showing by the witness that the time and labor necessary to work out an accurate result as to Hillegass' account with the bank would be great and very difficult. The proof of this fact could not aid the jury in arriving at a conclusion as to the guilt or innocence of the defendant. It would have been entirely proper for the defendant to cross-examine the witness from the books as to the correctness of his conclusions, and as to the correctness of the lump sums to which he testified; but there is nothing to indicate that this was the purpose of the question. Subsequently the court ordered that the witness during the recess should explain how he arrived at the lump sums from the books of the bank, and counsel for the defendant announced that was satisfactory.

5. The objection to the correspondence between the Farmers' National Bank, whose funds were misapplied, and the Second National Bank of Philadelphia, was admissible, for the purpose of proving that the Boyertown National Bank paid certain checks of Hillegass, the amount of which was charged to him on the books of the bank, but which checks could not be obtained, and for this purpose we think it was clearly admissible.

6. It will not be necessary to consider the remaining reasons for a new trial separately. It was incumbent upon the government to establish the overdrafts of Hillegass with criminal intent. In order to prove the overdrafts, the government was required to go back to the beginning of Hillegass' transactions with the bank, as his account had never been balanced during the whole time of his connection with the institution, and it was necessary to show the condition of the "discounted notes" account, as well as his transactions in overdrafts, as they were both so intermingled as to require an examination of both accounts in order to ascertain exactly his indebtedness to the bank in either. The intent alleged required affirmative proof of its existence, so that the letters written by Hillegass to Hartman in connection with his deposits and overdrafts, together with the kind of notes and securities generally sent to the bank, for which he in many instances received credit, and the irresponsibility of the parties whose checks and notes he accepted and foisted on the bank, were facts proper to submit, from which the jury could legitimately draw the inference that his overdrafts were made with the intent to defraud the bank.

The motion in arrest of judgment is overruled, and a new trial refused.

In re CULVER et al.

(District Court, D. Minnesota, Sixth Division. December 1, 1909.)

BANKRUPTCY (§ 354*)—PARTNERSHIP—MARSHALING AND DISTRIBUTION OF ASSETS.

Evidence considered, and held to establish that two bankrupts were at the time of their bankruptcy, and had been for more than 20 years, general partners in all their business; that all of their property, whether held

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

in the name of the firm or of either or both partners, was partnership property, and all of their debts partnership debts, whether evidenced by obligations of the firm or either or both partners.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 555-559; Dec. Dig. § 354.*]

In the matter of M. A. and G. H. Culver, partners as Culver Bros., bankrupts. On petition for review of an order of referee assigning assets to various estates, dated August 14, 1909, and an order of the referee relating to the disallowance of claims against partnership assets, filed August 19, 1909. Reversed.

A. B. Darelius, for petitioning creditors.

E. P. Sanborn, for answering creditors.

E. H. Crooker, for trustee in bankruptcy.

Cliff & Purcell, for bankrupts.

WILLARD, District Judge. It is a mistake to say, as do the respondent creditors on page 2 of their brief, that the partnership between M. A. and Geo. H. Culver commenced at Ortonville in 1900, or in 1901. The evidence requires a finding that it commenced at Britton, S. D., in 1885, and that it continued from that date until it was ended by these bankruptcy proceedings in 1909. It has thus continued for more than 20 years without interruption. M. A. Culver testified that they had done business with one of their present creditors for more than 20 years.

It is also a mistake to say, as do the respondent creditors on page 4 of their brief, that the business in which the partnership was engaged was mercantile business only. The evidence requires a finding that from 1885 until these bankruptcy proceedings were commenced the bankrupts were partners in each and every kind of business in which either one of them was engaged, or in which both were engaged together. That what is called by the parties the "outside business" did not commence at Ortonville, also, clearly appears from the evidence. M. A. Culver testified that they had been dealing in gold and silver mining stocks before they went to Mankato, and that the company had dealt in iron lands before they went to Ortonville, and that they bought a farm or two in Dakota before they left Britton.

The evidence is uncontradicted that all these transactions, including the cattle business at Britton, were transactions which were carried on for the benefit of the partnership. The theory that there was a tenancy in common between the two brothers with reference to each particular piece of land that they bought, and that each transaction outside of the mercantile business constituted a separate transaction, independent of all the others, finds no support in the evidence. George Culver testified repeatedly that they were general partners in everything, and that there was no separate agreement as to each tract of land.

The evidence also shows that since 1885 neither one of these bankrupts has ever had any individual property or business. That their partnership agreement extended to every kind of property in which either one was interested is shown by the testimony relating to their

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

homesteads. When this matter first came up at the examination of M. A. Culver, he testified that the two homesteads were handled in exactly the same way as these mining and other properties; and on cross-examination he said that they belonged to the partnership just the same as all the rest of the property, and that if sold they would divide the profits and losses just the same as all other properties; and, what is most significant, he added that that was what they had done at Britton where they both had homes. This last statement was corroborated by George Culver, who testified that when he sold his home in Britton he put the money derived therefrom into the business at Ortonville.

It is true that thereafter during the examination some attempt was made by leading questions to modify the effect of this declaration, but it is very clear from the evidence that this homestead property was treated in exactly the same way as all the property owned by them; in other words, they were general partners in everything.

In English and American law such a partnership is very rare. This, however, is not true in other systems of jurisprudence. In the Spanish Civil Code such a universal partnership in property is recognized, and the rights and liabilities of partners therein defined.

I hold that the evidence requires a finding that since 1885 there has existed between the bankrupts such a universal partnership as has been heretofore mentioned, and this evidence is to my mind practically uncontradicted. The impression which I formed and announced at the hearing has been confirmed by a careful reading of all the evidence. The question as to the relations between the two bankrupts must be determined largely by the testimony of the partners themselves. There are certain undisputed facts, which, according to the respondent creditors, show that no such universal partnership existed; but these undisputed facts do not create a conflict in the evidence. They simply make it necessary to determine how much the existence of these facts weakens the positive statements of the two partners as to the existence of that relation between them.

In answer to a question upon cross-examination, M. A. Culver testified that his brother was running the merchandise business almost exclusively. Other evidence presented to the same effect was uncontradicted, and it was also proven that M. A. Culver devoted very little attention to the mercantile business, but did transact, almost exclusively, the outside business. These facts constitute a circumstance indicating the existence of this general partnership. That M. A. Culver was a partner in the mercantile business is undisputed. It would be very strange if he could entirely neglect that part of the business and devote himself to these mining and other transactions, and still be entitled to a share of the profits which might result from the mercantile business.

The evidence shows that very soon after going to Ortonville George Culver and M. A. Culver went into the granite business. Part of the stock of the granite company stands in the name of George Culver, part in the name of M. A. Culver, and part in the name of Culver Bros. In view of the evidence in this case, how is it possible to say that all of the granite stock is not partnership property?

Among the circumstances which, according to the respondent creditors, indicate that the only partnership business was that relating to the merchandise, is the fact that the partnership name was Culver Bros. This was the name under which they transacted business at Britton, and the name under which they had transacted business from that until the present time. The evidence shows that the business other than the mercantile business which the partnership transacted was, as a general rule, carried on in the name of M. A. Culver. M. A. Culver testified that they treated and kept the mercantile business separate from the outside business, and that that was one reason why it was transacted in his name. Another reason was, for matters of convenience, the business being done by M. A. Culver, it was more convenient to have the titles in his name. The existence of a partnership having been proven, and it having been established that this partnership was engaged in mining and land speculation, the fact that the title to the property acquired in such speculations was taken not in the partnership name, but in the name of one of the partners, is not conclusive that it is not partnership property.

The only fund which these brothers have ever had since 1885 was a partnership fund. All of the property now held by them in the name of M. A. Culver, or in the name of George H. and M. A. Culver, was necessarily acquired by the use of partnership funds; and it was acquired for partnership purchases, because the evidence shows that when it was sold the profits and losses were to be equally divided. It was therefore, applying the rule stated on page 9 of respondent creditors' brief, partnership property. The respondent creditors applied this same rule in the present case, for they claim that the lot upon which the store building is located is partnership property, although the title thereto is in the name of Geo. H. and M. A. Culver.

Considerable time was devoted in taking the testimony to the question as to whether the proceeds from the sales of outside property were used in the mercantile business or not. Both partners testified positively that such proceeds were used; but on cross-examination they were not able to state the amount nor any of the details of such application. While I consider the fact proven, yet I do not consider it at all material. There was but one partnership, and it was engaged in all kinds of business. The mercantile business was one branch of the general business, and whether the funds were kept separate or not is, in my opinion, immaterial.

Much evidence was also taken with reference to statements which have been made by the bankrupts to their creditors from time to time. It is claimed by the respondents that this outside property did not figure nor their outside liabilities in these statements. One statement, however, was produced which was given to the Brown County Bank (Exhibit 8) wherein all these items did appear. These statements, however, can in no way operate as an estoppel against creditors holding notes signed by M. A. Culver. The only bearing which they have in the case is their tendency to show that the statements made by the two bankrupts as to their partnership were not correct.

It is admitted that, while the partnership kept books of account

showing the condition of its mercantile business, it kept no books whatever relating to its other business. This is also another fact the only tendency of which is to weaken the statement of the partners as to the existence of their partnership.

But when these and all other circumstances of a similar nature are considered and given their due weight, the fact still remains proven, in my opinion, that there was this universal partnership existing since 1885. When the brothers were at Mankato engaged in the hardware business, were they not engaged in partnership business, simply because the hardware business was different from the general mercantile business which they carried on at Ortonville? There being no evidence that the original partnership formed in Britton in 1885 was ever discontinued or suspended, what would be said of the rights of the creditors, if there are any now who became such by reason of the hardware business carried on at Mankato? Would they be partnership creditors entitled now to share in the partnership assets, or would they be independent and separate creditors?

As has been said before, this case is an extremely rare one, but it has to be disposed of with reference to the recognized principles of law. The question is: What shall such disposition be? There are apparently only two courses to pursue, for it cannot for a moment be contended, in view of the evidence, that the property which stands in the name of M. A. Culver is his private property, or that when he bought he was engaged in a private enterprise in which his brother had no interest. It must be held either that there was one general universal partnership and that all of the property in question is partnership property, or it must be held that there was one partnership as to the mercantile business, another partnership as to the granite business, another partnership as to the oil business, and another partnership as to the mining business. It would be also necessary to hold that, in cases of other pieces of real estate bought by M. A. Culver, there was a separate partnership in respect to each piece so bought. No warrant can be found in the evidence for holding that there were only two partnerships, one relating to the mercantile business, and the other relating to the outside business. When the liabilities are apportioned, it would also have to be held that the liabilities which were incurred on account of the mercantile business should be the liabilities of that partnership, and that each of the other partnerships, the granite, the oil, the mining, and the land, should have its respective quantum of liability.

The liabilities would have to be apportioned in that way, no matter how the notes are signed, because, in my opinion, if it is proven that a note signed in the name of one of the partners was in fact given for the partnership business, and the proceeds realized therefrom were used in the partnership business, such note is a partnership liability. *Davis v. Turner*, 120 Fed. 605, 56 C. C. A. 619, Circuit Court of Appeals, Fourth Circuit. There being here one general partnership, all the liabilities were necessarily incurred for the benefit of that partnership.

The impracticability of dividing up the assets and the liabilities among the several different partnerships of which mention has been made would be a strong argument against pursuing such a course.

But there is a stronger reason, namely, that the evidence does not show any such multiplication of partnerships. There was only one partnership. All of the property belongs to that partnership, and all of the debts are the debts of that partnership.

The result is that the orders here reviewed are reversed, and the case is remanded to the referee, with instructions to make an order declaring that all of the property now owned by either one or both of the bankrupts is partnership property, and that all of the debts, whether evidenced by obligations of the Culver Brothers, or of M. A. Culver, or of Geo. H. Culver or of M. A. & Geo. H. Culver, are partnership liabilities.

It is ordered that all persons interested have 20 days from the filing of this order in which to file a petition for review.

In re WALKER.

(District Court, N. D. Alabama, S. D. February 5, 1910.)

No. 8,162.

BANKRUPTCY (§ 314*)—PROVABLE CLAIMS—INDEBTEDNESS TO PARTNER ARISING AFTER BANKRUPTCY.

Where, at the time of the filing of a petition in voluntary bankruptcy by one partner, the firm and the remaining partner are solvent, and the bankrupt is not indebted to either, the solvent partner cannot prove a claim against the bankrupt estate because in his liquidation of the partnership business, owing to causes arising subsequently, it falls to pay out, and he is obliged to use funds of his own; such claim, if valid, being one arising after the bankruptcy, not provable nor released by the bankrupt's discharge.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 470; Dec. Dig. § 314.*]

In the matter of G. O. Walker, bankrupt. On review of order of referee. Affirmed.

C. B. Powell, for claimant.

George Huddleston and A. Leo Oberdorfer, for trustee in bankruptcy.

GRUBB, District Judge. This was a petition to review the order of the referee in bankruptcy, disallowing the claim of George Pappas, as the administrator of Peter Pappas. The bankrupt, G. O. Walker, and the deceased, Peter Pappas, were partners, doing business under the firm name of the "Birmingham Ice Cream & Dairy Company." The bankrupt filed a voluntary petition on December 24, 1907, seeking to have himself, his partner, and the firm adjudged bankrupts. The other partner, Peter Pappas, appeared and resisted adjudication of himself and of the firm. The court, thereafter, adjudicated Walker, but, determining Pappas and the firm to be solvent, declined to adjudicate either. The solvent partner thereupon elected to take over the partnership assets for administration, and they were, accordingly, turned over to him, upon his giving bond to pay all the partnership

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

indebtedness. A receiver had been appointed, upon the filing of the petition, who was in possession of the assets, and who delivered them to the solvent partner for liquidation of the partnership affairs. The solvent partner thereupon settled the partnership affairs, and claims that the assets failed of paying the partnership debts, and that he paid from his individual resources an amount over and above the assets turned over to him, and over and above his proper share of the firm indebtedness. For this amount he proved his claim against the individual estate of G. O. Walker, which the referee disallowed by striking it from the files; and from this order of the referee the review is taken.

The referee disallowed the claim without passing upon the merits, holding that it was not a provable claim against the estate of G. O. Walker in bankruptcy, even if correct in its items.

The certificate of the referee contains this statement:

"Upon the hearing of the said motion, it was admitted that, on and prior to December 24, 1907, when the said petition for adjudication of the said firm of Birmingham Ice Cream & Dairy Company and of himself was filed in this court by the said G. O. Walker, the firm of the Birmingham Ice Cream & Dairy Company was amply solvent, and out of the firm assets all creditors of the firm could easily be paid, and that both partners contributed to the firm everything he was liable to contribute and had drawn nothing out of the firm; so that, as between the partners, neither owed the other anything; nor did either owe the firm anything; and that the claim attempted to be set up, which constitutes the subject of this review, arose entirely and altogether after the institution of the said proceedings in bankruptcy by the said G. O. Walker."

It will be seen that this is certified as an admission of the parties to the proceeding, and not as a mere finding by the referee. It is also borne out by the finding of the court itself that both the firm and Peter Pappas were solvent at the time of the filing of the petition.

If it be conceded that one partner, to whom a balance is found to be due upon settlement of the partnership affairs as of the date of the filing of the petition from his copartner, may file a claim in bankruptcy against the individual estate of his bankrupt partner therefor, the principle is not controlling of this case.

The certificate shows an admission by the parties that at the time of the filing of the petition there was no indebtedness existing upon a partnership settlement, as between the partners, and that the partnership assets, without resort to the individual property of either partner, were amply sufficient to fully pay all the partnership debts. At the time of the filing of the petition in bankruptcy, the bankrupt partner owed the solvent partner nothing, either because of greater contribution to the firm assets by the solvent partner or larger withdrawals therefrom by the bankrupt partner, or because in order to pay the firm indebtedness recourse would be necessary upon the solvent partner or his property, after exhaustion of the firm assets. The effect of the referee's certificate is not merely that the parties erroneously believed the state of the partnership accounts to be, at the time of the filing of the petition, as recited therein, but it is an admission that such was the actually existent state of the accounts as between the partners, at that time. The case is, therefore, not one of an unascertained or unliq-

undated indebtedness due the solvent partner, Peter Pappas, but one in which there was no indebtedness at all due him at that time from his bankrupt partner. The indebtedness claimed by him arose subsequent to the filing of the petition in bankruptcy, by reason of the solvent partner having elected to take the administration of the partnership assets, which, when the petition was filed, were admittedly ample to pay all partnership debts, but which, owing to subsequently arising causes, failed to realize enough to do so, and by reason of his having undertaken with them to satisfy all the firm debts.

If any claim arose in favor of the solvent partner against his copartner because of the insufficiency of the partnership assets to liquidate partnership debts and the consequent necessary resort to the property of the solvent partner for that purpose, it was of subsequent origin to the filing of the petition in bankruptcy, and is not a provable claim against the bankrupt partner, nor one from which a discharge in bankruptcy would release him.

The bankrupt court is one of limited jurisdiction, having jurisdiction only of proceedings which look to the allowance of provable claims, and to the discharge of the bankrupt from his debts on the one hand, and to the collection and distribution of his assets among his creditors on the other. A proceeding which has no relevancy to one or the other of these ends must be without the jurisdiction of the bankrupt court.

The bankrupt court retains jurisdiction over a solvent partner, who has undertaken to liquidate the partnership affairs, for the purpose of compelling him to account to the trustee for the interest of the bankrupt partner, if any, in the firm, to the end that it may be applied to the payment of the individual creditors of the bankrupt partner. In this case, there was a deficiency of the partnership assets upon liquidation of the partnership affairs by the solvent partner, and the bankrupt court is not concerned in the solvent partner's liquidation of the partnership estate upon the ground of collecting and distributing the assets of the bankrupt partner among his creditors. Nor has it jurisdiction of the claim of the solvent partner against his bankrupt copartner for reimbursement of the amount expended by him in liquidating the firm debts, over and above his share of the deficiency in firm assets; since no such claim was in existence when the petition was filed, and it is not a provable or dischargeable debt against the bankrupt partner.

The bankrupt court, being concerned with the settlement of the partnership affairs only for the two ends mentioned, and not having the general jurisdiction of a court of equity to do complete equity between the partners as between each other, will not proceed to determine the equities of the two partners inter sese, except so far as they may be germane to some one of the legitimate purposes of bankruptcy proceedings; but will remit the solvent partner to a court of equity for a settlement of his claim against his copartner. The discharge of the bankrupt partner in bankruptcy would be no bar to such a proceeding in equity, since the claim on which it is based is not a provable one against the individual estate of the bankrupt partner.

The petition for review is denied, at the cost of petitioner, and the order of the referee, disallowing and striking the claim from the files, is sustained and confirmed.

In re DONAHEY.

(District Court, M. D. Pennsylvania. February 1, 1910.)

No. 1,433, in Bankruptcy.

1. **BANKRUPTCY (§ 396*)—EXEMPTIONS—EFFECT OF REMOVAL FROM STATE.**

The right of a bankrupt to his exemption is to be determined as of the date when it is claimed, and his removal from the state after the claim is made is immaterial, although the right is only given to residents by the state law.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 396.*]

2. **BANKRUPTCY (§ 400*)—EXEMPTIONS—SUFFICIENCY OF CLAIM.**

Under a state law giving a debtor the right to an exemption in property to be selected by him to a stated value, where a bankrupt was possessed of property capable of being divided from which he could make his selection, he was required to do so in his schedules, and a claim to the exemption from "proceeds of personal property" to the amount limited is insufficient.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 671-675; Dec. Dig. § 400.*]

3. **BANKRUPTCY (§ 400*)—EXEMPTION—WAIVER OF SPECIFICATION.**

A specification of the goods claimed by a bankrupt as exempt may be waived. But no such effect is to be given to an agreement by which the owner, as against the claim of a third party is allowed to take possession of the goods and make a sale of them in the interest of creditors; the bankrupt taking no part in the arrangement and the question of his exemption not entering into it.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 400.*]

In Bankruptcy. In the matter of W. M. Donahey, bankrupt. On certificate from referee, passing on exceptions to bankrupt's claim for \$300 exemption. Exceptions sustained.

H. W. Petriken and Atkinson & Pennell, for exceptions.

Wilberforce Schwoyer and J. Howard Neely, for bankrupt.

ARCHBALD, District Judge. The right of a bankrupt to his exemption is to be determined as of the date when it is claimed. In re O'Hara (D. C.) 20 Am. Bankr. Rep. 714, 162 Fed. 325. And as in this instance he was a resident of Pennsylvania at the time of filing his schedules, where claim was made, it is immaterial that he may now be a fugitive from justice in another state, to which, as it is said, he has withdrawn in order to escape arrest by his wife for desertion. Springer v. Lewis, 22 Pa. 191; McCrary v. Chase, 71 Ala. 540; Caldwell v. Renfro, 99 Mo. App. 376, 73 S. W. 340; 12 Am. & Eng. Ency. of Law (2d Ed.) 85, 86. It is denied that this is the fact, but the certificate of the referee seems to assume that it is; his conclusion being that it is of no consequence, the absence of the bankrupt not having interfered with the settlement of the estate. But the \$300 exemption

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

law in Pennsylvania was passed for the benefit of resident citizens, in order that they may not be reduced to utter poverty, and become charges on the community, and the right to it cannot therefore be asserted where this relation does not exist. *Yelverton v. Burton*, 26 Pa. 354; *McCarthy's Appeal*, 68 Pa. 218; *Dock v. Cauldwell*, 19 Pa. Super. Ct. 51; *Collom's Appeal*, 2 Penny. (Pa.) 130; *Snow v. Dill*, 13 Phila. (Pa.) 138; *In re O'Hara* (D. C.) 20 Am. Bankr. Rep. 714, 162 Fed. 325. If there has been any such withdrawal from the state here, however, it took place after the claim was made, which, being good at the time, is not to be thrown out because of the bankrupt's having gone away afterwards.

It is further objected, however, that the exemption was not properly claimed; money and not property having been asked for. As it appears in the schedules, the claim is in terms "for the proceeds of personal property, \$300," which does not conform to the requirement of the statute. The debtor is called upon to designate the particular property which he desires to retain, which he has the right to do to the value of \$300, as determined by a due appraisal. But it is goods, and not the proceeds of them, that he is entitled to, and it is these, therefore, that he must specify and demand. *Hammer v. Freeze*, 19 Pa. 257; *In re Haskin* (D. C.) 6 Am. Bankr. Rep. 485, 109 Fed. 789; *In re Wunder* (D. C.) 13 Am. Bankr. Rep. 701, 133 Fed. 821; *In re Pfeiffer* (D. C.) 19 Am. Bankr. Rep. 230, 155 Fed. 892; *In re Blanchard* (D. C.) 20 Am. Bankr. Rep. 417, 161 Fed. 793. He cannot, as here, claim money resulting from a sale. The case is not like *In re Renda* (D. C.) 17 Am. Bankr. Rep. 521, 149 Fed. 614, where, after the bankrupt had designated the goods which he desired to have set aside, they were sold by arrangement with the trustee, which, it was held, did not prevent him from coming in on the fund. Neither is it like *Burke v. Guaranty, Title & Trust Company*, 14 Am. Bankr. Rep. 31, 134 Fed. 562, 67 C. C. A. 486, where specified property was claimed, the only objection to it being that it was not properly itemized. There may be some things in the opinion which go further than that, but that is the real question involved, and therefore the one that must be taken to have been decided. It may be, also, that where the only property out of which the bankrupt can secure his exemption is indivisible and above the value of that which is allowed him, a different rule should obtain, a sale in that case being the only alternative. *In re Oderkirk* (D. C.) 4 Am. Bankr. Rep. 617, 103 Fed. 779; *In re Kane*, 11 Am. Bankr. Rep. 533, 127 Fed. 552, 62 C. C. A. 616. But, according to the bankrupt's schedules here, he had liquors and cigars to the value of \$500, and furniture and carpets worth \$3,000 more; so that there was no dearth of goods out of which to select, and no occasion, therefore, for introducing any such exception.

It is said, however, that there was an arrangement between all parties concerned by which, for the purpose of getting better prices for the estate, the hotel property—furniture, liquors, lease, license, and good will—were taken possession of by the trustee and disposed of as a whole, which would have been seriously interfered with, and the result materially reduced, if the bankrupt had been allowed to first take \$300

worth of property out of it. But that does not meet the question. However desirable it may have been, from the standpoint of creditors, to sell the property in bulk, it was not indispensable, the goods being readily divisible; and, if not, the bankrupt was bound to designate the particular part to which he would look for his claim, which went to the right, and not to the mere exercise of it, the exemption being of goods, and not money, and it being essential that they should be appraised, in order to see that he did not get more than he was entitled to. This did not prevent the goods selected from being subsequently sold with the rest, if that was deemed advisable. *In re Renda* (D. C.) 17 Am. Bankr. Rep. 521, 149 Fed. 614. But, besides being necessary to determine their value, it enabled them to be charged with a proportionate share of the loss, upon their being disposed afterwards at a forced sale indiscriminately with others, which is important. *In re Ansley Brothers* (D. C.) 18 Am. Bankr. Rep. 457, 153 Fed. 983; *In re Arnold* (D. C.) 22 Am. Bankr. Rep. 392, 169 Fed. 1000.

This is not to say that a specification of the goods could not be waived, and a claim, such as is here made, be accepted as sufficient, all parties consenting. But there is nothing here on which anything of that kind can be predicated. No such effect is to be given to the agreement between the excepting creditor and the trustee, by which the amicable action in ejectment which had been entered by Mr. Jacobs as owner of the hotel premises was to be opened, and the trustee allowed to take possession and make sale of all the property in the hotel in the interest of creditors. The bankrupt, so far as appears, had no part in this arrangement, nor was the question of his exemption drawn into it. It was merely an adjustment between the owner of the hotel and the trustee by which the proceedings which had been instituted in the common pleas were withdrawn, and the rights of the trustee, as the representative of creditors, recognized. It cannot be resorted to, to dispense with defects in the bankrupt's claim, which it had nothing to do with.

It is further said that the bankrupt had the right to amend. *In re Duffy* (D. C.) 9 Am. Bankr. Rep. 358, 118 Fed. 926; *Burke v. Guaranty, Title & Trust Co.*, 14 Am. Bankr. Rep. 31, 134 Fed. 562, 67 C. C. A. 486. But the trouble is he did not do so. And it is too late now, after the property has been disposed of. *In re Von Kerm* (D. C.) 14 Am. Bankr. Rep. 403, 135 Fed. 447.

The exceptions are sustained, and the exemption disallowed, and the referee will take action accordingly.

IN RE BAILLES.

(District Court, D. South Carolina. December 21, 1909.)

BANKRUPTCY (§ 398*)—EXEMPTIONS—SOUTH CAROLINA STATUTE.

Under the provisions of the Constitution of South Carolina (Const. art. 3, § 28), which entitles a debtor to a personal property exemption of \$500, except from "payment of obligations contracted for the purchase of such

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

homestead or personal property exemption," as construed by the Supreme Court of the state, which governs in determining the right of a bankrupt to the exemption, an indebtedness for borrowed money used in the purchase of the property claimed is not an obligation contracted for its purchase, and does not defeat the right of the bankrupt to the exemption.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 676-677; Dec. Dig. § 398.*]

In the matter of Elbert L. Bailes, bankrupt. On review of order of referee denying bankrupt's claim to a homestead exemption. Reversed.

Lambert W. Jones, for creditors.

Blease & Dominick, for bankrupt.

BRAWLEY, District Judge. The referee disallowed the homestead exemption claimed, because, as stated in his report, the funds in hand consist entirely of the proceeds of a stock of goods which had not been paid for, upon the authority of *McGahan v. Anderson*, 113 Fed. 115, 51 C. C. A. 92, and *Cannon v. Dexter Broom Company*, 120 Fed. 657, 57 C. C. A. 119; but upon the petition for review it was stated that the referee refused to allow the bankrupt to offer testimony which the bankrupt was prepared to offer, which testimony would have shown that there was in said stock of merchandise on the 3d day of December, 1908, goods and merchandise of the value of \$1,347.80, which could be identified as having been a part of the stock, and which had been paid for in full. I was of opinion, and so stated in the order then made, that if the bankrupt could prove satisfactorily that there were goods and merchandise in his stock which had been fully paid for, the rule laid down in the *Anderson* and *Cannon* Cases would not apply. The petition was referred back to the referee, with directions to allow Bailes to offer testimony in support of the allegations set up in his petition for review, and the case is now before me upon a second report of the referee and the testimony taken by him.

It appears from this testimony that Elbert L. Bailes, the bankrupt, testifies that this stock of merchandise was purchased at the sale made under orders of this court by his brother, and that since that time he has been in charge of it, and he swears that at the time of the sale there was a considerable quantity of merchandise in the stock of goods which had been fully paid for long before the bankruptcy proceedings were instituted, and that there was, at the time when his testimony was taken, such merchandise amounting in value to considerably more than \$500, the amount of the personalty exemption claimed. This testimony has not been contradicted, and therefore must be taken upon this hearing as true; but the referee has disallowed the homestead exemption, and the case is again before me upon the petition to review his finding.

The referee reports that the bankrupt began business in the year 1906 by borrowing \$5,000 from his wife, that during all the time that he continued in business he was indebted to her and to other creditors from whom he bought merchandise, and that the note for \$5,000 given to his wife has been proved as a claim against the bankrupt estate,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

which will pay possibly a little more than 30 cents on the dollar of his indebtedness; but it appears from the testimony that in January, 1907, he had on hand a stock of goods of the value of \$7,000, that his indebtedness to merchandise creditors was less than \$1,000, and the claims of the merchandise creditors proved in this case were, with slight exceptions, all contracted subsequent to January, 1907, so it seems to be established that in January, 1907, he had on hand merchandise which had been paid for in full to an amount considerably more than \$5,000.

It is true, as found by the referee, that he was continuously in debt from the time he commenced business until its disastrous conclusion, and it is not surprising, therefore, that the moral sense of the referee is shocked, when a man who has lived for two or three years at the expense of his creditors, and whose estate will only pay about 30 cents on the dollar of his indebtedness, should claim \$500 as an exemption and receive a full discharge of his debts; but the court is not concerned with the wisdom or justice of the homestead exemption law, and it is to be governed in such matters by the laws of the state. They declare that every head of a family shall be entitled, as a homestead exemption, to personal property of the value of \$500, with a proviso that there shall be no homestead exemption from "payment of obligations contracted for the purchase of said homestead or personal property exemption."

The Supreme Court of South Carolina in *McNair v. Moore*, 64 S. C. 82, 41 S. E. 829, has decided that money borrowed and applied to the payment of the purchase price of land bought of a third party is not a contract for the purchase money of the land in the sense of the Constitution. There was a like decision under a similar provision of the old Constitution in *Calmes v. McCracken & Koon*, 8 S. C. 97, where Calmes borrowed from Koon the money which paid the cash portion of the purchase money of land which he subsequently claimed as a homestead. It was contended in that case that the note given by Calmes to Koon was "an obligation contracted for the purchase of said homestead." The court held that this was not supported by the letter or the spirit of the Constitution; that Koon was in no wise a creditor by reason of any contract for the purchase, and it is only in favor of such a creditor that the constitutional exemption can apply, saying that the proviso which excludes the right of homestead "was a provision for the benefit of the vendor, for without it, if the purchase money was not paid or secured to be paid, a judgment which he might afterwards recover on the debt so created might be defeated by the interposition of the right of homestead by the debtor."

These decisions by the Supreme Court of South Carolina, interpreting the Constitution of this state in a matter of purely domestic concern, will be followed by the courts of the United States; and, assuming that the goods claimed as homestead exemption had been paid for out of the moneys borrowed from the wife, they seem to be conclusive that this indebtedness to the wife is not a bar to the homestead exemption. As matter of course, the wife is not here objecting to the allowance of the homestead exemption.

It is therefore ordered and adjudged that the report of the referee disallowing the exemption be reversed, and that the trustee do pay over to Elbert L. Bailes, out of the moneys in his hands, the sum of \$500 as a homestead exemption of personalty.

IN re CULLEN.

(District Court, E. D. Pennsylvania. February 11, 1910.)

No. 3,288.

BANKRUPTCY (§ 345*)—CLAIM TO FUND—JUDGMENT CREDITOR—RELEASE—“OTHER ESTATE.”

A judgment creditor expressly released his lien on certain described real estate of his debtor that it might be conveyed to a mortgagee, the debtor having a right to reconveyance on payment of the mortgage debt at any time before the property should be sold by the mortgagee. The release, however, provided that it should not affect the creditors' lien on the other estate of the debtor. *Held*, that on a sale of the property free from liens by the mortgagee and the debtor's trustee in bankruptcy, realizing a sum more than sufficient to pay the mortgage debt, such surplus did not constitute "other estate" within the meaning of the release, and that the judgment creditor had no claim thereto.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 345.*

For other definitions, see Words and Phrases, vol. 6, p. 5080.]

In the matter of Thomas A. Cullen, bankrupt. On review of decision of referee. Affirmed.

Henry A. Hoefler, for Edward Trainer.

John Dolman, for Bergner & Engel Brewing Company.

J. B. McPHERSON, District Judge. The point upon which the decision of this case must turn will appear from the following statement of facts:

In October, 1903, the bankrupt owned 10 houses upon which Edward Trainer held two judgment liens, while a building association held three prior mortgages upon the same property. The bankrupt's indebtedness to the association was evidently not in a satisfactory condition, for a plan of liquidation was made between them on October 6th, which is evidenced by the following resolutions:

"It was moved and seconded that the offer of Thos. A. Cullen be accepted, viz., to transfer to the Ass'n the 10 houses situated at No. 1802 to 1820 So. Bancroft St. inclusive, upon which the Ass'n now has a mortgage. To apply the rents, first deducting repairs and collecting commissions, to the payment of ground rent, taxes, water rents and the dues in the Ass'n on the loan now existing, as well as interest on the amount of money which the Ass'n will advance to pay the taxes now due.

"Mr. Cullen agreeing to pay on demand any deficit between the rents and expense charges due and interest above mentioned. Failure on his part to pay the deficit on demand being a sufficient authority for the Ass'n selling the properties for the best price they will bring.

"The following motion was made and carried:

"That if Mr. Cullen pays the Ass'n debt against the houses above mentioned at any time while they remain in the Ass'n hands, that they be reconveyed over to him. This not to impair the Ass'n right to sell the houses at any

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

time, if the deficit between receipts and payments referred to in the former motion is not paid on demand."

To aid in carrying out this plan, Trainer released his judgments on October 26th; the important language of the release being a covenant that:

"I will not at any time or times hereafter, sell or dispose of, attach or levy upon, or claim or demand the aforesaid premises, with the appurtenances, or any part thereof, in or by virtue of the aforesaid judgment, or claim any estate therein, so that the said Thomas A. Cullen, his heirs and assigns, shall and may hold the same, free and clear of and from the judgment aforesaid; provided, however, that nothing herein contained shall invalidate the lien or security of the said judgment upon the other estate of the said Thomas A. Cullen."

On December 14th the bankrupt carried out his part of the plan by conveying the houses to the association in pursuance of the foregoing resolutions, and the association continued to administer the property until March 24, 1909. Cullen was adjudged a bankrupt late in 1908, and on March 4, 1909, the referee made an order directing his equity in the houses to be sold free of liens. In order to make an advantageous sale, the association joined the trustee in selling the whole title on March 24th—not only the bankrupt's equity, but also the legal title that had been conveyed in December, 1903—and, after the association's claim had been paid in full out of the proceeds of sale, a fund remained which belonged to the bankrupt's equity. To this fund two claimants appeared, Trainer and the Bergner & Engel Brewing Company. It would needlessly increase the difficulty of understanding the question for decision if the facts concerning these claims should be stated in detail. It is enough to say that if the equity of the bankrupt in the property was part of his "other estate"—within the meaning of that phrase in the proviso of Trainer's release—Trainer should receive the fund in dispute; otherwise, the claim of the brewing company is superior in right.

The referee (Theodore M. Etting, Esq.) decided against Trainer's contention, and I shall add only a few words to explain why I agree with his ruling. In my opinion the bankrupt's equity in the houses cannot be properly described as "other estate of the said Thomas A. Cullen"; that is, as something else than the very property in which it is an equitable interest or an equitable estate. Trainer gave up all right of every kind which he could claim in or out of these specific houses by virtue of his judgments, so that the property might be free and clear from the grasp of these liens; but he expressly retained the lien and security of the judgments against "other estate" of his debtor. As I understand the release, it must mean at least this: "I abandon my claim upon whatever estate or interest Cullen now has in these houses; but I retain my rights against any other estate that he may now possess, or may come to possess hereafter." If, therefore, Cullen's equity under his arrangement with the association was an estate that existed when the release was executed, Trainer expressly gave up all claim upon it for "any time or times hereafter," and has no right to the fund now in hand, which merely stands in its place. To my mind the question seems to be free from difficulty. Cullen did not convey his whole

estate, equitable as well as legal, to the association. He continued to hold a certain undefined but real interest, and this never passed out of his ownership. It is this that was sold on March 24th, and upon this, or its proceeds, Trainer by an instrument under seal had released any claim whatever under his judgments.

The decision of the referee is affirmed.

In re MUDARRI.

(Circuit Court, D. Massachusetts. January 8, 1910.)

1. ALIENS (§ 68*)—NATURALIZATION—PROCEEDINGS—OBJECTIONS BY UNITED STATES.

Naturalization Act June 29, 1906, c. 3592, § 11, 34 Stat. 599 (U. S. Comp. St. Supp. 1909, p. 482), provides that the United States shall have the right to appear to cross-examine the petitioner and the witnesses produced in support of his naturalization petition concerning any matter touching or in any way affecting his right to admission to citizenship, and may call witnesses, produce evidence, and be heard in opposition to the petition. *Held*, that the court will ordinarily admit a petitioner to citizenship in the absence of declared opposition by the United States, and hence it is the duty of the United States attorney to specify his objections and to support the same by argument.

[Ed. Note.—For other cases, *Aliens*, Dec. Dig. § 68*]

2. ALIENS (§ 61*)—NATURALIZATION—"FREE WHITE PERSON"—SYRIANS.

A Syrian born in Damascus is a "free white person," entitled to naturalization under Rev. St. § 2169 (U. S. Comp. St. 1901, p. 1933), providing that the provisions of the title relating to naturalization shall apply to aliens, being free white persons, etc.

[Ed. Note.—For other cases, see *Aliens*, Dec. Dig. § 61*]

For other definitions, see *Words and Phrases*, vol. 8, pp. 7446, 7447].

Naturalization proceedings on petition of one Mudarri. Naturalization granted.

William H. Lewis, Asst. U. S. Atty.

LOWELL, Circuit Judge. The petitioner was born in Damascus, and testified that he was a Syrian by race. The United States attorney was asked if he opposed the petitioner's naturalization. He replied that the United States would call the court's attention to the petitioner's birthplace and presumed race; that it would neither approve nor oppose naturalization, but would leave the allowance thereof to the judgment of the court. This course the court deems quite improper, for reasons which may here be stated briefly.

Section 11 of the present naturalization act provides that the United States—

"shall have the right to appear before any court or courts exercising jurisdiction in naturalization proceedings for the purpose of cross-examining the petitioner and the witnesses produced in support of his petition concerning any matter touching or in any way affecting his right to admission to citizenship, and shall have the right to call witnesses, produce evidence and be heard in opposition to the granting of any petition in naturalization proceedings." Act June 29, 1906, c. 3592, 34 Stat. 599 (U. S. Comp. St. Supp. 1909, p. 482).

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The court is informed and understands that, by virtue of the section just quoted and of instructions thereupon issued by the Bureau of Naturalization, the United States attorney has made careful inquiry concerning the admissibility of the petitioner in the case at bar, and in like cases. The court is glad to acknowledge the helpfulness of this preliminary inquiry. Without it the examination of the petitioner and of his witnesses in court, whether conducted by the attorney or by the court itself, would be at haphazard, as was the examination by the court before the act of 1906. By the course now adopted, the proof in every case is made satisfactory; while, under the old statute, real proof was very often wanting. But the act of 1906 has done more than help the judge in making an investigation of fact for himself. We need not consider what would be the court's duty if the United States should now take no part in naturalization proceedings. Such a course is practically unthinkable. Where preliminary inquiry has been made; where the attorney attends at the hearing, and in behalf of the United States examines the petitioner and his witnesses with the freedom permitted in cross-examination; where the right to offer additional evidence is fully recognized, being often exercised in like case—the court is ordinarily justified in restricting its function to a decision as between litigants. The court, indeed, is not required to admit the petitioner to citizenship, although the United States assents thereto; but, after a hearing conducted as above described, the court will ordinarily admit to citizenship in the absence of declared opposition by the United States. No more than any other litigant can the United States be permitted to put the court to an independent investigation of law or of fact, without announcing its own contention in the matter. That which the United States is unwilling to support by argument the court need not consider seriously. When this position had been explained to the United States attorney, he promptly and properly announced that the United States opposed the naturalization of the petitioner on the ground that he was not a free white person within the meaning of Rev. St. § 2169 (U. S. Comp. St. 1901, p. 1333). In support of their several contentions, the United States and the petitioner have submitted briefs.

The case at bar is pretty well covered by the opinion of this court in the Halladjian Case, 174 Fed. 834, although what was there said of Armenians does not apply in every respect to Syrians. Those who call themselves Syrians by race are probably of a blood more mixed than those who describe themselves as Armenians. However this may be, the older writers on ethnology are substantially agreed that Syrians are to be classed as of the Caucasian or white race. Modern writers on ethnology, who have departed from the ancient classification, are not agreed in substituting any other which can be applied under section 2169. Inasmuch as Syrians have been classified as above stated, and as this court has long admitted Syrians to citizenship, the petitioner will also be admitted.

While the case at bar is thus free from considerable doubt, yet the court may properly point out that cases of difficulty are likely to arise in construing section 2169, unless its wording is changed and the intent of Congress is made to appear. That section implies a classifica-

tion of some sort. What may be called for want of a better name the Caucasian-Mongolian classification is not now held to be valid by any considerable body of ethnologists. To make naturalization depend upon this classification is to make an important result depend upon the application of an abandoned scientific theory, a course of proceeding which surely brings the law and its administration into disrepute. Here it is impossible to substitute a modern and accepted theory for one which has been abandoned. No modern theory has gained general acceptance. Hardly any one classifies any human race as white, and none can be applied under section 2169 without making distinctions which Congress certainly did not intend to draw; e. g., a distinction between the inhabitants of different parts of France. Thus classification by ethnological race is almost or quite impossible. On the other hand, to give the phrase "white person" the meaning which it bore when the first naturalization act was passed, viz., any person not otherwise designated or classified, is to make naturalization depend upon the varying and conflicting classification of persons in the usage of successive generations and of different parts of a large country. The court greatly hopes that an amendment of the statutes will make quite clear the meaning of the word "white" in section 2169.

PENNSYLVANIA STEEL CO. et al. v. NEW YORK CITY RY. CO. et al.

(Circuit Court, S. D. New York. January 10, 1910).

Nos. 2-9, 2-35, 3-37, 2-149, 3-114.

COURTS (§ 500*)—FEDERAL COURTS—ADJUSTMENT OF CLAIMS AGAINST RECEIVERS
—QUESTIONS DETERMINED.

In adjusting a claim of a receiver for a street railroad company appointed by a state court against receivers of lessees of such road, appointed by a federal court, for its use and occupation while in their possession before it was turned over to the state receiver, the federal court will not undertake to determine how much of the rental shall be paid to the state receiver and how much to the company, which is a matter to be disposed of by the state court.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 500.*]

In Equity. Suits by the Pennsylvania Steel Company and the Degnon Contracting Company against the New York City Railway Company and the Metropolitan Street Railway Company; the Morton Trust Company, as trustee, against the Metropolitan Street Railway Company and others (two cases); the Guaranty Trust Company of New York, as trustee, against the Metropolitan Street Railway Company and others; and the Guaranty Trust Company of New York, as trustee, against the Second Avenue Railroad Company in the City of New York and others. In the matter of the application of the Second Avenue Railroad Company in the City of New York and George W. Lynch, receiver, for allowance of claim. Order of reference.

*For other cases see same topic & § NUMBERS in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Byrne & Cutcheon, for Pennsylvania Steel Co. and another.
Masten & Nichols, for receivers of Metropolitan St. Ry. Co.
Dexter, Osborn & Fleming, for receivers of New York City Ry. Co.
James L. Quackenbush, for New York City Ry. Co.
J. Parker Kirlin, for Metropolitan St. Ry. Co.
Brownson Winthrop, for Morton Trust Co.
Davies, Stone & Auerbach, for Guaranty Trust Co.
John W. Griggs, for Second Ave. R. Co. and another.

LACOMBE, Circuit Judge. This is a petition dated December 29, 1909, by the Second Avenue Railroad Company and by George W. Linch, its receiver, under order of the Supreme Court of the state dated September 19, 1908. It prays that this court will proceed by reference to a special master to determine petitioners' claims for compensation for the use and occupation from June 1, 1908, to November 12, 1908, of the property of the road theretofore leased to the Metropolitan Street Railway Company; and to determine how much of such compensation shall be paid by receivers of the New York City Railway Company and how much by receivers of the Metropolitan Street Railway Company; also, how much of such compensation shall be paid to the Second Avenue Railroad Company and how much to Mr. Linch as its receiver.

In October, 1908, petition was filed asking that the property in question then held by the receivers of this court should be turned over to the receiver of the Second Avenue, and that certain claims then made by him be adjusted and paid. Reference may be had to opinion in Morton Trust Company v. Met. St. Ry. Co. (C. C.) 165 Fed. 489. The several claims were there discussed, some of them disposed of, and others referred to the special master. It was supposed that by this time they would have been presented and liquidated; but the present applications disclose the fact that after that decision the parties in interest took a long vacation, and nothing has been presented to the master. Now we have a similar application for reference as to one of the claims. The reason suggested for a further order is that the first one was entitled in only one of the many suits, and an adjudication therein might not bind all interests. The suggestion is not persuasive. All that the petitioners are concerned with is to get their money. If they had proceeded promptly under the old order and liquidated their claim, they would probably receive a check for the same within a few days. It is also not easy to understand why this alleged defect in the order did not suggest itself to some one in the course of the last 14 months. Nevertheless the alleged debt is the debt of the court, incurred (if it be incurred) by the court's receivers, whatever their title may be, and if the making of an additional order will expedite its liquidation such an order will be made. But, in view of the long and unexplained delay, the order will provide that the claim be filed with the special master within 15 days, and that he be instructed to set it down for an early hearing and to require counsel to be prompt in proving it.

The court takes this occasion to suggest again to all the special masters that all claimants should be required to be prompt in making proof of their claims. It is hoped that the court's administration of all these

properties is drawing to its close, and the time will soon come when dilatory creditors will not be allowed to file claims *nunc pro tunc*, and when dilatory claimants will be required to complete their proofs promptly or have their claims dismissed.

Referring again to the opinion in 165 Fed. 489, it will be noted that there were other claims then advanced by petitioners, of which it now appears, upon inquiry by the court, the special master who was authorized to pass upon them more than a year ago has never heard. It might be fair to assume that such a condition imports a waiver of them; but the resuscitation of this claim for use and occupation may indicate that they also are to be brought up under some fuller headlining. The order made under this decision will therefore contain a clause that all claims of the Second Avenue Railroad Company or its receiver, not covered by the terms of this order, against receivers of this court who have heretofore held temporary possession of the property of such railroad, must be filed with the special master within 30 days or be forever barred.

As to the subsidiary request that the master determine how much of the compensation, if any be due, shall be paid by receivers of the New York City Railway and how much by receivers of the Metropolitan Street Railway, the order will permit him to do so, if it be found necessary. But as at present advised the court sees no necessity of his wasting time over any such determination. Any claim which may be proved for use and occupation of the Second Avenue Road by receivers of this court, whatever their title may be, will be paid, and how such payment shall be distributed as a matter of charge and credit between the different interests represented will be adjusted by the master in the general accounting between such interests.

As to the other subsidiary request that the master determine how much of the compensation, if any be found due, shall be paid to the Second Avenue Railway Company and how much to its receiver, this court must register an emphatic denial. All money found to be due will have to be paid to the same individual, George W. Lynch, receiver of the Second Avenue Railway Company, either as receiver of the choses in action of that company or as the holder of a chose in action accruing after he took its place. How he shall distribute that money is a matter for the determination of the state court, which appointed him. It would be indecorous for us to undertake even to indicate such distribution, besides which we have troubles enough of our own without borrowing those of a receivership which this court did not create.

PENNSYLVANIA STEEL CO. v. NEW YORK CITY RY. CO. et al.

(Circuit Court, S. D. New York. January 12, 1910.)

RECEIVERS (§ 149*)—CLAIMS AGAINST RECEIVERSHIP—TIME FOR PROVING.

Where, pursuant to orders of a federal court in a proceeding against insolvent street railroad companies in which receivers have been appointed, advertisement has been made requiring claims against the defendants to be proved before a special master before a named date, claimants

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

who elect to prosecute their claims to judgment against the defendants, expecting that their judgments will be allowed nunc pro tunc, will be required to act with reasonable diligence so as not to delay the closing of the receivership; otherwise their claims will not be allowed against its funds.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 263; Dec. Dig. § 149.*]

In Equity. Suit by the Pennsylvania Steel Company against the New York City Railway Company and the Metropolitan Street Railway Company. In the matter of claims against receivers.

Byrne & Cutcheon, for plaintiff.

James L. Quackenbush, for New York City Ry. Co.

J. Parker Kirlin, for Metropolitan St. Ry. Co.

Masten & Nichols, for receivers of Metropolitan St. Ry. Co.

Dexter, Osborn & Fleming, for receivers of New York City Ry. Co.

LACOMBE, Circuit Judge. It is more than two years now since advertisement was made by the special master requiring claims against defendants to be filed with him before a named date, if claimants elected to prove them against any funds in or coming to receivers' hands. Since then from time to time orders have been made in special cases allowing claims to be filed nunc pro tunc. In many of these cases the claimants have elected to prosecute an action to judgment against the railway company, expecting that the court would allow such judgment to be filed nunc pro tunc as a claim against such funds. See (C. C.) 157 Fed. 443. As was indicated in the memorandum filed March 16, 1908 (C. C.) 161 Fed. 786, this proceeding cannot be held up indefinitely for the accommodation of dilatory claimants. After March 1, 1910, no orders will be signed allowing such claims to be filed nunc pro tunc. Between now and then parties must elect whether they will file their claims with the special master and submit their proofs to him, or will continue to prosecute their actions against defendants, and such election will be considered final.

PENNSYLVANIA STEEL CO. v. NEW YORK CITY RY. CO.

(Circuit Court, S. D. New York. February 19, 1910.)

STREET RAILROADS (§ 58*)—CLAIMS AGAINST RECEIVERS—REFERENCE.

Order referring claim against receivers for lessee street railroad company, for use and occupation of leased line after the payment of rental ceased, amended.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 58.*]

In Equity. Suit by the Pennsylvania Steel Company against the New York City Railway Company. Motion by Central Park, North & East River Railroad Company to amend order of November 30, 1908, referring certain questions to the special master, on the ground that the order does not fully express the decision of the court pursuant to which it was entered.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Byrne & Cutcheon, for Pennsylvania Steel Co.
 J. L. Quackenbush, for New York City Ry. Co.
 Dexter Osborn & Fleming, for receiver of New York City Ry. Co.
 Dykman, Oeland & Kuhn, for Central Park, N. & E. R. R. Co.
 Masten & Nichols, for receivers of Metropolitan St. Ry. Co.

LACOMBE, Circuit Judge. The decision was rendered October 19, 1908. 165 Fed. 472. After stating that receivers should account for whatever receipts came to their hands from the operation of the lessor's road during the period for which no rent has been paid, deducting what is properly chargeable against the same, it was referred to the master to take testimony and report thereon, and also as to petitioner's claim to be paid rent, providing that application to be paid a sum equivalent to rent might be renewed before the master. It was the intention to leave the question what amount should be paid by receivers to Central Park North & East River Railroad Company practically open before the master to be passed upon by him and reviewed by the court. Apparently the order does not specifically refer to the special master the question of rent, and this motion is granted so far as it asks for the insertion of a new clause marked "fourth." The motion to amend by restricting the special master's inquiry as to receipts and deductions to the period from January 1, 1908, to August 5, 1908, is denied. It was the intention of the court to have the special master investigate and report for the period from date of receivership as a basis on which to determine what amount should now be paid, whether rent or quantum valebat.

PENNSYLVANIA STEEL CO. et al. v. NEW YORK CITY RY. CO. MOR-
 TON TRUST CO. v. METROPOLITAN ST. RY. CO. (two cases).
 GUARANTY TRUST CO. OF NEW YORK v. SAME
 (Circuit Court, S. D. New York. February 18, 1910.)

Nos. 2-9, 2-33, 2-149, 3-37.

1. STREET RAILROADS (§ 49*)—LEASES—BREACH OF COVENANT.

A covenant by the lessee in a lease of a street railroad to pay all taxes "lawfully laid and imposed" upon the property or franchises demised is not broken because taxes imposed have been allowed to become in arrears, where the delay was caused by litigation instituted in good faith by the lessee and afterward by its receivers to effect a reduction of the tax, and its necessity or propriety has been demonstrated by the result.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 49.*]

2. STREET RAILROADS (§ 58*)—INSOLVENCY AND RECEIVERS—REPAIR OF LEASED LINES.

Orders granted authorizing receivers for the lessee of a street railroad system to repair certain leased lines to comply with the requirements of the leases.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 58.*]

3. STREET RAILROADS (§ 49*)—LEASES—CONSTRUCTION.

Where a covenant by a lessee of street railroad lines to "pay and discharge all taxes, assessments, license fees and percentages of receipts

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

which may be lawfully laid or imposed upon the property or franchises hereby demised," or on the lessor companies in respect thereof, has been construed by the parties during nine years to include a special franchise tax created and imposed since the leases were made, such construction will be followed by the courts.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 49.*]

4. STREET RAILROADS (§ 58*)—RECEIVERS—ADOPTION OF LEASE.

The mere payment by receivers for a lessee of a street railroad of whatever the lease requires to be paid to the lessor as compensation for the use and occupation of its property will not amount to a final election to adopt and ratify such lease.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 58.*]

5. STREET RAILROADS (§ 58*)—INSOLVENCY AND RECEIVERS—ADMINISTRATION OF PROPERTY.

Receivers for an insolvent lessee of an extensive street railway system, including a large number of lines, held on long leases, should so far as possible preserve the integrity of the system until its sale.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 58.*]

6. STREET RAILROADS (§ 58*)—RECEIVERS—PAYMENT OF TAXES ON LEASED PROPERTY.

Receivers for the lessee of a street railway system authorized to pay franchise taxes imposed on the lessors of lines included in such system as required by the terms of the leases, which taxes had been in litigation for a number of years prior to and during the receivership, where their validity and the amounts due have been finally adjudicated by the state courts.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 58.*]

7. INTERNAL REVENUE (§ 7*)—INCOME TAX—CONSTRUCTION OF STATUTE.

The federal excise tax imposed on the net income of certain corporations by Act Aug. 5, 1909, c. 6, 36 Stat. 112 (U. S. Comp. St. Supp. 1909, p. 844), was not intended to include insolvent corporations with no net income whose properties are being administered by a court.

[Ed. Note.—For other cases, see Internal Revenue, Dec. Dig. § 7.*]

In Equity. Suits by the Pennsylvania Steel Company and another against the New York City Railway Company; the Morton Trust Company against the Metropolitan Street Railway Company; the Guaranty Trust Company of New York against the Metropolitan Street Railway Company; and the Morton Trust Company against the Metropolitan Street Railway Company. In the matter of receiverships.

Various petitions and cross-petitions in the suits above enumerated were argued at the same time, and they are so interrelated that they should be disposed of in a single opinion.

Byrne & Cutcheon, for Pennsylvania Steel Co. and another.

Jas. L. Quackenbush, for New York City Ry. Co.

Dexter Osborn & Fleming, for receiver of New York City Ry. Co.

Brownson Winthrop, for Morton Trust Co.

J. Parker Kirlin, for Metropolitan St. Ry. Co.

Masten & Nichols, for receivers of Metropolitan St. Ry. Co.

Davies, Stone & Auerbach, for Guaranty Trust Co.

*For other cases see same topic & NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

LACOMBE, Circuit Judge. The questions presented on this hearing will be considered separately, although not necessarily always in the order of their presentation.

Petition of Harlem Railroad Company.

This company is the owner of what, without going into details, is known as the Fourth Avenue & Madison Avenue Line, including Eighty-Sixth Street Crosstown Line. The property was leased to the Metropolitan Street Railway Company for 999 years on June 11, 1896, and has since been operated by that company, by its lessee, the New York City Railway Company, and by the receivers of the two last-named companies. The petition prays that receivers "be instructed and directed to elect whether or not they will assume and adopt the [said] lease, or that it be determined that the petitioner may re-enter and repossess its properties therein described," and for general relief.

As to the election whether or not to assume and adopt the lease, it is sufficient to say that as to all leases held by the Metropolitan Street Railway Company this court in the decree of foreclosure inserted provisions which instructed the receivers to take no action, which might be construed as an election, prior to sale. Appeal was taken to the Circuit Court of Appeals, has been argued, and is now under consideration by the appellate court. Under these circumstances, it would be highly indecorous for this court to instruct receivers further on this subject, while that tribunal is considering the propriety of the instructions already issued—unless some most extraordinary and unforeseen contingency should arise, of which there is no suggestion here. This election, however, is of no especial importance now. The gist of the petition is that the covenants of the lease have been already broken, and that lessor is entitled to re-enter. If that is so, mere election to "assume and adopt" would not change the situation.

The alleged breaches of the leases on which petitioner relies are these:

(A) The lease provides that the lessee shall during the term of the lease "pay and discharge all taxes, assessments, license fees and percentages of receipts which may be lawfully laid or imposed upon the property or franchises hereby demised, or any part thereof, or upon or exacted from the lessor in respect thereof, or by reason of the payment of the rent hereby reserved or upon the stock of the lessor by reason of its receipt of the rent hereby reserved." Subsequent to the making of the lease, the state of New York devised and put in force a new form of taxation on public service corporations, referred to in the record as the "special franchise tax." This tax was imposed directly on the lessor road. The lessee at once challenged the constitutionality of this tax, carried the question to the Supreme Court of the United States, was defeated, and paid the tax for the year which it thus brought up. It also questioned the amount of the tax as assessed by the state officials, and for each and every year undertook to review it by certiorari. The multitudinous proceedings thus resulting—for there are many other lessors—were instituted by the lessee (afterwards by receivers) are pending in court and have been carefully at-

tended to. Each certiorari is in the name of the lessor; the lessee and subsequently the receivers retaining counsel and paying all the expenses of litigation. On November 10, 1909, receivers sent to the secretary of petitioner the following letter:

"Dear Sir: As you doubtless know, the special franchise taxes of your company have not been paid in full. Proceedings by certiorari to review the assessment for the years 1901 to 1909 inclusive were begun in the name of your company and are still pending. In view of the recent decision of the Court of Appeals in the Jamaica Water Company Case [196 N. Y. 39, 89 N. E. 581] it is probable that an attempt will be made to collect the unpaid taxes by a sale of the franchises. The receivers have not sufficient funds to make the payments demanded by the comptroller's office or even the amounts which are not in dispute. It is possible that conditions may arise which will involve some conflict of interest between your company and the company of whose property we were receivers. We, therefore, deem it advisable and proper to give you notice to take immediate charge of the proceedings on behalf of your company. Our counsel, Messrs. Masten & Nichols, will facilitate you in so doing."

It is argued that this was a notification that receivers would decline to continue the prosecution of the certiorari proceedings. The receivers contend that no such construction should be put upon their letter. The decision referred to therein settled some of the questions involved in all these certiorari proceedings, making it manifest that the amount of each tax was greatly in excess of what it should have been. This made it probable that the remaining questions might be settled by adjustment with the state and city officials, by mutual stipulations as to the amount of certain items entering into each calculation. Inasmuch as the tax was laid on the lessor, and counsel in charge had not been selected by the lessor, it was thought best to give notice of the situation and afford the latter opportunity to put its own counsel in charge, if it saw fit so to do; the expense of litigation, however, being borne by receivers. The letter is susceptible of this construction, but, even if it were not, the mere sending of it was not a breach of any covenant, so long as receivers actually continued to press the litigation at their expense for the benefit of the lessor.

(B) The special franchise taxes for the years 1901-1909 are unpaid, and it is contended that this circumstance constitutes a breach of the lease. But the record shows that the lessee and subsequently the receivers have instituted and prosecuted proceedings in the state courts to secure a review of the action of the taxing officers and effect such a reduction of the tax as would bring it within what the statute allowed.

These proceedings were not mere devices to delay the payment of just obligations; they were prosecuted in good faith and the recent decision of the Court of Appeals demonstrates their propriety. The lease required the payment of taxes "lawfully laid and imposed" and provided for the payment of such taxes "during the term of the lease." It is thought that a delay merely sufficient to secure relief from the imposition of exorbitant burdens not lawfully imposed does not constitute a breach of the lease. It seems unnecessary to review at greater length the elaborate discussion of this question which is

found in the briefs, in view of what is said *infra* in disposing of the petition of receivers.

(C) The city having advertised the sale of its lien for unpaid franchise taxes, petitioner voluntarily paid \$400,000 to the collector of assessments and arrears to secure a postponement of such sale, and asks that it be forthwith repaid such sum. It is thought this payment was unnecessary. The sale of the liens on property of other lessors was postponed, without payment being made. But further elaboration of this point is unnecessary, in view of instructions to receivers *infra*.

(D) The lease contains a covenant to keep the demised property in good working order, condition, and repair. The petition does not expressly allege a breach of this covenant; but on the argument it was conceded by all that the property is not now in a proper condition of repair. In view, however, of the instructions given to receivers *infra* in regard thereto, further discussion of the subject is unnecessary.

The prayer of the petitioner that the \$400,000 be immediately repaid, and that it be allowed to re-enter, is denied.

Petition of Eighth Avenue Railroad Company.

Petition of Ninth Avenue Railroad Company.

These petitions are for the same relief and upon substantially the same facts, except that no payment has been made by either of these roads to the collector of assessments. For reasons above expressed, in *Re Harlem Railroad*, they are denied.

Petition of Receivers.

Repairs on Harlem Road Lines.

Receivers state that these lines are in bad condition, and that according to the estimates of their engineers \$313,900 will be required to restore them to the condition of good repair, which the lease calls for. While a reasonable *locus poenitentiae* may be allowed a person who, holding property under such a lease, has allowed it to deteriorate, he should act promptly when complaint is made. There seems to be no real objection to this expenditure by any one, although upon the argument counsel for the trustee under the second mortgage suggested that it should be ordered only on condition that the lessor should agree to abandon any claim to re-entry for breach of any covenant. All parties—except possibly this lessor—appeared to agree in the conclusion that the integrity of the system should not now be disturbed. It certainly would be promptly disturbed, if the requirements of this lease that the property be kept in “good working order, condition and repair” are not observed. Receivers will take immediate action to make all necessary repairs.

Petition of Receivers as to Eighth Avenue Repairs.

This is a similar request for instructions; the cost of necessary repairs being estimated at \$505,850. It is similarly disposed of.

Petition of Receivers as to Special Franchise Taxes.

The receivers set forth the details of unpaid special franchise taxes

for the years 1901-1909 showing that the net balance payable, after equalization and deductions in accordance with the decisions of the state courts and including interest, is in excess of \$3,000,000. This includes all the lines in the system. The last two years cover the period when the roads were operated by receivers, and it was stated on the argument that they have reserved a sum sufficient to settle for these two years on the reduced basis, but are without means to pay even the reduced amount for the earlier years. They also point out that it is highly important for all concerned that payment be made, if arrangements can be made with the collecting officers to readjust the claims on the basis indicated by the decisions, for two reasons: First, it would stop future accumulation of interest; and, second, payment of tax for each year would operate, as indicated in the Jamaica Water Company Case, to reduce the amount payable for the next succeeding year. They ask for instructions.

As to so much of these taxes as are imposed upon the special franchises of the Metropolitan Street Railway Company itself, it would certainly seem that they should be paid as promptly as money can be procured for that purpose, and it is not understood that there is any serious objection to such a course. The representatives of bondholders, however, strenuously oppose any payment at the present time of taxes imposed on franchises of the leased lines; although the trustee under first mortgage suggests that payment be made, for account of all concerned without prejudice to future adjustment between them, of the taxes for the year 1904.

Counsel for the second mortgage bondholders contends that grave doubt exists whether the special franchise taxes assessed in respect to the property of the leased lines are payable by the lessee; also, that payment now would necessarily involve a final election to adopt and ratify the lease, and thus adversely affect the disposition of possible purchasers to bid upon the foreclosure sale. He does not agree with counsel for the first mortgage bondholders that payment of the taxes of 1904 now would be of any advantage. The first mortgage bondholders ask that the whole matter be postponed until the decision of a specified certiorari proceeding now pending to review the taxes of 1905.

Upon the question whether or not the various leases impose upon the lessee the burden of paying these special franchise taxes, a brief has been filed on behalf of bondholders. It contends forcibly, and with the citation of many authorities, that, since this peculiar tax is a new creation of the Legislature of a sort which did not come into existence until after the leases were executed, it should not be included within the general provisions which require the lessee to pay all taxes, assessments, and charges. The argument is not found persuasive because for nine years or more both parties to each and every lease have practically construed it as imposing the obligation to pay these special taxes upon the lessee.

The mere payment by receivers of whatever a lease requires to be paid to the lessor as compensation for the use and occupation of its property will not amount to a final election to adopt and ratify such

lease. What effect such payment might have on the disposition of possible purchasers at foreclosure sale this court cannot determine. The controlling element of the situation seems to be the necessity for preserving the integrity of the system so long as it remains in the hands of receivers; until foreclosure sale and delivery thereunder discharges them from responsibility they should leave nothing undone which it is within their power to do, and which may be essential to secure the offering of the property for sale as a unitary system.

The situation has changed very much within the past few months. Prior to the final decision of the Jamaica Water Company Case, 196 N. Y. 39, 89 N. E. 581, by the Court of Appeals, no state officer could accept anything less than the full amount of the taxes imposed, however exorbitant they might be. It is thought, as expressed above, that receivers did not make default under any of these leases because they did not undertake in some way to raise the money necessary to pay these exorbitant claims in full, pending proceedings to secure their reduction by the state courts. This court may be right or wrong in such conclusion. If it be erroneous, either or all of the lessor roads which have filed petition can review the decision promptly during the March session of the Circuit Court of Appeals if they so desire. But a failure now to undertake to discharge these taxes by payment of them at the equalized and revised rate indicated as proper by the state courts might very well be held to constitute a breach of the lease. It is certainly reasonable to assume now that there is a final decision by the state court of last resort that the state officers who are charged with the collection of those taxes would be found ready and willing to accept the reduced amounts in satisfaction and discharge.

Receivers, therefore, should take up the matter of adjustment of all these special franchise taxes with the state officers, and, if they succeed in effecting a liquidation on the equalized and revised basis, the court will authorize the issue of receivers' certificates to an amount sufficient, with the money already reserved to cover the last two years, to make up the total sum necessary to be paid, including repayment to Harlem Railroad Company of the \$400,000 it has already advanced to the collector of assessments. Should foreclosure sale take the property out of receivers' hands, before such adjustment can be finally effected, they will at least have preserved the property intact, without the disintegration which would necessarily result from making default under these leases.

Petition of Receivers as to Federal Tax.

Receivers ask instructions as to what action, if any, they shall take under Act Aug. 5, 1909, c. 6, 36 Stat. 112 (U. S. Comp. St. Supp. 1909, p. 844), referring to section 38, which provides for a special excise tax upon net income of certain corporations, joint-stock companies, and associations. The act contains no provisions as to receivers, and it is not thought that Congress intended to include bankrupt corporations with no net income whose properties are being administered by a court. It would seem to be sufficient if at the time fixed for making returns a statement be filed with the proper officer showing that these roads are in the hands of receivers. Whether the various lessor companies

are or are not within the terms of the act as corporations carrying on business and receiving a net income is a question which they will, of course, determine for themselves upon the advice of their own counsel. Whether, if this tax be properly assessed upon them, it should be paid by lessor or lessee, is a question to be determined when it may arise. Such determination will be in no way affected by the present decision, since "practical construction" as to such tax cannot be shown.

Ex parte KOERNER.

(Circuit Court, E. D. Washington, E. D. December 15, 1909.)

No. 1,425.

1. ALIENS (§ 54*)—PROCEEDINGS FOR DEPORTATION—CONCLUSIVENESS OF FINDINGS OF EXECUTIVE OFFICERS.

In proceedings for the deportation of alien immigrants, while the courts are bound by the findings of the Executive Department, they cannot properly refuse relief, where on the admitted facts it appears as a matter of law that the person sought to be deported is not within the inhibition of the statute.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 54.*]

2. ALIENS (§ 53*)—AUTHORITY TO DEPORT—CONVICTION OF CRIME IN FOREIGN COUNTRY.

The provision of Immigration Act Feb. 20, 1907, c. 1134, § 2, 34 Stat. 898 (U. S. Comp. St. Supp. 1909, p. 448), excluding from admission persons "who have been convicted of or admit having committed a felony or other crime or misdemeanor involving moral turpitude," and of section 20 (page 459), requiring the deportation of any alien who shall enter the United States in violation of law, do not authorize the deportation of an alien because of his conviction of a felony in the country from which he came after his admission into the United States,

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 53.*]

3. HABEAS CORPUS (§ 23*)—PERSONS HELD FOR DEPORTATION—AUTHORITY OF COURTS TO DISCHARGE.

A court is not precluded from discharging an alien held for deportation on a writ of habeas corpus because of the pendency of an appeal from the order of deportation before the Secretary of Commerce and Labor, where on the admitted facts there is no warrant of law for his deportation and he is unlawfully restrained of his liberty.

[Ed. Note.—For other cases, see Habeas Corpus, Dec. Dig. § 23.*]

Petition by Otto Koerner for writ of habeas corpus. Petitioner discharged.

Munter & Lovejoy, for petitioner.

A. G. Avery, U. S. Atty.

WHITSON, District Judge. The petitioner seeks release by writ of habeas corpus from imprisonment in the Spokane county jail. He is detained for deportation upon a warrant issued on November 9, 1909, by the Acting Secretary of Commerce and Labor under the act of February 20, 1907 (34 Stat. 898). The Chinese and immigrant inspector, after a full and fair hearing, reported his proceedings to the Secretary, before whom the matter may be considered as still pending.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The documents upon which the warrant was issued, as disclosed by the petition and admitted by the return, show that the petitioner entered the country on the 12th day of April, 1909, and was thereafter convicted of the crime of embezzlement in Austria, the country from which he came, on the 8th day of October, 1909. The clause of the statute under which the right to deport is claimed appears in section 2 of the act above noted, and reads:

"* * * Persons who have been convicted of, or admit having been convicted of, a felony or other crime or misdemeanor involving moral turpitude.
* * *

The petitioner was sentenced to imprisonment in the penitentiary, and, indulging the presumption that the law of the foreign jurisdiction is the same as that of this country, he was guilty of the commission of a felony and of a crime involving moral turpitude; but it affirmatively appears that he was convicted after he left Austria, and, it not appearing that he has admitted the commission of the offense, he is not brought within the statute. While the courts are bound by findings duly made by the executive branch in matters of this kind (*United States v. Ju Toy*, 198 U. S. 253, 25 Sup. Ct. 644, 49 L. Ed. 1040; *Pearson v. Williams*, 202 U. S. 281, 26 Sup. Ct. 608, 50 L. Ed. 1029; *Oceanic Navigation Company v. Stranahan*, 214 U. S. 321, 29 Sup. Ct. 671, 53 L. Ed. 1013), they cannot properly refuse relief, where upon the admitted facts it appears as a matter of law that the person sought to be deported is not within the inhibition of the statute. *Gonzales v. Williams*, 192 U. S. 1, 15, 24 Sup. Ct. 171, 48 L. Ed. 317; *Ex parte Watchorn* (C. C.) 160 Fed. 1014.

This is the case presented here. Want of jurisdiction, and not an erroneous finding, is the state of the record. The fact that the matter is still pending before the department is assigned as a sufficient reason for denying the prayer of the petition; but it is to be remembered that the petitioner is in the meantime deprived of his liberty, and while so restrained he might be deported without the sanction of any statute, which would be violative of his rights, or, as it was expressed by the Supreme Court in *Chin Yow v. United States*, 208 U. S. 13, 28 Sup. Ct. 201, 52 L. Ed. 369, "without the process of law to which he is given a right."

It will be assumed, in the absence of any showing to the contrary, that the grounds for deportation were fully disclosed in the proceedings looking to that end. It may be, however, that the department has information other than that made to appear, or, in view of those facts which do appear, that the government from which the petitioner came may desire his extradition. He will therefore be held for a reasonable time in order to enable the department to supply additional proof or to allow for the institution of extradition proceedings; for if of the criminal classes the statute ought to be given full scope, and treaty obligations naturally suggest that reasonable opportunity be afforded for apprehension and return of one who has fled the country to which he owed allegiance to escape punishment for an infraction of its laws.

The petitioner having been held five days, and no further showing made nor other proceedings instituted, he was discharged.

UNITED STATES v. M. FURUYA & CO.

(Circuit Court, W. D. Washington, N. D. January 21, 1910.)

No. 1,334 (1,749).

CUSTOMS DUTIES (§ 38*)—CLASSIFICATION—NORI—"SEAWEEDS CRUDE OR UNMANUFACTURED."

Nori, a seaweed gathered from the ocean and sun-dried, without the addition of any other substance and without being subjected to any other process than spreading it on mats to facilitate drying, is "seaweeds * * * crude or unmanufactured," within the meaning of Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 617, 30 Stat. 199 (U. S. Comp. St. 1901, p. 1685).

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 38.*]

On Application for Review of a Decision by the Board of United States General Appraisers.

Elmer E. Todd, U. S. Atty.

Comstock & Washburn (Albert H. Washburn, of counsel), for importers.

HANFORD, District Judge. In this case the collector of customs exacted payment of duty on the imported merchandise at the rate of 20 per cent. ad valorem under section 6 of the tariff act of 1897 (Act July 24, 1897, c. 11, 30 Stat. 205 [U. S. Comp. St. 1901, p. 1693]), as a nonenumerated manufactured article. The importer paid the duty under protest, contending that the merchandise is nondutiable under paragraph 617, which reads as follows:

"617. Moss, seaweeds and vegetable substances, crude or unmanufactured, not otherwise specially provided for in this act."

The Board of General Appraisers sustained that contention, and for a reversal of that decision the collector of customs has appealed to this court.

The uncontradicted evidence in the case proves that the merchandise called "nori" is in fact seaweed gathered from the ocean and sun-dried, without the addition of any other substance and without being subjected to any process of manufacture other than to spread it on mats to facilitate drying by the sun; and it is the opinion of the court that the decision of the Board of General Appraisers holding that the special enumeration of seaweed in paragraph 617 includes this commodity, and that it belongs on the free list, is correct.

This case is easily distinguishable from *Wilkens v. United States* (C. C.) 84 Fed. 152, in which case the commodity in question, called "kittul," was fiber of the leaf stalks of the jaggery palm of East India, which had been, before importation, improved by labor in combing it between steel brushes with a little oil to soften it for taking out kinks and curls, slightly coloring it, and making it straight for bunching by lengths for brushes.

The court affirms the decision of the Board of General Appraisers.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

GONSOULAND v. ROSOMANO.

(Circuit Court of Appeals, Fifth Circuit. March 15, 1910.)

No. 1,818.

1. PLEADING (§ 228*)—EXCEPTIONS—NO CAUSE OF ACTION.

An exception to a petition for want of facts must be overruled, if the petition states facts which would entitle plaintiff to judgment if proved to be true.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 584-590; Dec. Dig. § 228.*]

2. PLEADING (§ 228*)—PETITION—SEPARATE CAUSES OF ACTION—EXCEPTION.

Where a petition seeks to recover several separate sums on a statement of facts relating to each claim, and it is met by an exception of no cause of action, presented as a defense to the entire petition, the exception should not be sustained if plaintiff has a cause of action within the court's jurisdiction on any branch of the case made.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 584-590; Dec. Dig. § 228.*]

3. MALICIOUS PROSECUTION (§§ 49-51*)—PETITION.

In an action for malicious use of process—malicious prosecution—plaintiff must ordinarily aver that defendant instituted the proceeding with malice and without probable cause, and that it terminated in his favor.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 96-99; Dec. Dig. §§ 49-51.*]

4. PROCESS (§ 168*)—ABUSE OF PROCESS—ELEMENTS OF ACTION.

An action for malicious abuse of process, civil or criminal, will lie though the process was lawfully issued on a valid judgment for a just cause and is valid in form; the gravamen being the malicious abuse of the power conferred by the judgment and writ.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 257; Dec. Dig. § 168.*]

5. PROCESS (§ 170*)—ABUSE OF PROCESS.

The right of action for abuse of process is applicable to all kinds of abuses in the service of lawful process, not only against the officer whose duty it is to act lawfully, but against all who unite with him or direct him to inflict the injury.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 258; Dec. Dig. § 170.*]

6. PROCESS (§ 171*)—ABUSE OF PROCESS—PETITION.

A petition alleged that plaintiff sold defendant certain real estate; that defendant recorded the act of sale, and failed and refused to pay any part of the purchase price, whereupon plaintiff was compelled to obtain a decree annulling the sale and restoring possession; that, pending such suit, defendant brought two suits against plaintiff, one for possession of the property purchased, and the other on a claim for rent; that in the suit for rent, by defendant's direction, there was a seizure of stock and fixtures belonging to plaintiff in another house, and plaintiff, to maintain his credit and lessen the injury to his business, paid the rent under protest and costs of both suits; that defendant, knowing of the pendency of the suit to annul the sale, obtained judgment for possession and caused to be issued a writ of ejectment and under the writ evicted plaintiff and his family and seized all the furniture, beds, bedding, and wearing apparel of himself, wife, and children, depriving them of its use notwithstanding its exemption; that the seizure was made by the direction of defendant to the officer in charge of the writ; that the property taken was never returned to plaintiff nor accounted for; that, after obtaining possession of the real

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

estate, defendant destroyed one of the buildings, and had acted throughout in bad faith, never intending to pay for the land; and that his action in the suits for rent and possession and in the use of process in such actions was malicious. *Held* to state a sufficient cause of action for abuse of process.

[Ed. Note.—For other cases, see Process, Dec. Dig. § 171.*]

7. FRAUD (§ 43*)—DECEIT—PETITION.

The petition also stated a cause of action for damages for deceit.

[Ed. Note.—For other cases, see Fraud, Dec. Dig. § 43.*]

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

Action by Henry Gonsouland against Marco Rosomano. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

This is an action at law for \$5,000 damages, brought by Henry Gonsouland, a citizen of Mississippi, against Marco Rosomano, a citizen of Louisiana.

The following are the material averments of the petition:

"That petitioner, as owner, acting in good faith, agreed to sell to the said Marco Rosomano the certain lot of ground, with all the buildings and improvements thereon, situated in the city of New Orleans, designated as lot No. 12 in square No. 31, bounded by Sequin, Eliza, Bouny, and Evilina streets, for the agreed price of \$1,300 cash, clear of all costs and expenses, and in execution of said agreement to sell, and in completion thereof, petitioner, on the 5th day of December, 1905, signed the act of sale of said property as prepared by a notary public, and delivery thereof immediately passed to said defendant, who caused said act of sale to be registered in the office of the register of conveyances in the city of New Orleans.

"Petitioner represents: That, although he signed said act of sale and delivered over to defendant the said property, the said defendant failed and refused to pay petitioner the purchase price thereof, and he was forced to institute suit against said defendant to rescind said sale for the nonpayment of the purchase price in the civil district court of the parish of Orleans; said suit being No. 77,938 of the docket of said court. That, after trial of said cause on the merits, judgment was therein rendered in favor of petitioner and against the said defendant, condemning and ordering the said defendant to pay the purchase price, to wit, \$1,300, less the sum of \$40.80, costs incurred in the transfer of said property, with legal interest from December 5, 1905, until paid within 10 days from the finality of said judgment, and in the alternative, should the defendant fail to pay as aforesaid to plaintiff within said time, then, in that event, that plaintiff have judgment in the alternative against the defendant rescinding and canceling said sale of the property described in plaintiff's petition restoring the same to him as owner and reserving to petitioner his right of action to recover the rents of said property from December 5, 1905, until paid. That said judgment is final and executory. No appeal has been taken therefrom.

"Petitioner shows that the said defendant failed to comply with said judgment in suit No. 77,938 by paying the purchase price or to deliver to petitioner the possession of said property or the rents or revenues collected by him on said property; amicable demand having been made without avail.

"Petitioner further shows: That during the pendency of the aforesaid suit for the dissolution of the sale of said property, and before said suit was tried, the said Rosomano filed a suit in the Second city court of New Orleans, No. 1,731, based upon a clause which was inserted in said act of sale without the knowledge or agreement of petitioner, whereby he was to pay to defendant the sum of \$4 per week contingent upon petitioner occupying said premises after the sale. That, the next day after signing the act of sale, defendant had petitioner served with a notice to vacate said property, which he refused to do. That defendant, as plaintiff in said suit, unlawfully caused to be issued and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

executed a writ of provisional seizure, and caused to be illegally seized the movable property of petitioner contained in the house at Eliza and Powder streets, of this city, to wit, the barroom fixtures, counter, liquors, whisky, and stock in trade, which property was not liable to seizure under said writ by law; the said Rosomano having no lien or privilege upon said property, placing a keeper in charge of petitioner's place of business, and closing the same for several days. That petitioner, in order to preserve his good standing with his creditors, paid under protest the said claim for rent and all costs under said writ of provisional seizure, amounting to \$31.80, notwithstanding that defendant had not paid the purchase price of said property, and was collecting rent on said property from the tenants of petitioner.

"Petitioner shows: That on December 18, 1905, defendant entered suit in the aforesaid Second city court, No. 1,722, against petitioner by rule for possession of said property described in his petition, and in the said act of sale as set forth in suit No. 77,938 of the docket of the civil district court, and while the said suit was still pending and untried on the merits. That petitioner refused to vacate said premises sold because the said defendant had failed to comply with his agreement by paying to petitioner the purchase price of said property. That in the said suit No. 1,722 of said city court the said defendant unlawfully caused to be issued and executed a writ of fieri facias or writ of ejectment, by which petitioner and his family were illegally ejected from said premises and threatened with arrest should any of them attempt to again enter said premises. That the keys of said premises were delivered to defendant under protest. That said defendant cleared said premises of the property of petitioner, consisting of his household furniture, kitchen utensils, and some clothing, throwing some of the furniture in the yard of said house, locking the doors and gates of said premises, denying petitioner the right to his property, retaining it, and taking into his possession the whole of the property, such as his parlor set, armoires, dressers, washstands, and bedroom sets, all of which property has never been returned to petitioner and is illegally detained or disposed of by said defendant to the injury and damage of petitioner. That by said illegal possession and detention petitioner has been illegally deprived of the use and enjoyment of his property, the comforts of his home, and forced to seek a home and shelter elsewhere, and to suffer the inconvenience and indignities of a public seizure. That some of the property seized was exempt under the law from seizure. That defendant maliciously and without probable cause took unlawful possession of petitioner's property over his protest, and deprived him of the whole of his property, which petitioner values at the sum of \$450, as per itemized list of said property attached to this petition and made a part hereof for greater certainty.

"Petitioner shows: That, a short time previous to the sale of said real estate to defendant, he erected in front of and adjoining said property two large rooms, which he and his wife used for a restaurant, wired with electric lights, where he conducted and from which he derived a good revenue that assisted materially in sustaining himself, wife, and family from said restaurant. That said two rooms were a part of said property sold to defendant aforesaid, and were substantially built of good material and finished in a workmanlike manner, and the same cost petitioner in all the sum of \$250, and in good order and condition when delivered to defendant. That said defendant after he took possession of said property tore down and destroyed said two rooms and appropriated the lumber and material thereof to his own use, as he did also all of the personal property of petitioner that was contained in the loft of said two rooms, which personal property is included and valued in the statement annexed to this petition. That, when defendant destroyed said two rooms and the property therein contained, he had no legal right to said property because the purchase price thereof had not been paid, and the suit in the civil district court was pending and undecided.

"Petitioner shows that he was obliged to hire the services of an attorney at law to protect his rights in the premises, and agreed to pay said attorney the sum of \$250, which petitioner considers a reasonable charge; that petitioner was forced to pay rent for himself and family from February 2, 1906, up to the present time, at the rate of \$20 per month; that there is due petitioner the sum of \$180 for rent paid by him; that said defendant has col-

lected rent on said property described in the act of sale for 14 months at the rate of \$18 per month; that there is due petitioner for said rent \$252, which said defendant refuses to pay after amicable demand; that petitioner has expended in costs in the suits in the Second city court of New Orleans, Nos. 1,731 and 1,722, the sum of \$45, and he is entitled to recover same.

"Petitioner shows: That the unlawful issuance of the several writs in the suits Nos. 1,722 and 1,731 in the Second city court of New Orleans, and the illegal execution thereof at the instance of the defendant in seizing the property of the petitioner, and particularly said property not liable to seizure under the law and said writs, was done with the deliberate intention and with malice to vex, harass, and annoy petitioner without any probable cause or loss to said defendant. That the said defendant willfully sought to oppress petitioner, to destroy his credit with those with whom petitioner had business relations, and to humiliate him in the eyes of the community in which petitioner resided at the time, and was a direct means of forcing the petitioner to leave said community and to live in Gulfport, where petitioner is at present engaged in business. That the conduct of the said defendant in the said act of sale of the property herein described was fraudulent, and petitioner's signature obtained to said act of sale was by fraud and deceit. That the said defendant never evidenced any intention of carrying out his agreement to purchase said property by paying to petitioner the sum agreed upon or to comply with the judgment rendered in said case; but every act was done by him to defraud and damage petitioner and deprive him of his property without due process of law.

"Petitioner shows that the unlawful and forcible ejectment of petitioner and his family from his home under said circumstances herein mentioned, the unlawful destruction of his property, the illegal seizure of the movable property of petitioner, the unlawful possession and illegal detention of said property, depriving petitioner of a home and the use and enjoyment of his property and the value thereof, forcing petitioner to leave this city, and being made to suffer the shame, indignity, and mental worry in the eyes of his friends and neighbors by being forcibly thrown out under protest upon the public street, and the injury and damage the petitioner suffered at the hands of the defendant herein, entitles petitioner to claim punitive and exemplary damages in the sum of \$3,475.

"Petitioner shows that the items of loss and damage herein claimed as actual damages suffered by petitioner are due to petitioner and should be paid to him by the said defendant, and petitioner subjoins hereto an itemized statement of defendant's indebtedness to petitioner, including all damages suffered and money paid by petitioner in the protestation and defense of his rights in the several suits in which the said property was wrongfully destroyed, appropriated and illegally detained by said defendant, and which petitioner was deprived of the value, use, and enjoyment thereof, and in support thereof petitioner makes the records in the several suits above mentioned part of this petition, and attaches the said records to this petition.

"Petitioner shows that he is entitled to claim the rent of the property, the sale of which was rescinded by judgment in suit No. 77,938 in the civil district court and collected by defendant, which he refuses to turn over or to account to petitioner from the 5th day of December, 1905, until the final determination of this suit, together with the amount he was obliged to pay for rent for himself and family, and such other sums as may be due, or until the delivery of the said property to petitioner, or in the alternative that his rights be reserved to him to bring his action for such rents as money as may become due from all sources from the filing of this suit by petitioner due by defendant.

"Wherefore, the premises considered, petitioner prays that the said defendant, Marco Rosomano, be cited to appear and answer this petitioner, and that after all legal delays and proceedings herein there be judgment in favor of petitioner in the full sum of \$5,000, and against the said defendant, with 5 per cent. interest on the rents collected by said defendant from December 5, 1905, until paid, and legal interest from judicial demand on the balance claimed herein, and legal interest on the sum of \$450, the value of the household furniture of petitioner illegally seized and detained by defendant, and all costs of court."

The defendant filed exceptions to the petition, several grounds of which were overruled by the Circuit Court; but the following exception, to wit, "that the plaintiff's petition shows no cause of action," was sustained, and the suit dismissed.

The plaintiff assigns that the Circuit Court erred in maintaining the exception of no cause of action and in dismissing the suit.

P. F. Hennessey, for plaintiff in error.

Henry P. Dart and Benj. W. Kernan, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge (after stating the facts as above). The exception of no cause of action was addressed to the petition as an entirety. Being sustained, it necessarily led to the dismissal of the suit. The question raised here is whether or not the Circuit Court erred in sustaining the exception. On an exception of no cause of action, the petition is taken as true, and if it states facts which entitle the plaintiff to judgment, if proved to be true, the exception should be overruled and the case tried on its merits. *Goldsmith v. Virgin*, 122 La. 831, 48 South. 279. When the petition seeks to recover several separate sums on a statement of facts relating to each claim, and is met by an exception of no cause of action presented as a defense to the entire petition, it should not be sustained if the plaintiff have a cause of action, within the jurisdiction of the court, on any branch of the case made by the petition. *Bank v. Bank*, 50 La. Ann. 528, 24 South. 14.

It appears from the petition that the plaintiff, Henry Gonsouland, sold to the defendant, Marco Rosomano, certain real estate; that the act was signed and the property transferred and the conveyance recorded in the defendant's name; that the defendant failed and refused to pay any part of the purchase price; and the plaintiff was compelled to resort to the state court to secure the annulment of the sale, and to have restored to him the title and possession of the property sold. In that suit the plaintiff obtained judgment as prayed for.

During the pendency of the plaintiff's suit for the annulment of the sale, the defendant, Rosomano, brought two suits in the Second city court of New Orleans against the plaintiff, Gonsouland, one for the possession of the property bought by him, and the other on a claim for rent. In the suit for rent, by the direction of the defendant herein, there was a seizure of the stock and fixtures, the property of the plaintiff contained in another house—not the one for which the rent was claimed. The plaintiff, to maintain his credit and lessen the injury to his business, paid under protest the claim for rent and all costs in both suits. The defendant, who had not paid any part of the purchase money for the real estate, and knowing that a suit was pending against him to annul the sale, obtained a judgment of possession and caused to be issued a writ of ejectment, and, under the writ, evicted the plaintiff, Gonsouland, and his family, and seized all of his furniture, bed, bedding, and wearing apparel of himself, wife, and children, depriving them of its use, notwithstanding its exemption from seizure. The seizure was made by the direction of the defendant, Rosomano, to the officer in charge of the execution, and the property taken was never

returned to the plaintiff, nor accounted for. After obtaining possession of the real estate, the defendant destroyed one of the buildings situated on the property. The petition alleges that the defendant acted in bad faith from the first; that he never intended to pay for the real estate; and that his action in the suits for rent and possession, and in the use of the process of the court in those actions, was malicious.

The plaintiff concludes this branch of the case by claiming as damages a sum exceeding \$2,000 for the unlawful destruction of his property, the illegal detention and conversion of his personal property, and for being made to suffer the "indignity and mental worry in the eyes of his friends and neighbors."

It is not necessary for us to consider the various claims for other and different sums asserted in the petition. No pleading is before us raising questions about them separately. We direct our attention to one branch of the suit only.

The petition, taken as an entirety, and disregarding surplusage, seems to us to contain sufficient allegations of facts, if true, to show the unlawful, willful, and malicious abuse of the process of the state court.

In sustaining the exception of no cause of action, the court below was probably influenced by the fact that Rosomano was successful in his suit to eject Gonsouland. To be influenced by that fact appearing in the petition is to confound the case made by the petition with an action for malicious prosecution. The gravamen of the complaint here is not the malicious suing out of process, but the action is founded on the abuse of process. In an action for the malicious use of process—malicious prosecution—the plaintiff must ordinarily aver in his petition that the defendant instituted the proceeding with malice and without probable cause, and that the case has terminated in his favor; and this he must prove to be entitled to a judgment for damages. *Wheeler v. Nesbitt*, 24 How. 544, 16 L. Ed. 765; *Stewart v. Sonneborn*, 98 U. S. 187, 25 L. Ed. 116. Where the action is predicated upon the abuse of process, such averment or proof is not required. *Grainger v. Hill*, 4 Bing. N. C. 212, 7 L. J. (C. P.) 85; *Railroad Co. v. Hardware Co.*, 143 N. C. 54, 55 S. E. 422; *Page v. Cushing*, 38 Me. 523, 527; *Snyder v. Brosse*, 51 Ill. 357, 99 Am. Dec. 551. An action for the malicious abuse of lawful process, civil or criminal, will lie, although the process was lawfully issued upon a valid judgment for a just cause, and is valid in form. The grievance for which redress is sought arises in consequence of subsequent acts—the illegal and malicious abuse of the power conferred by the judgment and writ. The principle is general and has been enforced in a great variety of cases. It is applicable to all kinds of abuses in the service of lawful process. For every such wrong there is a remedy, not only against the officer whose duty it is to act lawfully, but against all who unite with him or direct him to inflict the injury. *Wood v. Graves*, 144 Mass. 365, 11 N. E. 567, 59 Am. St. Rep. 95; *Mayer v. Walter*, 64 Pa. 283, 286; *Rogers v. Brewster*, 5 Johns. (N. Y.) 125; *Antcliff v. June*, 81 Mich. 477, 45 N. W. 1019, 10 L. R. A. 621, 21 Am. St. Rep. 533; *Casey v. Hanrick*, 69 Tex. 44, 6 S. W. 405; *Wanzer v. Bright*, 52 Ill. 35; *Crusselle v. Pugh*, 71 Ga. 744, 747; *Juchter v. Boehm, Bendheim & Co.*, 67 Ga.

534; *Rosenthal v. Circuit Judge*, 98 Mich. 208, 57 N. W. 112, 22 L. R. A. 693, 39 Am. St. Rep. 535; *Twilley v. Perkins*, 77 Md. 252, 26 Atl. 286, 19 L. R. A. 632, 39 Am. St. Rep. 408; *Huyghe v. Brinkman*, 34 La. Ann. 831.

In *Crescent Live Stock Co. v. Butchers' Union*, 120 U. S. 141, 147, 7 Sup. Ct. 472, 479 (30 L. Ed. 614), Mr. Justice Matthews, speaking for the Supreme Court, said:

"It is conceded that, according to the law of Louisiana, the action for a malicious prosecution is founded on the same principles, and subject to the same defenses, as have been established by the common law prevailing in the other states."

And there is no reason why the same is not true as to an action for the abuse of process. Civil Code of Louisiana, art. 2315 (2294).

Besides showing an abuse of process, the petition as a whole presents an actionable case for fraud and deceit. The averments are to the effect that the defendant acted in bad faith throughout the transaction; that he never intended to make payment for the real estate, but obtained the conveyance with the intent to secure possession of the property, real and personal, without paying for it, and to make such profit and gain as he could without any compensation to the plaintiff. The scheme was successful to the plaintiff's damage, and the defendant unjustly profited by it. The process of the court being harshly and oppressively used to carry out such purpose, the action, as we have shown, lies for the abuse of the court's process. But the same facts also constitute a fraud and deceit which is actionable at law on general principles. It was held by the Supreme Court that an action lies for obtaining a certificate of stock by deceit. *Fenemore v. United States*, 3 Dall. 357, 1 L. Ed. 634. It is an old and well-settled doctrine that, in all cases where a person sustains pecuniary loss or damage by the deceit and fraud of another, an action on the case lies at the suit of the partly injured to repair the wrong. This is recognized both by the English and the American courts. *Pasley v. Freeman*, 3 Durnf. & E. 51; *Dobell v. Stevens*, 3 B. & C. 623, 10 Com. Law Rep. 201; *Young v. Hall*, 4 Ga. 95; *Lowe v. Trundle*, 78 Va. 65; *Allison v. Tyson*, 5 Humph. (Tenn.) 449; *Applebee v. Rumery*, 28 Ill. 280.

In this day, it should make no difference what an action may be called. The question is whether the facts stated show a wrong and injury to the plaintiff by the defendant for which he is entitled to redress. It would be intolerable if the law afforded no remedy for a deliberate and successful cheat, enforced and carried out by the abuse of legal process, whereby the plaintiff was damaged and the defendant profited unjustly.

What we have said is, of course, based upon the assumption that the averments of the petition are true, and must be considered without prejudice to the defendant in a trial on the merits.

Judgment reversed, and cause remanded for a new trial.

PUGET SOUND ELECTRIC RY. v. HARRIGAN.

(Circuit Court of Appeals, Ninth Circuit. February 14, 1910.)

No. 1,765.

1. MASTER AND SERVANT (§ 217*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—ASSUMPTION OF RISK.

An employé does not assume the risks arising from his employer's negligence, which are not incidental to the business, when he has no actual knowledge of the same.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574-600; Dec. Dig. § 217.*]

Assumption of risk incident to employment, see note to *Chesapeake & O. R. Co. v. Hennessey*, 38 C. C. A. 314.]

2. MASTER AND SERVANT (§ 217*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—ASSUMPTION OF RISK.

An employé, by undertaking a service in which he was obliged at night to depend upon the light of a lantern carried by him, did not thereby assume the risk from conditions due to the negligence of the employer because it would have been possible for him by the aid of his lantern to have ascertained and guarded against the danger, but he assumed only such risks as he could have avoided by the exercise of reasonable care.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574-600; Dec. Dig. § 217.*]

3. MASTER AND SERVANT (§§ 286, 288, 289*)—ACTION FOR INJURY TO SERVANT—QUESTIONS FOR JURY.

Defendant operated an electric railroad, and at one terminal made up a train at night at a switch on a trestle. There was a light at the switch stand only and a platform extending for some distance. Plaintiff, as conductor, was sent one night to make up the night train, and having run the motor car on the switch to a point where it would clear cars on the main track, which was in fact beyond the platform and at a place not lighted by the switch light, he swung off with his lantern. He had not been at the place for some time, but knew that in the meantime the platform had been extended, although not how far, and seeing a plank below him, and supposing it to be the platform, dropped to it; but it proved to be only a single plank lying on the timbers below the level of the track, and he fell from the trestle and was injured. *Held* that, under the facts of the case, the question of defendant's negligence in failing to provide a platform at the place or better lights, and also the question of plaintiff's contributory negligence and assumption of risk, were properly submitted to the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1010-1060, 1068-1132; Dec. Dig. §§ 286, 288, 289.*]

In Error to the Circuit Court of the United States for the Western Division of the Western District of Washington.

Action by Frank Harrigan against the Puget Sound Electric Railway. Judgment for plaintiff, and defendant brings error. Affirmed.

The parties to this action will be designated as "plaintiff" and "defendant," as they were in the court below. The defendant owned and operated an electric railway between Tacoma and Seattle. Near Tacoma, the railway is constructed on a trestle at an elevation of about 35 feet, with a branch from the main line running to the tide flats in the form of a wye, one arm of the wye in a curve leading toward Tacoma, and the other arm, also in a curve leading toward Seattle. At the junction of the wye leading towards Seattle with the main track, there is a platform extending alongside the main track and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

a small portion of the wye, which is about 225 feet in length, varying in width from 3 to 7 feet. The platform is guarded on the outside by a fence about 3 feet in height. There is no fence or guard rail at the south end of it, and the platform is about level with the rails of the track. It has been used by the defendant in the work of switching cars on the trestle. About 100 feet north from the south end of the platform is a switch stand, used to operate the switch at the junction of the wye with the main track. South of the platform, and beginning about 500 feet from the end thereof, there was at the time of the accident a 2-inch plank from 25 to 30 feet long, and 10 inches wide, lying on top of the bents of the trestle close to the branch line, and about 20 inches lower than the platform. The plank was without guard rail or protection. Being underneath the level of the track, it was not visible from the main track.

There is no evidence as to the purpose for which the plank had been placed there. According to the testimony, it had been there for some time prior to the accident. It had not been used by the defendant's employees while engaged in the work of switching on the trestle. The track of the wye was not planked between the ties or at the sides. There was a cluster of five incandescent lights at the north end of the platform and on the opposite side of the main track from the switch. Over the lights was an inverted reflector which cast the light downward. The light lit up the north end of the platform and the location of the switch stand; but it did not extend to the south end of the platform, nor to the plank above referred to. For more than two years prior to August 23, 1907, it had been the practice of the defendant to switch cars and make up the night freight train from Tacoma to Seattle on the trestle at the switch above mentioned; but on that date the defendant ordered its employees to weigh the meat cars, which made a part of the night train, on the scales in its freight yards in Tacoma. That order was carried out until November 23, 1907, the date of the accident. On the evening prior to that date, the tracks to the scales in the freight yards being obstructed, the defendant instructed the plaintiff not to weigh the cars on the night of November 23d. The only place furnished by the defendant to switch the cars and make up the night train was on the wye of the trestle.

The plaintiff entered the employment of the defendant in August, 1905, as a trolley tender. He subsequently acted as rear brakeman on the night freight until March, 1906. At that time the platform at the switching place on the trestle was quite short. Subsequently it was lengthened. It was usually dark when the plaintiff passed the switch. His duties did not take him on the wye, or require him to be upon the platform, but during the summer of 1907 he hauled some steel rails on the main line, which took him past the switch in the daytime. On October 21, 1907, he took charge of the freight train known as the "meat run," as conductor, and he remained in charge thereof until the time of the accident. During this time he switched the meat cars in the freight yards at Tacoma. He testified that he knew that the platform had been lengthened, but that he did not know how far it had been extended. The body of the motor car was 45 feet long. It had six doors, one in each end, two large doors on each side in the center, and one narrow door at each side near the end. The end doors were used by the men in stepping from the motor out upon the pilot to make couplings. When a car stood on the wye near the switch in such a position as to be clear of the main line, the southern end of it extended about 15 feet beyond the south end of the platform.

On the night of the accident, it was cold, dark, and rainy. The crew of the night train were required to make good time, and it was customary for the conductor to assist them in the switching. The plaintiff and his crew, consisting of Murphy, motorman, and Smith and Hubbard, brakemen, took the motor from the Tacoma freight yards, went to the packing house on the wye, coupled onto the meat cars, and hauled them on the wye of the trestle leading towards Seattle, and left them at the customary place just far enough back from the switch to clear the main line. The plaintiff with his crew on the motor, then went back to the freight yards, coupled onto a merchandise car there, went back to the wye, left the merchandise car on the main line, proceeded with the motor past the switch, then backed up to couple onto the

meat cars. Murphy operated the motor, and the plaintiff stood in the rear of the motor, tending the trolley. He knew that there was a freight train about three miles up the track waiting for his train to pass. While the coupling was being made, the plaintiff, intending to turn the switch, stepped out of the side door of the rear end of the motor, stepping out backwards, and grasping the handles on each side of the door with his hands. His lantern hung on his arm. There was no light except such as was furnished by his lantern. It did not distinctly light up the place beneath him. He testified that he believed that the platform extended past that point, and seeing a plank beneath him, and taking it to be the platform, he let loose of the motor, and swung around, stepped on the plank, and, losing his balance, fell to the ground beneath, receiving serious injuries. In bringing his action to recover damages, he alleged, in substance, that the defendant was negligent: First, in failing to provide a platform sufficient in length and properly guarded at the switching places; second, in permitting the plank to lay on the caps of the trestle in an unguarded condition; third, in failing properly to light said switching place and the plank. The defendant denied negligence, and pleaded assumption of risk and contributory negligence on the part of the plaintiff. The jury returned a verdict for the plaintiff for \$5,500, for which a judgment was rendered.

Benjamin S. Grosscup and W. C. Morrow, for plaintiff in error.
J. F. O'Brien, O. P. Burkey, and J. E. Burkey, for defendant in error.

Before GILBERT and MORROW, Circuit Judges, and HUNT, District Judge.

GILBERT, Circuit Judge (after stating the facts as above). The defendant assigns as error the refusal of the court to grant its motion for a directed verdict for want of testimony to justify a verdict in favor of the plaintiff, and contends there was failure of proof of negligence on its part in any respect. It argues that the platform was of ample size for switching purposes, that lights were provided sufficient to light the switch stand, and that it was the duty of the conductor to move up his train after coupling onto the meat cars and before stepping from the motor to turn the switch. On considering the whole testimony, we are of the opinion that the court below did not err in submitting the question of the defendant's negligence to the jury. The platform had recently been extended southward, but it had not been carried so far as to extend alongside the rear end of a motor standing on the wye when in a position to be clear of the main track. If it had been extended 15 feet farther than it was, it would have been made perfectly safe. Again, it would seem that the south end of the platform should have been lighted, and that the unguarded plank, which was calculated to deceive an employé, should not have been left upon the bents by the side of the track. There was no evidence that it was there for any useful purpose. Its presence there was not explained. It is quite conceivable that an employé who had not been switching at the wye since the extension of the platform, and who had no knowledge of the presence of the plank, and who had no light for his guidance except the dim light furnished by a signal lantern, might have been misled into taking it for the platform. In *Hough v. Railway Co.*, 100 U. S. 213, 25 L. Ed. 612, the court said that a railroad company was under obligation "to provide and maintain in suitable condition the

machinery and apparatus to be used by its employes—an obligation the more important, and the degree of diligence in its performance the greater, in proportion to the dangers which may be encountered." See, also, *Northern Pacific Ry. Co. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. 590, 29 L. Ed. 755, and *Washington & Georgetown R. R. Co. v. McDade*, 135 U. S. 554, 10 Sup. Ct. 1044, 34 L. Ed. 235.

Nor do we think the case should have been taken from the jury on the ground that the plaintiff assumed the risk of the injury which he received, or that there was error in giving or refusing instructions to the jury on that subject. Of course, it is a matter of common knowledge that there is always more or less personal risk in the occupation of a railroad employé. In accepting his employment, the plaintiff assumed all the ordinary and usual risks incident thereto, not only those which he knew; but those which he might, in the exercise of reasonable care, have discerned. But he assumed such risks with the recognized qualifications, one of which is that the employer shall use usual care to obviate or at least minimize the danger, and he did not assume the risk of latent defects, notwithstanding that his opportunity of discovering them was the same as that of his employer. He did not assume the risks arising from his employer's negligence, which were not incidental to the business, when he had no actual knowledge of the same. *Union Pacific Ry. Co. v. O'Brien*, 161 U. S. 451, 16 Sup. Ct. 618, 40 L. Ed. 766; *Texas & Pacific Ry. Co. v. Archibald*, 170 U. S. 665, 18 Sup. Ct. 777, 42 L. Ed. 1188.

Taking all the evidence into consideration, we are not convinced that the facts were such as to call for any instruction other than that which was given upon the subject of assumption of risk. The argument advanced in this connection might more properly be addressed to the defense of contributory negligence, negligence on the part of the plaintiff in not causing the motor to be moved up to the switch stand, where there was ample light, before getting off the car to turn the switch, and in not exercising more care to know that the platform was beneath him before he stepped off upon the unguarded plank. The court gave the following instruction:

"Assumption of risk means that one who enters a dangerous employment assumes the hazards which attend that employment, which ordinary foresight and reasonable prudence cannot anticipate, and yet are likely to occur."

But the defendant asked the court to charge the jury that the plaintiff assumed the risk of working with the aid of the artificial light furnished by his lantern, and that it was his duty to exercise care commensurate with the circumstances; that it "was his duty to use his lantern in such a way as was necessary to protect him under the circumstances." The instruction so requested goes further than the just rule in regard to assumption of risk. To have thus instructed the jury would have been to say, in effect, that the plaintiff was bound to exercise such care as to make an accident impossible. Such is not the law. He was bound only to exercise reasonable care.

While the question whether there should have been an instructed verdict on the ground of the plaintiff's contributory negligence is not free from doubt, we are not convinced, in view of the evidence, that

there was error in submitting the question to the jury. The plaintiff was unfamiliar with the place at which the switching was to be done. He knew that the platform had been extended, but he did not know to what point it had been extended. The defendant did not furnish a fixed light sufficient to light up the south end of the platform. It furnished the plaintiff a lantern which, as the evidence tends to show, was not adequate to light up the premises. It had placed alongside its track a plank which was there for no explained purpose, and which was likely to deceive. In view of all the circumstances, we are not prepared to say, as a matter of law, that the plaintiff, in descending from the car as he did, with the light which he had, and in stepping upon the apparent platform beneath him, was guilty of contributory negligence such as to preclude him from recovering damages.

The judgment is affirmed.

GREAT LAKES TOWING CO. v. KELLEY ISLAND LIME & TRANSPORT CO. et al.

KELLEY ISLAND LIME & TRANSPORT CO. v. CITY OF CLEVELAND et al.

(Circuit Court of Appeals, Sixth Circuit. February 8, 1910.)

Nos. 1,878, 1,923.

1. SHIPPING (§ 81*)—INJURY TO VESSEL ON BRIDGE PIER—VIOLATION OF RULES BY OVERTAKING VESSEL.

When the Ohio, a flat-bottomed steam scow having no very efficient steering apparatus, was near the draw of a bridge across the Cuyahoga river in Cleveland, moving slowly, she was overtaken and passed by the tug Lutz, moving at a much greater speed, which forced her way through the narrow space between the scow and the docks without any signal or agreement. The movement of the water from her passing caused the scow to sheer to port in the draw, which was only 60 feet wide and to strike some submerged timbers around the central bridge pier by which she was so injured that she sank. There was no fault in her navigation. *Held*, that the tug was clearly in fault for violation of rule 25 of the navigation rules for the Great Lakes and their tributaries (Act Feb. 8, 1895, c. 64, 28 Stat. 649 [U. S. Comp. St. 1901, p. 2891]), which prohibits an overtaking vessel from passing another in narrow channels without obtaining her consent, and rule 6 of the inspectors' rules made thereunder.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 344, 345; Dec. Dig. § 81.*]

Overtaking vessels, see note to *The Rebecca*, 60 C. C. A. 254.]

2. MUNICIPAL CORPORATIONS (§ 751*)—LIABILITY FOR TORTS—DUTIES ABSOLUTELY IMPOSED.

A city, vested by statute with control over all public bridges within its limits and the duty of keeping them in repair and free from nuisance, cannot divest itself of such duty or of liability for damages caused by its non-performance by contracting with another to attend to it.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1580; Dec. Dig. § 751.*]

3. MUNICIPAL CORPORATIONS (§ 751*)—LIABILITY FOR TORTS—NEGLIGENCE OF CONTRACTOR.

A city, given control of all public highways and bridges by statute, entered into a contract for the removal and reconstruction of a bridge across

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

a navigable stream. In doing the work the contractor removed a line of piles placed around the central pier of the bridge to prevent vessels from coming in contact with it, leaving the ends of submerged timbers used in the foundation projecting beyond the superstructure unguarded and their position unmarked. Through the fault of another vessel a vessel passing through the draw was caused to sheer, and struck the ends of such timbers and was so injured that she sank. *Held*, that a provision of the contract requiring the contractor to take all precautions during the work to prevent injury to others did not exonerate the city from liability for the contractor's negligence which was one of the proximate causes of the vessel's injury, and that it was jointly liable with the offending vessel therefor, and each should be required to pay half.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1580; Dec. Dig. § 751.*]

4. COLLISION (§ 130*)—MEASURE OF DAMAGES—LOSS OF USE OF VESSEL.

Where the owner of a vessel injured in collision substituted others in her place while she was laid up for repairs, an allowance of interest on her value during such time, instead of the profits she might have earned, was not error.

[Ed. Note.—For other cases, see *Collision*, Cent. Dig. § 284; Dec. Dig. § 130.*]

5. COLLISION (§ 130*)—DAMAGES—ALLOWANCE OF INTEREST.

In a suit in admiralty to recover damages for an injury to a vessel in collision, the allowance of interest on the damages awarded from the date of the interlocutory decree fixing the liability, instead of from the time the damages were liquidated as is the usual practice, was within the discretion of the court, especially where the case had been pending for several years, and the larger items of damages were for definite amounts expended and were not disputed.

[Ed. Note.—For other cases, see *Collision*, Cent. Dig. § 284; Dec. Dig. § 130.*]

Appeal from the District Court of the United States for the Northern District of Ohio.

In Admiralty. Suit by the Kelley Island Lime & Transport Company against the Great Lakes Towing Company and the City of Cleveland. From the decree libellant and the Great Lakes Towing Company appeal. Reversed in part.

For opinion below, see (D. C.) 144 Fed. 207.

W. C. Boyle, for Kelley Island Lime & Transport Company.

F. S. Masten, for Great Lakes Towing Company.

Before SEVERENS and WARRINGTON, Circuit Judges, and KNAPPEN, District Judge.

SEVERENS, Circuit Judge. The Kelley Island Lime & Transport Company, the owner of the steam barge Ohio, filed its libel in the court below charging the respondents, the Great Lakes Towing Company and the city of Cleveland, with having by negligence caused the Ohio to come into collision with a pier of a drawbridge over the Cuyahoga river, a navigable stream running through the city into Lake Erie. The river coming down and passing under the bridge (called in the record the "Middle Seneca Street Bridge"), and going on 220 feet further, makes a sharp turn to the left around a point called the "Knuckle," opposite to which the river spreads out into a bay. On being

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

collected again it passes on 440 feet, and then passes under another bridge called the "Lower Seneca Street Bridge." At about 3:30 o'clock of the afternoon of June 25, 1901, the Ohio was passing around the Knuckle going up the river. Her length was 131 feet and her breadth of beam 29 feet. She was a flat-bottomed scow, and had no very efficient steering apparatus. Her course of navigation was effected by her two propellers, one on her starboard and the other on her port side. By reversing that on the port side and operating the other the vessel would be turned to port, and vice versa. It would seem that at that time only the channel on the right hand of the pier was used for navigation. It was narrow, being only about 60 or 65 feet wide. The adjacent shore was lined with docks. At about the time she got turned around and was taking her course up the river and moving slowly, she was passed on the port side by a steam tug of the towing company called the "Goulder," moving much more rapidly. The tug went on under the bridge without materially altering the course of the Ohio, unless perhaps by inducing it slightly more to starboard. Very soon afterwards and when the Ohio was getting near the bridge, the steam tug Lutz, another tug of the towing company, came up astern, and without any signal of any kind pushed on at high speed between the Ohio and the docks on the shore to starboard. The space was narrow. As the tug passed the stem of the Ohio, the latter sheered off to port, and before the tug had got far past, the Ohio collided with the submerged projecting timbers in the foundation of the pier of the draw-bridge. These timbers were of oak and 12 inches square. They were laid some three feet below the surface of the water, in an octagonal form. They extended beyond their overlapping joints and projected beyond the perpendicular of the pier, some of them about two feet. It was on one or more of these projections that the Ohio struck. She was broken into to such an extent that she soon after sank. The Cuyahoga river is much less than 500 feet in width. We have mentioned enough of the facts to indicate what the judgment should be in respect to the liability of the towing company for the conduct of the Lutz.

The 25th rule of the regulations prescribed by the Act of February 8, 1895, c. 64, 28 Stat. 649 (U. S. Comp. St. 1901, p. 2891), reads as follows:

"In all channels less than five hundred feet in width no steam vessel shall pass another going in the same direction unless the steam vessel ahead be disabled or signify her willingness that the steam vessel astern shall pass, when the steam vessel astern may pass, subject, however, to the other rules applicable to such a situation."

By the third section of rule 28 authority is given to the Board of Supervising Inspectors to establish further regulations not inconsistent with the act. Among the rules prescribed by the board under this authority are the following:

"Rule 6. When steamers are running in the same direction, and the pilot of a steamer which is astern shall desire to pass on the right or starboard side of the steamer ahead, he shall give one short blast of the whistle, as a signal of such desire and intention and shall put his helm a port; or if he shall desire to pass on the left or port side of the steamer ahead, he shall give two short blasts of the whistle as a signal of such desire and intention, and shall put his helm to starboard, and the pilot of the steamer ahead shall an-

swer by the same signals; or, if he does not think it safe for the steamer astern to attempt to pass at that point, he shall immediately signify the same by giving several short and rapid blasts of the whistle. and under no circumstances shall the steamer astern attempt to pass the steamer ahead until such time as they have reached a point where it can be safely done, when said steamer ahead shall signify her willingness by blowing the proper signals. The boat ahead shall in no case attempt to cross the bow or crowd upon the course of the passing steamer."

"Rule 22. Notwithstanding anything contained in these rules every vessel overtaking any other shall keep out of the way of the overtaken vessel."

"Rule 21. Every steam vessel which is directed by these rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed or stop or reverse."

Here was a palpable violation of both the statutory and the supervising inspectors' rules. And having regard to the narrow space between the Ohio and the docks through which the Lutz must run and the character of the other vessel and the control she had of herself, the negligence of the Lutz seems wanton. The Ohio was lawfully navigating the river. She was a clumsy craft, but none the less entitled to the protection given her by the rules. The need of a strict regard of them was obvious to the Lutz. She was not only bound to get the consent of the Ohio, but in these circumstances she was bound to slacken her speed to a degree which would enable her to pass the Ohio safely. Instead of this, without even a warning, she pressed into the narrow space and went by her at full speed. There is much conflict in the testimony as to what her speed was, but it leaves no doubt that it was much greater than prudent navigation would permit. The result was what might have been anticipated. The current set up by the displacement of the water on her bow crowded over against the forward starboard of the Ohio, and at the same time the falling back of the water in her wake would suck the after part of the Ohio toward the path through which the Lutz had passed. The Ohio was moving forward. And thus by natural causes, she sheered off to the place of collision. These influences would have a peculiar effect upon the Ohio because of her shallow draft. If she had had a keel down in deep water her movement would not have been so much affected. We therefore concur with the District Court in holding that the liability of the Lutz is clearly established. That being so, and the conduct of the Lutz being of itself sufficient to have caused the disaster, the towage company must make a clear case of fault against the Ohio before it can charge the latter with any part of the consequences. But there is no ground on which to rest an imputation of fault on the part of the Ohio.

But a more serious question arises in the controversy about the liability of the city. And upon this it is necessary to state some further facts. The Seneca Street Bridge had been standing for many years. We have already described the foundation of the pier on which it swung was built, and particularly the submerged projections of its octagonal timbers. For the purpose of shielding the pier from external injury or for the purpose of preventing vessels from colliding with it, or perhaps for both purposes, for it would serve both, the city had long before driven a line of piles a few feet distant from the pier

which projected visibly above the water. Contemplating the rebuilding of the bridge, the city had made a contract therefor with a construction company. This contract included the removal of the pier and replacing it by a new structure. And it seems probable that the removal of the line of piles would be a part of the dilapidations which the construction company would make. There was an express stipulation that all piles should be removed; but this we suppose had reference to the piles driven into the bottom of the river, on which the pier was built. However, the piles were an appurtenant to the pier, and the construction company had a short time before this accident removed the line of piles in order to get at the work of removing the pier. By very full and ample stipulations in the contract, the city had imposed upon the construction company the duty of so executing it that every public interest should be carefully guarded, and, further, that if anything should be done by the construction company which would expose the city to any liability to other persons, the construction company should save the city harmless. Nevertheless it was provided that the work should be done under the supervision of the city engineer and the city inspector. There is no evidence that either of these officials directed the removal of the line of piles. But there is enough to induce the belief that they must have known before the accident that it had been done, or was about to be done. The defense made by the city is that having contracted with a responsible party for the construction of the bridge for due consideration, and enjoined upon that party all needful precaution against doing or suffering to be committed any injury which might happen to others during the progress of the work, and, further, that if the contractor had done the work properly and as required by the contract, this accident would not have happened, the city should not be held liable for the misfeasance of the contractor. The learned judge thought at the trial that the city should be exonerated upon the ground just stated. Afterwards upon a rehearing he held that the taking out of the line of piles was not the proximate cause of the injury which he thought was solely due to the conduct of the Lutz.

As to the first ground, we think the position of the city cannot be sustained. Laying aside for the present the circumstance that the city retained the control of the execution of the contract to the extent that it might have interfered to prevent the removal of the piles until the dangerous structure behind them had been removed, the question remains whether it can absolve itself by employing some one else to do the work upon a stipulation that the employé, whether he be a servant or a contractor, shall observe and perform the duty of the city. In other words, is it an absolute duty or one which may be delegated? We think the city cannot contract itself out of its duty.

By section 2640, Rev. St. Ohio 1890, the duties of municipalities in the state are prescribed as follows:

"The council shall have the care, supervision and control of all public highways, streets, avenues, alleys, sidewalks, public grounds and bridges within the corporation, and shall cause the same to be kept open and in repair, and free from nuisance."

In the case of *Faust v. City of Cleveland*, 121 Fed. 810, 58 C. C. A. 194, we had before us a case where the appellant had filed a libel in personam against the city to recover damages for an injury to a vessel navigating this same river, occasioned by a snag submerged in the channel of the stream which, it was alleged, it was the duty of the city to have removed. We dealt with the case as one involving the question whether the river was a "highway" within the meaning of the statute above quoted. We held that it was not, and, without further inquiry, affirmed the judgment of the lower court which was for the defendant. But here the controlling fact is that the city was charged with the care, supervision, and control of the offending structure by statute. Its bridges are put upon the same footing as its streets and highways. That the duties incident to the care and control of streets and bridges are personal and absolute and cannot be devolved upon contractors is well settled in Ohio as will be seen by reference to the following decisions of the Supreme Court: *Circleville v. Neuding*, 41 Ohio St. 465; *Covington Co. v. Steinbrock*, 61 Ohio St. 215, 55 N. E. 618, 76 Am. St. Rep. 375. Similar decisions have been made by the federal courts. In the very similar case of *Wilson v. Chicago* (D. C.) in 42 Fed. 506, and on appeal in 63 Fed. 626, 11 C. C. A. 366, the contractors who built the bridge and had guaranteed the proper execution of the work to the city were made parties to the suit, and they and the owners of the tug were held jointly liable. It does not appear how the city escaped, but doubtless because the court worked out the equities between it and the contractors, and imposed the liability upon the latter. See, also, the case of *Chicago v. Robbins*, 2 Black, 418, 426, 17 L. Ed. 298; *Cleveland v. King*, 132 U. S. 295, 10 Sup. Ct. 90, 33 L. Ed. 334. The city knew of these submerged timbers for it put them there. And it should not have removed the piles or suffered them to be removed without giving warning to those navigating the river of the danger to which the removal of the piles exposed their vessels.

We are also of the opinion that the contention which the city makes that the removal of these piles was a cause of the injury too remote to subject her to liability, cannot be sustained. It is true that the removal of the piles had already taken place, and that the accident might not have taken place but for wrongful conduct of the tug. But it is also true that if the piles had not been removed the injury to the Ohio would probably have been much less severe. They had the capacity of springs and would cushion the blow. And it is also to be observed that the negligence of the city did not cease to be operative upon the removal of the piles. It was a continuing negligence which would become effective whenever the chance of accident should occur. The negligence of the city and that of the tug were therefore coincident and co-operative, and not remote and proximate, causes of the injury; and in such case both the parties at fault are liable for the consequences. The result is that the owners of the *Lutz* and the city should be held jointly liable, and each be required to pay one-half of the damages. The decree should go against them jointly, but if one is compelled to pay more than one-half it should be accorded the right of contribution of the excess from the other.

Two minor questions are raised upon this appeal. One is by the libellant, who complains that it should have been allowed what the Ohio would have earned during the time required for her repair, and by this we understand is meant the loss of profits she would have gained for it during that time. But the libellant substituted other vessels for her in the business in which she was engaged. So the profits were secured. There was no clear proof as to what value for the services of the substituted vessels should be allowed. Instead of making an allowance as and for profits, the commissioner allowed interest on the value of the Ohio, and his action in this respect was confirmed by the court. We see no fair ground for complaint by the libellant.

The other question is whether the court below was right in allowing interest on the damages. The court allowed interest from the date of its interlocutory decree, which was February 5, 1906, down to the entry of the final decree; and the libellant insists that interest should be allowed from the date of the injury. The general rule of law, or practice rather, is to allow interest in cases where the amount of damages is uncertain and is matter for proof, from the date when they were liquidated—that is, fixed by judicial ascertainment—which in this case would be the date of filing the commissioner's report. The date of filing the interlocutory opinion was a year earlier than that. Thus the libellant was allowed a year's interest more than the rate above stated would allow. But the rule is not a fixed one, and is subject to variation by the circumstances. Its application rests in the discretion of the jury, or of the court where it stands in the place of the jury, and the exercise of this discretion will not be reviewed unless it has been palpably abused. The facts of this case are such as to show that the action of the court was not inequitable. The case had been a long time pending, and many of the large items of damages were for definite amounts of expenditure which are not now disputed either in their amount or necessity. The fixing of the date of the interlocutory opinion was, in a large sense, somewhat compensatory for these considerations, and was not an abuse of discretion. This objection must therefore be overruled.

The decree of the court below, in so far as respects the liability of the Great Lakes Towing Company and the city of Cleveland for the damages suffered by the Ohio, should be reversed and, instead thereof, it is directed that a decree be entered in favor of the libellant and against both of the defendants last mentioned in the terms indicated in the foregoing opinion, jointly and severally with a provision that, if either should be compelled to pay more than a moiety of the sum adjudged against both, it may have execution for the excess. The decree of the court below will in other respects be affirmed. The costs in respect to the controversy concerning the liability of the two defendants respectively will be paid to the libellant by the city of Cleveland. The costs incurred by the libellant in the controversy concerning the matter of complaint set up in the cross-appeal will be paid by the Great Lakes Towing Company.

MACK S. S. CO. v. THOMPSON.

(Circuit Court of Appeals, Sixth Circuit. February 8, 1910.)

No. 1,992.

1. ADMIRALTY (§ 29*)—JURISDICTION IN REM—LIEN GIVEN BY STATE STATUTE.

Where an admiralty court has jurisdiction of a maritime claim, as a charge for towage under a contract with the owner, express or implied, the libellant may as a general rule proceed against the owner in personam, and if he has a lien upon the vessel towed, given either by the general rules of the maritime law or by a local statute, he may proceed in rem.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 289, 296; Dec. Dig. § 29.*]

2. ADMIRALTY (§ 16*)—JURISDICTION IN REM—LIEN GIVEN BY STATE STATUTE.

Under Comp. Laws Mich. 1897, § 10,789, which gives a lien on watercraft constructed, or being constructed, for towage, a charge for towage of a new vessel being built in that state and completed, except for her fittings, whether regarded as a completed vessel or not, may be enforced by a proceeding in rem against her in an admiralty court, where the contract was with the owner, who was a resident of another state; the contract for towage being maritime.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 23, 24, 193; Dec. Dig. § 16.*]

Admiralty jurisdiction to enforce liens created by state laws, see note to *The Electron*, 21 C. C. A. 21.]

3. MARITIME LIENS (§ 57*)—STATUTORY LIENS—WHEN ENFORCEABLE IN ADMIRALTY.

A lien for repairs, towage, etc., given by the local law, to be enforceable in a court of admiralty, must be reconcilable with the principles of the maritime law, and notwithstanding general language of the statute, in the absence of express agreement, the work must have been done under circumstances which under such law would raise a presumption that it was on the credit of the vessel, and not of the owner. A contract for towage made with a resident owner would not raise such a presumption, but it would be otherwise if the owner were a nonresident.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 96; Dec. Dig. § 57.*]

4. ADMIRALTY (§ 1*)—MARITIME LAW—EFFECT OF STATE LEGISLATION.

The maritime law of the United States subsists as an entirety as the subject of federal jurisprudence, and is to be administered by the federal courts without impairment by state legislation.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 1-6; Dec. Dig. § 1.*]

5. MARITIME LIENS (§ 57*)—STATUTORY LIENS—ENFORCEMENT IN ADMIRALTY.

Liens created by state laws on vessels are not of themselves merely subjects of the maritime law, but, because such a lien is a right or interest inherent in a principal subject of a maritime nature of which the admiralty takes jurisdiction, the court will recognize the lien as an incident of the debt it is administering, and give to the owner of the claim the benefit of it.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 96; Dec. Dig. § 57.*]

6. TOWAGE (§ 6*)—LIABILITY FOR SERVICE—CONSTRUCTION OF AGREEMENT.

A shipbuilding company completed a vessel under a contract with the exception of her fitting, and she was left at its wharf in a stream through the winter. Payment had been made so that title to the vessel had passed. In the spring, fearing damage from flood, the company wrote the owner, asking permission to have her moved out of the stream, which was granted.

*For other cases see same topic & § NUMBERS in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Held that, under the circumstances and as the service was for its protection, such consent might properly be construed as an agreement that the towage should be at the owner's expense.

[Ed. Note.—For other cases, see *Towage*, Cent. Dig. § 5; Dec. Dig. § 6.*]

Appeal from the District Court of the United States for the Eastern District of Michigan.

Suit in rem in admiralty by Robert P. Thompson, doing business as the Thompson Tug Company, against the steamer *F. B. Squire*, the Mack Steamship Company, claimant. Decree for libellant, and claimant appeals. Affirmed.

G. H. Eichelberger, for appellant.

Before SEVERENS and WARRINGTON, Circuit Judges, and KNAPPEN, District Judge.

SEVERENS, Circuit Judge. The Jenks Shipbuilding Company under contract with the appellant, the Mack Steamship Company, built during the season of 1903 the steamship *F. B. Squire* at its works on Black river, an affluent of the St. Clair river. The vessel had been substantially completed, but had not been taken out. She had been launched and inspected, but whether a license had been issued does not appear. Her engines and boilers had been put in, and she had been completed, except that the "fittings," as they are called in the record, furniture and the like, which the contractors had agreed to supply, had not yet been put on board. These were incidentals which it was customary to put in when the vessel was about to leave. Otherwise she was ready to go. By the terms of the contract, the vessel was to be delivered at the shipbuilding company's works on Black river. She had been paid for, and a bill of sale had been given by the contractor to the owners. But she stayed over winter at the dock of the contractor, and was remaining there, when, on March 12, 1904, the Jenks Shipbuilding Company, being apprehensive of danger to the vessel from the spring freshets, sent the following letter to the managing owner:

"Port Huron, March 12, 1904.

"Mr. Charles O. Jenkins, Cleveland, Ohio.

"Dear Sir: Thinking it might be advisable to move the '*F. B. Squire*' out into the river, I ask for your consent. We thought perhaps it might be advisable to have her moved out the first of the week. We haven't had any high water here at all, and we don't know whether we will have, but there is a great deal of water up in the country, and it is liable to come down with a sudden rush and cause some damage. I wish you would wire us on receipt of this if we shall have her moved.

"Yours very truly,

"The Jenks Shipbuilding Company, by A. O. Carpenter."

On March 15th the managing owner telegraphed the following reply:

"Cleveland, Ohio, March 15, 1904.

"The Jenks Shipbuilding Company, Port Huron, Michigan.

"Shift '*Squire*' as per your letter of 12th.

Charles O. Jenkins."

Black river is a small and rather tortuous stream, and it was customary to take large vessels like the *Squire* (which was 430 feet long)

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

out by using tugs, one at each end, to manage their course down the stream. The Jenks Shipbuilding Company on getting the telegram procured tugs of the libelant, which towed the Squire out of Black river and down the St. Clair to a dock called Miller's Coal Dock, where she was laid up. The owner of the tugs presented his bill to the appellant for the towage, and, payment being refused, he filed this libel against the ship to enforce a lien he claimed to have. The owner answered, setting up his claim of title to the steamer, and averring that:

"The said Jenks Shipbuilding Company, for their own convenience and economy, and at their own instigation and acting in their own behalf, caused said vessel to be moved from their shipyard, where the vessel was under contract to be delivered to the Mack Steamship Company, to a place on the Detroit river, and the said libelant at no time acted at the request of the Mack Steamship Company or its agent."

The proofs were taken in open court, and a decree was awarded to the libelant.

The principal grounds on which the appellant relies are, first, that there was no admiralty jurisdiction; and, second, that the towage was done at the instance and in behalf of the Jenks Shipbuilding Company, and not for the appellant.

It is admitted, and cannot be doubted, that a towage contract is a maritime contract. 1 Conk. Adm. 28, note; *The May Queen*, Spr. 558, Fed. Cas. No. 9,360; *Porter v. The Sea Witch*, 3 Woods, 75, Fed. Cas. No. 11,289; *The W. J. Walsh*, 5 Ben. 72, Fed. Cas. No. 17,922. And, if the contract was made by or on behalf of the appellant and the appellant resided in another state (questions we shall take up later), we suppose it is not doubted that a libel in personam would be a proper remedy, in admiralty against the owner. That seems to be admitted, if the facts are as above supposed. But the stress of the appellant's contention is that the "Squire" was not a completed vessel, and therefore was not a subject for a maritime lien. And, if the vessel was not so far complete as to come within the range of a general maritime lien, it must be admitted that, if there were nothing more, this libel, which is one in rem, would fail for the lack of any lien upon the vessel. But a Michigan statute supplies this lack. Section 2 of chapter 298 of Compiled Laws of 1897 gives a lien upon watercraft constructed or being constructed for, among other things, "towage."

Now, it is the well-settled law of this court and elsewhere that where the admiralty court has jurisdiction of a maritime claim, in this case a charge for towage, under contract with the owner, express or implied, the libelant may as a general rule proceed against the owner in personam; and, if he has a lien upon the vessel towed given either by the general rules of the maritime law or by a local statute, he may proceed in rem. The admiralty court will recognize and enforce by its own procedure a lien given by a local statute for the security of the claim where the provision of the local law does not antagonize or derogate from the principles of the maritime law. This subject was given much consideration and the rules upon which the admiralty court will enforce, as incident to a maritime claim, liens given by state laws, laid down in the case of *The Samuel Marshall* decided by this court in 1893, 54 Fed. 396, 4 C. C. A. 385. One of those rules was the

one last above stated. And to the like effect are *The Lottawana*, 21 Wall. 558, 22 L. Ed. 654, *The J. E. Rumbell*, 148 U. S. 1, 13 Sup. Ct. 498, 37 L. Ed. 345, and *The Glide*, 167 U. S. 606, 17 Sup. Ct. 930, 42 L. Ed. 296. "But the District Courts," it was said in *The Lottawana*, "having jurisdiction of the contract as a maritime one may enforce liens given for its security, even where created by the state laws."

The court below seems to have put its decision upon the ground that the *Squire* was a completed vessel ready to proceed in its business of navigation on being supplied with certain incidentals which were not a substantive part of the ship. We are not disposed to controvert that conclusion. But the condition of the *Squire* puts her upon debatable ground, and we prefer to rest our own decision upon the presence of the local statute. The libel is wide enough to enable the court to grant relief upon either ground.

A question is made as to whether towing was done upon the credit of the owner, or is a proper charge against the vessel. If the owner had been a resident of the state, so that it might or should be presumed that the tug company looked to him for payment, it would be open to the appellant to insist that the vessel could not be properly charged. And the decisions on that subject have settled the law to that effect. The testimony is not quite positive on that point. It was not made a ground of defense by the answer, nor does it appear to have been raised upon the trial. Mr. C. O. Spencer was "managing owner" of the Mack Steamship Company and had his office and place of business at Cleveland, Ohio, and the correspondence in this business was conducted by him from that place. It is not shown where the other owners reside. If there was any ground in fact for claiming the benefit of this objection, we should have expected some allegation or proof to sustain it. The objection rests upon an exception to the general rule. We think it should be held that the owners were resident in Ohio. It seems necessary to settle this question and to find ground for settling it in this way; for, if the owner has not a foreign residence, there could be no presumption that a credit for the services was given to the vessel, and the giving credit to the vessel is a condition to the lien which the libellant seeks to enforce, as was held by this court in the case of *The Samuel Marshall*, 54 Fed. 396, 4 C. C. A. 385. We notice that the Court of Appeals for the First Circuit in the case of *The Iris*, 100 Fed. 104, at page 112, 40 C. C. A. 301, speaks of the statement made in the opinion of this court in the case of *The Samuel Marshall* to the effect "that a local lien can be enforced in admiralty only when credit is given the vessel, and that in this respect there is the same limitation as with reference to supplies furnished a ship in a foreign port" as a dictum. And the Court of Appeals for the Third Circuit assigns to it a similar character. With great respect to those able courts, we think this is a misapprehension. It was, in fact, made a decisive point in the case. Judge Taft, who wrote the opinion, had said that the charterer stood in the place of the owner, that the charterer resided at the same place with the libellant, and that the supplies had been furnished at that port. If the local statute had the effect to give a lien without regard to the presence or absence of the owner and

these were the only facts to be considered, the decree must have been for the libellant. The whole drift and purpose of that part of the opinion was to demonstrate that, notwithstanding the general language of the local statute, the effect which should be given to it in the court of admiralty was the creation of a lien which should be reconcilable with the principles of the maritime law; in other words, that the court would not surrender a general rule of the admiralty law which it is bound to administer, and substitute for it a local statute. But it would enforce a lien given by such statute in cases where it is not inconsistent with the maritime law, and only to that extent, in short, it would subordinate the statute to its own imperative rules. It is true there was another ground stated on which the court might have rested its decision. But it thought fit to rest it also upon the former ground. If the first declaration was a dictum, by the same token the second was also, and the case is void of authority. But we have not so considered it. In the case of *Davidson v. Baldwin*, 79 Fed. 95, 24 C. C. A. 453, Judge Lurton, who delivered the opinion of the court, cited that case as authority for the doctrine which it was supposed to have established for the court. The rule in respect to the giving credit whether to the vessel or its owner rests upon a presumption arising upon the evidence. And it has long been axiomatic that the known presence of the owner at the place where supplies are furnished or other assistance given to the vessel, whether at home or abroad, would give rise to a presumption that a personal credit was given to him, and this presumption would prevail in the absence of proof to the contrary. A lien upon the vessel would be given only where there was either a necessity or an agreement for it. If the local statute be construed to be without restriction as to the credit intended, it would give to a creditor at the home port of the owner an advantage superior to that of one who furnishes supplies or other assistance at a foreign port, a result the very opposite to the general policy of the maritime law. A local statute which should give a lien absolutely and without regard to this rule, which rests upon a fundamental principle of the maritime law and is born of the necessities of commerce, would be in effect to make a new law for the admiralty. If this can be done in respect to one thing, it may be done in many, and in the end the admiralty jurisprudence might be honeycombed, if not displaced, by a mass of heterogeneous local statutes. Local statutes provide different rules in respect to the rank of liens, a matter of serious importance. A court of admiralty would abandon its own jurisdiction, if it should enforce them when they were in conflict with the rules of maritime law. And, if this be so, it must be because of the predominant authority of the admiralty court throughout the domain of the maritime law, which will not hearken to the ordinances of state legislation. In general these local statutes consist of these three features: The creation of a lien, the prescription of the procedure, and the order of the distribution of the proceeds. Beyond question, the admiralty court will not adopt the procedure, nor will it proceed in the distribution in the order prescribed by the statute, unless, as rarely happens, that order is the same as that prescribed by the maritime law. For the same reason and by the same

authority, it will disregard any quality of the lien which is not in harmony with its own maxims. A contract for the supply of necessities in the home port of the owner is a contract of a maritime nature, and although it would be presumed, in the absence of evidence to the contrary, that credit was not intended to be given to the vessel, yet evidence of an express agreement would be sufficient to attach a lien. Inasmuch as the jurisdiction is taken solely because of the maritime nature of the subject, it is both logical and reasonable to say that the lien, which is an inherent right therein, should partake of the same qualities as the subject, upon the analogy that prevails in other like relations in other departments of the law, as in the case of a mortgage or other security given for the payment of a debt and which attends upon it, into whosoever hands the debt may pass.

We think the maritime law subsists as an entirety as the subject of federal jurisprudence, and is to be administered by the federal courts without impairment by state legislation. If changes are to be made in it, it must be done by federal authority. These reasons would persuade us to follow the rule affirmed by this court in the case of *The Samuel Marshall*, even if we were not bound by the authority of that decision. The rule was not inaugurated, nor was it first announced, by the opinion in that case. On the contrary, it had already been stated and applied by Mr. Justice Matthews, with whom the circuit judge concurred, in the case of *The Guiding Star*, 18 Fed. 263, a case pending in this circuit, where the court upon a very lucid statement of the rule declined to rank the lien given by the local law, according to the position it would have under such law, and determined its rank by the rule of the maritime law, and reversed the decree of the lower court, which was at variance with it.

Liens created by state laws on ships and other water craft are not of themselves merely subjects of the maritime law. But because such a lien is a right or interest inherent in a principal subject of a maritime nature of which the admiralty takes jurisdiction, a *jus in re*, as Mr. Justice Curtis characterized it in the *Young Mechanic*, the court will recognize this advantage as an incident of the debt or claim it is administering, and will give to the owner of the claim the benefit of it. The court treats the claim as one improved by the lien. And upon another special ground where a surplus has arisen after a sale for the satisfaction of the claim, the court will administer it; this *ex necessitate*. It has the fund and must dispose of it. This is a part of and properly belongs to the duty the court is discharging.

The rule affirmed in *The Guiding Star* and in *The Samuel Marshall* has been recognized in the Second Circuit by Judge Brown in the case of *The Advance* (D. C.) 60 Fed. 766, and by the Court of Appeals in *The Electron*, 74 Fed. 689, 21 C. C. A. 12, and by Judge Hazel in *The William P. Donnelly* (D. C.) 156 Fed. 302. The ruling in *The Electron* was reaffirmed in *The Golden Rod*, 151 Fed. 9, 80 C. C. A. 246. In the Ninth Circuit it had already been applied by Judge Hoffman in *The Columbus*, 5 Sawy. 487, Fed. Cas. No. 3,044, and it was confirmed subsequently by the Circuit Court of Appeals in *The Lighters*, 57 Fed. 664, 6 C. C. A. 493, and by Judge Morrow in *The Templar* (D. C.)

59 Fed. 203, and *The Alvira* (D. C.) 63 Fed. 144. In the Fourth Circuit, Judge Brawley, in the case of *The Sappho* (D. C.) 89 Fed. 366, adhered to the same doctrine. In the Fifth Circuit, Judge Toulmin signified his concurrence in *The Lena Mowbray* (D. C.) 71 Fed. 720, and *The City of Camden* (D. C.) 147 Fed. 847. In the Seventh Circuit Judge Seaman agreed in *The Westover* (D. C.) 76 Fed. 381. To the contrary are in the First Circuit *The Iris*, 100 Fed. 104, 40 C. C. A. 301, by the Circuit Court of Appeals, and in the Third Circuit, *he Vigilant*, 151 Fed. 747, 81 C. C. A. 371, by the Circuit Court of Appeals. And in both the First and Third Circuits there have been decisions of the lower courts to the same effect. It is much to be regretted that there should be such a conflict of opinion, but our own duty seems clear.

In respect to the objection that the towage was not requested by the appellant, it is to be inferred that the court thought that in the light of the circumstances the correspondence should be construed as indicating that it was to be done for the benefit of the appellant and therefore presumably to be paid for by it. The vessel was to be delivered at the shipbuilding company's wharf; and the title had already passed. If it had remained there, it would have been at the owner's risk. We are inclined to concur in the construction of the agreement which the court put upon it.

The decree of the District Court will be affirmed, with costs.

In re FARRELL.

(Circuit Court of Appeals, Sixth Circuit. January 24, 1910.)

No. 1,982.

1. ASSIGNMENTS FOR BENEFIT OF CREDITORS (§ 184*)—NATURE OF ASSIGNMENT—CAPACITY OF ASSIGNEE.

Though the legal title to property covered by a deed of assignment passes to the assignee, he is regarded as the assignor's agent to distribute the proceeds of the property among the creditors.

[Ed. Note.—For other cases, see *Assignments for Benefit of Creditors*, Cent. Dig. §§ 555-571; Dec. Dig. § 184.*]

2. BANKRUPTCY (§ 440*)—APPEAL—"CONTROVERSY ARISING IN BANKRUPTCY PROCEEDINGS."

Nothing can be regarded as a "controversy arising in bankruptcy proceedings," within Bankr. Act July 1, 1898, c. 541, § 24a, 30 Stat. 553 (U. S. Comp. St. 1901, p. 3431), providing for appeals in such proceedings, where the subject-matter and object of the proceedings are within the power of the trial court to make a summary order, especially where a plenary action is not sought; a complaint in regard to a summary order to turn over assets not being specially made appealable under such subdivision.

[Ed. Note.—For other cases, see *Bankruptcy*, Dec. Dig. § 440.*]

Appeal and review in bankruptcy cases, see note to *In re Eggert*, 43 C. C. A. 9.]

3. BANKRUPTCY (§ 440*)—REVIEW—APPEAL—PETITION TO REVISE.

In determining the remedy as between review or appeal in bankruptcy proceedings, the court is governed by the object and character of the proceeding.

[Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. § 915; Dec. Dig. § 440.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

4. BANKRUPTCY (§ 440*)—SURRENDER OF ASSETS—SUMMARY ORDER.

A decision denying a summary order, in bankruptcy, to compel the bankrupt's assignee for the benefit of creditors to turn over to the trustee assets alleged to belong to the bankrupt, is reviewable on a petition to revise in matter of law, authorized by Bankr. Act July 1, 1898, c. 541, § 24b, 30 Stat. 553 (U. S. Comp. St. 1901, p. 3432).

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 440.*]

5. BANKRUPTCY (§ 9*)—STATE INSOLVENCY LAWS—SUSPENSION.

Rev. St. Ohio § 6343, as amended by Act April 23, 1898 (93 Ohio Laws, p. 290), and Act May 12, 1902 (95 Ohio Laws, p. 608), regulating the administration of property assigned for the benefit of creditors, is not an insolvent law, and was not, therefore, suspended by the federal bankruptcy act.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 7-9; Dec. Dig. § 9.*]

6. ASSIGNMENTS FOR BENEFIT OF CREDITORS (§ 22*)—NATURE AND EFFECT.

A voluntary assignment for the benefit of creditors, consisting of a transfer of property of a debtor to an assignee in trust to distribute among the creditors, rests primarily, not on the state statute, but on the debtor's common-law power to dispose of his property.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. §§ 36-38; Dec. Dig. § 22.*]

7. BANKRUPTCY (§ 161*)—ACTS OF BANKRUPT—ASSIGNMENT FOR THE BENEFIT OF CREDITORS—TIME.

Where no steps were taken to have an assignor for the benefit of creditors declared a bankrupt until more than six months after his assignment had been filed in the probate court, and it appeared that the assignment was valid both at common law and under the state statutes, the bankrupt's trustee was not entitled to a summary order requiring the assignee to surrender the net assets belonging to the bankrupt in his hands, and this though the appraisal filed by the assignee in probate court indicated that the assignor was solvent, since the making of the assignment authorized the creditors to proceed in bankruptcy within four months, regardless of the debtor's solvency.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 161.*]

Petition to Review an Order of the District Court of the United States for the Northern District of Ohio.

In the matter of the bankruptcy of George B. Harvey. On petition to revise in matter of law an order refusing to grant a summary order requiring one Mason to turn over alleged assets of the bankrupt to George T. Farrell, trustee. Affirmed.

The petitioner asks this court to revise in matter of law the action of the court below in refusing to grant a summary order to turn over alleged assets of the bankrupt. On August 3, 1903, Harvey filed a voluntary petition in bankruptcy and was on that day adjudged a bankrupt. On the 18th of that month petitioner was appointed and qualified as trustee in bankruptcy for the benefit of the creditors of Harvey. More than six months prior thereto, namely, January 25th of that year, Harvey filed in the probate court of Columbiana county, Ohio, his deed of assignment for the benefit of his creditors, transferring all his property to one Mason. Mason accepted the appointment, gave bond, and otherwise qualified as assignee, and had, under orders made by the probate court prior to the commencement of his assignor's proceedings in bankruptcy, distributed a substantial portion of the assets among the creditors. The assignee received further moneys, and under like orders made distribution among the creditors after appointment of the trustee in bankruptcy.

On March 1, 1909, while the bankrupt was engaged in the administration of his assignor's estate, the trustee of the bankrupt filed a petition in the court

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

below in which he prayed for an order to restrain the assignee from disposing of any of the assigned property, to stay further proceedings in the probate court, and to require the assignee to show cause why he should not file a report in the court below of his proceedings in the probate court, and why he should not turn over to the trustee for the benefit of the bankrupt all the property in possession of the assignee and not distributed at the time Harvey was adjudged bankrupt. On March 12th the assignee filed an answer, in which he summarized the proceedings taken in the probate court, and claimed that all his payments of costs, expenses, dividends, etc., were made before he had any knowledge that the petition in this proceeding was filed or was to be filed, and in reliance upon his right to wind up his trust under the deed of assignment, claimed title to the property in his possession and the right to hold it as assignee, and denied the right and jurisdiction of the court below to take the property from him, and protested against the making of any order. The trustee in his reply admitted that the assignee was entitled to certain commissions, and was indebted for services of his attorneys and for other expenses of administration, and waived all claim to the assets remaining in the hands of the assignee, except such as the probate court or any higher court of Ohio "may find upon final adjudication to be due from said assignee to this trustee."

The matter was referred to the referee in bankruptcy, who denied the petition. On petition for review in the district court, the order of the referee was affirmed, and the petition dismissed.

C. F. Smith, for petitioner.

N. B. Billingsley, for respondent.

Before SEVERENS and WARRINGTON, Circuit Judges, and SANFORD, District Judge.

WARRINGTON, Circuit Judge (after stating the facts as above). The question first requiring attention is one of procedure. It is claimed for the assignee that the case should have been brought to this court by appeal, and not by petition for revision. As shown in the statement, the effort of the trustee in bankruptcy was to obtain a summary order to compel the assignee to turn over the assets received by him from his assignor, less dividends theretofore paid, and less such commissions, expenses, and attorney's fees as the Ohio courts might fix, or, stated in another way, to pay over the net assets remaining applicable to payment of creditors.

In *Seinsheimer v. Simonson*, 107 Fed. 898, 47 C. C. A. 51, this court entertained a case on petition to review an order made by the District Court affirming an order of the referee in bankruptcy, which required an assignee, who, at the time his assignor was adjudged bankrupt, was administering the estate under a general assignment made in Kentucky, to pay over certain moneys which he had applied to payment of his commissions and his counsel. The moneys were claimed to be trust assets for which he was chargeable. The order of this court reversing the court below was affirmed by the Supreme Court on certiorari in *Louisville Trust Co. v. Cominger*, 184 U. S. 18, 22 Sup. Ct. 293, 46 L. Ed. 413.

In the case of *In re Abraham* (*Bernheimer v. Bryan*, Marshal) 93 Fed. 767, 783, 35 C. C. A. 592, an appeal was taken in the District Court to the Circuit Court of Appeals from a summary order made by the District Court as a court of bankruptcy, requiring the marshal to seize goods purchased of an assignee under a general assignment, and on motion made to dismiss the appeal on the ground, among

others, that the order made was not appealable, the appeal was treated as a petition for revision. Although the case was reversed by the Supreme Court in *Bryan v. Bernheimer*, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814, yet it was not reversed for that reason. In *Holden v. Stratton*, 191 U. S. 115, 119, 24 Sup. Ct. 45, 48 L. Ed. 116, it is pointed out by the Chief Justice that in *Bryan v. Bernheimer*, supra—"the Circuit Court of Appeals treated the case as if before it on a petition for revision, though it had been carried there on an appeal, and we considered the decree as rendered in the exercise of a supervisory power."

It should be stated that in *Mueller v. Nugent*, 105 Fed. 581, 44 C. A. 620, this court again entertained a case on petition for review of a summary order made by the District Court to pay over certain moneys of the bankrupt, which were in possession of his son, but held that the person in possession could not be dispossessed, except by plenary suit. Since the Supreme Court, in reversing the decision (184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405), held that the order could be enforced by commitment, it would seem that the petition to review in this court was well within the ruling.

And in *York Manufacturing Co. v. Cassell*, 201 U. S. 344, 353, 26 Sup. Ct. 481, 484, 50 L. Ed. 782, in explaining the decision in *Mueller v. Nugent*, the court said:

"The dispute in the *Mueller Case* was whether the court of bankruptcy had power to compel, in a summary way, the surrender of money or other property of the bankrupt in the possession of the bankrupt, or of some one for him, without resorting to a suit for that purpose. This court held, as stated by the Chief Justice in delivering the opinion: 'The bankruptcy court would be helpless indeed if the bare refusal to turn over could conclusively operate to drive the trustee to an action to recover as for an indebtedness, or a conversion, or to proceedings in chancery, at the risk of the accompaniments of delay, complication, and expense, intended to be avoided by the simpler methods of the bankrupt law.' It was held that the trustee was not thus bound, but had the right, under the facts in that case, to proceed under the bankrupt law itself, and take the property out of the hands of the bankrupt, or any one holding it for him."

The power thus mentioned is the same as that invoked in the present case; for, although the legal title to the property covered by the deed of assignment passes to the assignee, he is regarded as the agent of the assignor to distribute the proceeds of the property among his creditors. *Bryan v. Bernheimer*, 181 U. S. 188, 192-193, 21 Sup. Ct. 557, 45 L. Ed. 814; *Crist v. Langhorst*, 5 Ohio Dec. 352 (per Force, J., speaking for the Hamilton Co., O., Dist. Court); *In re Stokes* (D. C.) 106 Fed. 312.

It is true that no decision has been cited, and that we do not discover any, in which the present question was made a distinct issue or the subject of an express decision. The nearest approach to this perhaps occurred in the Fifth Circuit in *Re Abraham*, supra, and in the approval given to the case in *Holden v. Stratton*, as before shown. But we think it may fairly be deduced from the decisions we have commented on that the practice of bringing up summary orders for revision upon petition to review is warranted by the bankruptcy act. Indeed, this would seem to follow alone from what is said in *Mueller v. Nugent* and *York Manufacturing Co. v. Cassell*, as before pointed

out; for the very holding that a summary order may be employed to compel payment of assets of a bankrupt which are held by him personally, or through an agency created by him, manifestly dispenses with the necessity to resort to plenary action.

Thus the remedy for coming into this court upon complaint made against allowance or refusal of a summary order is, we think, reducible to petition to revise in matter of law, according to subdivision "b," § 24, of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 553 [U. S. Comp. St. 1901, p. 343]). Nothing, as it seems to us, can be regarded as a controversy "arising in bankruptcy proceedings" within the purview of subdivision "a," § 24, where the subject-matter and object of the proceedings are within the power to make a summary order. Certainly this is true where plenary action is not sought. It is hardly necessary to say that complaint in regard to a summary order to turn over assets is not specially made appealable under subdivision "a" of section 25. In determining the question of remedy, then, as between review or appeal under the bankruptcy act, we are not to be governed by our ideas of whether the power invoked can be rightly exercised or not in the given instance, but by the object and character of the proceeding. *Coder v. Arts*, 213 U. S. 223, 233, 29 Sup. Ct. 436, 53 L. Ed. 772. We therefore hold that the case is properly before us.

The contention made on behalf of the trustee of the bankrupt is two-fold: That the assignment laws of Ohio are insolvency or bankruptcy laws, and so are suspended by the bankruptcy act; and that the assets in the hands of the assignee are held by him as agent of his assignor, the present bankrupt, and are consequently part of the estate to be administered in bankruptcy. These claims are resisted on the grounds that the applicable Ohio statutes are not insolvency or bankruptcy laws, and that the assignment was made more than four months prior to the filing of the petition in bankruptcy. It is urged that these grounds of defense are sustained by *Mayer v. Hellman*, 91 U. S. 496, 23 L. Ed. 377, and *Boese v. King*, 108 U. S. 379, 2 Sup. Ct. 765, 27 L. Ed. 760, both relating to the bankruptcy act of 1867 (14 Stat. 517, c. 176), and the former also to the statutes of Ohio, and the latter to the statutes of New Jersey, concerning assignments for the benefit of creditors. Those decisions, especially the first one, must rule the case at bar, unless there be some later change in legislation rendering them inapplicable.

Section 6343 of the Revised Statutes of Ohio was amended twice (in 1898 [93 Ohio Laws, p. 290] and in 1902 [95 Ohio Laws, p. 608]) between the times when the decisions just mentioned were rendered, and the dates of the general assignment and the filing of the petition in bankruptcy in question. The difference between the old section and the new one is that the former declared that assignments made to a trustee in contemplation of insolvency and with intent to prefer or delay creditors should inure to the equal benefit of all creditors and that the trusts arising under them should be administered as other assignments, while the latter declares all instruments, including assignments that are made in trust or otherwise by a debtor, and all judgments suffered by him to be taken against himself in contempla-

tion of insolvency and with the design to prefer creditors, or with intent to hinder, delay, or defraud creditors, shall be declared void, and shall inure to the equal benefit of all the creditors.

It is said of the change thus made, first, that involuntary assignments are provided for. But this was so before. The existing amendment only increases the instruments that shall inure to the benefit of creditors. It is claimed next, and truly, that under the old section a preference could be made in favor of a debtor, as held in *Cross v. Carstens*, 49 Ohio St. 548, 567, 31 N. E. 506, and that this cannot be done under the new section. The theory of that decision was that the old section did not in terms apply to a mortgage made to prefer a particular creditor as mortgagee, and not made to him as trustee for the benefit of others. But the transaction under review was in no sense like the one upheld in *Cross v. Carstens*.

It cannot escape attention, moreover, that both of these changes plainly tended to remove, rather than to enhance, conflict between section 6343 and the bankruptcy act; for they are both in harmony with the policy of that act in compelling equality of distribution of the property of debtors among their creditors. We therefore see no reason why the language employed in *Mayer v. Hellman* to meet the claim there made, as here, that the bankruptcy act suspended the "operation of the act of Ohio regulating the mode of administering assignments," is not quite as applicable now as it was then. It was said (page 502 of 91 U. S. [23 L. Ed. 377]):

"That the statute of Ohio is not an insolvent law in any proper sense of the term. It does not compel, or in terms even authorize, assignments. It assumes that such instruments were conveyances previously known, and only prescribes a mode by which the trust created shall be enforced. * * * There is nothing in the act resembling an insolvent law. It does not discharge the insolvent from arrest or imprisonment. It leaves his after-acquired property liable to his creditors precisely as though no assignment had been made. The provisions for enforcing the trust are substantially such as a court of chancery would apply in the absence of any statutory provision. The assignment in this case must, therefore, be regarded as though the statute of Ohio, to which reference is made, had no existence. There is an insolvent law in that state; but the assignment in question was not made in pursuance of any of its provisions."

One important feature of that decision is its recognition of the separable quality of the Ohio statutes there referred to. Another is that, while a portion of the Ohio act is an insolvency law, yet that a voluntary assignment is not made in pursuance of any of its provisions. Indeed, a voluntary general assignment for the benefit of creditors is not made in Ohio in virtue of any statute at all. Section 6335 provides that:

"When any person * * * shall make an assignment to a trustee of any property * * * in trust for the benefit of creditors, it shall be the duty of said assignee, within ten days after the delivery of the assignment to him, and before disposing of any property so assigned, to appear before the probate judge of the county in which the assignor resided at the time of executing the said assignment, produce the original assignment, or a copy thereof, cause the same to be filed in the probate court, and enter into a bond. * * *"

This, as pointed out in *Mayer v. Hellman*, presupposes the existence of a deed of assignment and creation of a trust, and simply undertakes

to regulate the trust later for the equal protection of the creditors. The right so to dispose of the property in trust is not dependent upon the statute. It is an ordinary attribute of ownership. In the case of *In re Gutwillig* (D. C.) 90 Fed. 475, 476, it was said by Judge Brown:

"Voluntary assignments for the benefit of creditors, * * * as practiced in this and other states, do not originate in the state statutes, but in the common-law power of the debtor to dispose of his property."

That opinion received deserved special approval through Mr. Justice White in *West Company v. Lea*, 174 U. S. 590, 596, 19 Sup. Ct. 836, 43 L. Ed. 1098. As said by Chief Justice Marshall in *Brashear v. West*, 7 Pet. 608, 613, 8 L. Ed. 801:

"The right to make it (a general assignment) results from that absolute ownership which every man claims over that which is his own."

So Chief Justice Graves said of such an assignment in *Cook v. Rogers*, 31 Mich. 391, 397:

"What is this basis for conveying in trust for creditors, to which allusion is made? It is the right which every man having the general capacity to contract has to make honest and unforbidden contracts, and the right of disposition which is incident to ownership."

Justice Field stated the same thing in *Mayer v. Hellman*, 91 U. S. 500 [23 L. Ed. 377]:

"The validity of the claim of the assignee in bankruptcy depends, as a matter of course, upon the legality of the assignment made under the laws of Ohio. Independently of the bankrupt act, there could be no serious question raised as to its legality. The power which every one possesses over his own property would justify any such disposition as did not interfere with the existing rights of others; and an equal distribution by a debtor of his property among his creditors, when unable to meet the demands of all in full, would be deemed, not only a legal proceeding, but one entitled to commendation."

It follows that the present deed of assignment is valid, both as respects the common law and the statutes of Ohio. See, also, *Pogue v. Rowe*, 236 Ill. 157, 86 N. E. 207. We do not overlook the fact that Congress has expressly made a voluntary assignment an act of bankruptcy. But this result was reached under our former bankruptcy laws, although an assignment was not made an act of bankruptcy in express terms. This is true also of the English acts. In *re Gutwillig*, supra, 90 Fed. 478; *West Company v. Lea*, supra, 174 U. S. 596, 19 Sup. Ct. 836, 43 L. Ed. 1098. But the provision of the present act limits, as also the other acts alluded to limited, the right to annual voluntary general assignments to specified periods of time. That time is fixed by the present act at four months from the date of filing the deed in the probate court.

It is admitted that all persons concerned in the present estate, including the assignor himself, suffered the limitation of four months to expire before commencing any proceedings in bankruptcy. The first thing done under the bankruptcy act, by any one interested in this matter, was the commencement of a voluntary proceeding by the assignor himself. But that was more than six months after making his assignment; and the first movement that can be said to have been made on behalf of the creditors under the bankruptcy act was the commence-

ment of the present proceeding after the lapse of more than six months succeeding the appointment of the trustee. It is therefore impossible to escape either the decision announced by Mr. Justice Harlan in *Boese v. King*, or that announced in *Mayer v. Hellman*. Justice Field said in the latter (91 U. S. 501 [23 L. Ed. 377]):

"Those periods constitute the limitation within which the transactions will be examined and annulled, if conflicting with the provisions of the bankrupt act. Transactions anterior to these periods are presumed to have been acquiesced in by the creditors. There is sound policy in prescribing a limitation of this kind. * * * Unless, therefore, a transaction is void against creditors independently of the provisions of the bankrupt act, its validity is not open to contestation by the assignee where it took place at the period prescribed by the statute anterior to the proceedings in bankruptcy. The assignment in this case was not a proceeding, as already said, in hostility to the creditors, but for their benefit. It was not, therefore, void as against them, or even voidable. Executed six months before the petition in bankruptcy was filed, it is, to the assignee in bankruptcy, a closed proceeding."

See the following decisions relating to assignments made since the passage of the present bankruptcy act: *Randolph v. Scruggs*, 190 U. S. 533, 537, 23 Sup. Ct. 710, 47 L. Ed. 1165; *Frazier v. Southern Loan & Trust Co.*, 99 Fed. (C. C. A., 4th Circuit) 707, 714, 40 C. C. A. 76, approved in *Pickens v. Roy*, 187 U. S. 177, 180, 23 Sup. Ct. 78, 47 L. Ed. 128; *Downer v. Porter*, 116 Ky. 422, 76 S. W. 135; *Grunsfeld Bros. v. Brownell*, 12 N. M. 192, 76 Pac. 310; *Patty-Joiner & Eubank Co. v. Cummins*, 93 Tex. 598, 57 S. W. 566; *Loveland on Bankr.* (3d Ed.) p. 30.

Nor can the rule thus established be escaped in the present case by the suggestion that, according to the appraisal filed in the probate court, the debtor appeared to be solvent, for the reason, if for no other, that it is settled by *West Company v. Lea*, supra, that the making of a general assignment entitles creditors (within the four months' period) to maintain a proceeding of involuntary bankruptcy against the assignor, without reference to his solvency.

The action of the court below is affirmed, with costs.

HOWARD SUPPLY CO. v. WELLS et al.

(Circuit Court of Appeals, Sixth Circuit. February 8, 1910.)

No. 1,991.

1. DAMAGES (§ 5*)—BREACH OF CONTRACT—"GENERAL DAMAGES" AND "SPECIAL DAMAGES."

The distinction between general and special damages for breach of contract is that the former are such damages as the law implies and presumes from the breach complained of, while the latter are such as have proximately resulted, but do not always immediately result, from the breach and will not therefore be implied by law.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 4; Dec. Dig. § 5.*]

For other definitions, see *Words and Phrases*, vol. 4, pp. 3059-3060; vol. 8, p. 7669; vol. 7, pp. 6572-6573; vol. 8, p. 7802.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. SALES (§ 418*)—ACTION BY PURCHASER FOR BREACH OF CONTRACT—DAMAGES—LOSS OF PROFITS.

Profits which the purchaser under an executory contract of sale of goods has actually lost by reason of the seller's failure to deliver may be recovered as damages for such breach, provided, first, such loss of profits was the natural and probable consequence of the breach and within the reasonable contemplation of the parties in the making of the contract as the damages likely to result from such breach; and, second, that the proof of such damages is not uncertain, speculative, or indefinite.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1198; Dec. Dig. § 418.*]

3. SALES (§§ 415, 418*)—ACTION BY PURCHASER FOR BREACH OF CONTRACT—DAMAGES.

On the failure of the seller to deliver goods as required by the contract, the law requires the purchaser to use reasonable diligence to mitigate the loss occasioned by such breach by providing other goods to take the place of those with respect to which the seller was in default, and he cannot recover for any special loss incident to his failure to so mitigate the injury; but the burden of proving that the damages sustained by the purchaser could have been prevented or mitigated by his action rests upon the seller as the party guilty of the breach of contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1170, 1188; Dec. Dig. §§ 415, 418.*]

4. SALES (§ 411*)—ACTION BY PURCHASER FOR BREACH OF CONTRACT.

The petition in an action by a purchaser of railroad ties for breach of contract by failure to deliver considered, and *held* to state a cause of action for the recovery of special damages.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 411.*]

In Error to the Circuit Court of the United States for the Eastern District of Kentucky.

Action by the Howard Supply Company against John P. Wells and John Pendleton. Judgment for defendants, and plaintiff brings error. Reversed.

The plaintiff in error, who was the plaintiff below, filed its petition as commencement of suit, alleging the making of a written agreement on December 8, 1906, between plaintiff and defendants, for the sale by the latter to the former of 25,000 cross-ties (and as many more as defendants should be able to secure), to be delivered f. o. b. cars between White House and Paintsville, Ky., inclusive, delivery to begin immediately and to be completed not later than November 1, 1907, at a price of 55 cents each for first-class and 40 cents each for second-class ties; that during the life of said contract, and until the bringing of suit, plaintiff was and is a West Virginia corporation engaged in the business of buying and selling railroad cross-ties for profit and reward; that during the period covered by the contract sued upon plaintiff had contracts for the sale of large quantities of cross-ties at prices under which it could have made a profit of 10 cents per tie upon all ties so contracted by defendants to be delivered to the plaintiff, and that, "had the defendants complied with their said contract to the extent of furnishing the minimum of 25,000 ties therein named, plaintiff would have derived a profit from the resale of \$2,500," that "the 25,000 ties agreed to be sold and delivered to it by said defendants were reasonably worth in the market 10 cents more per tie than the amount named in said contract"; alleged plaintiff's readiness at all times during the life of the contract to fully perform it, its offers at various times to so perform, and its demands that defendants perform the same; alleged defendants' failure and refusal to deliver any of the ties contracted for, and that the defendants "by their refusal to so perform said contract caused plaintiff to lose the profit upon said ties of 10 cents per tie amounting to the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

sum of \$2,500"; and demanded judgment for damages sustained in the last-named sum.

Defendants demurred generally to the petition upon the ground that it failed to state facts sufficient to support a cause of action, for the reasons, first, that the alleged damage consists of prospective profits, not shown to have been in the contemplation of the parties to the contract; second, that the petition fails to show that plaintiff's profit would have amounted to anything after the payment of the expense of transporting the ties from the place where defendants were to deliver them to the plaintiff to the place where plaintiff was to deliver them under its contract of resale; third, that it does not appear by the petition that defendants' failure to comply with the contract prevented plaintiff from supplying the full number alleged to have been resold and contracted for resale; and, fourth, that it does not appear that plaintiff was unable to purchase in the market, for the purpose of supplying its demand for resale, ties of the kind called for by the defendants' contract, or that plaintiff was compelled to pay more on such repurchase than the price agreed to be paid defendants. There was also a special demurrer, which, so far as material here, will be mentioned later. The general demurrer was sustained.

Thereupon, plaintiff, by leave of the court, filed an amended petition, which differed from the original petition, so far as material here, in these respects: First, following the allegation that during the life of the contract the plaintiff was engaged in the business of buying and selling railroad cross-ties for profit and reward, was added the allegation that the plaintiff "entered into the above contract with the defendants with a view of reselling the cross-ties mentioned therein for a profit, which resale thereof and anticipated or expected profits thereon was reasonably within the knowledge and contemplation of the parties to said contract at the time of the execution of the same, and that your petitioner is entitled to recover such profits as it could have obtained on a resale of said cross-ties as the measure of its damages for the breach of said contract by said defendants hereinafter complained of"; second, in lieu of the general statement in the original petition that plaintiff had contracts of resale, the allegation was inserted "that at the time of entering into the contract aforesaid your petitioner had a contract with one of its customers to sell and deliver 500,000 cross-ties, which contract and agreement was before November 1, 1907, at which time said contract with the defendants expired, extended to any number of ties over and above said number of 500,000 which your petitioner would deliver until such time as its said customer should notify your petitioner not to make further delivery of such ties, under which contract and arrangement your petitioner could have sold and delivered to its said customer the minimum of 25,000 ties provided for in its said contract with the defendants, in addition to all of the ties that your petitioner was able to or did buy up till in February, 1908, that under the terms of its contract with its said customer it was to receive 10 cents per tie more than the contract price provided for in its contract with the said Pendleton and Wells," this allegation being followed by that contained in the original petition, that, "had the said defendants complied with their said contract by the furnishing of the minimum of 25,000 ties provided for in said contract, your petitioner would have derived a profit on the resale thereof to its said customer of \$2,500." The minimum of 25,000 ties were alleged to have been reasonably worth in the market 10 cents more per tie than the amount named in the contract "during all the period covered by said contract."

The defendants demurred to the amended petition for the reasons, first, that the court had no jurisdiction of the subject-matter "for the reasons set out in the demurrer to the original petition" (reference being apparently had to the ground of special demurrer, that nominal damages only were recoverable under the allegation of the petition); and, second, that the amended petition does not state a cause of action "for same reasons set out in general demurrer to original petition." At the same time defendants moved to strike out as "immaterial, irrelevant, and redundant," and as "not competent or proper as a measure of recovery," various paragraphs of both the original and amended petitions, the effect of the granting of which would be to leave therein (aside from the allegations of plaintiff's legal capacity and the diversity of citizen-

ship of the parties) only the allegations of the making of the contract, the plaintiff's readiness and willingness to perform it, the defendants' failure and refusal to perform, and the prayer for process, and without any allegation or prayer for recovery of damages. The court sustained the demurrer to the amended petition, granting leave to amend, and at the same time granted in full defendants' motion to strike out the allegations referred to, in both the original and amended petitions. No statement of reasons for granting the motion to strike out is contained in the record, except such as may be inferred from the grounds assigned for the motion and from the reference in the order granting it to the allegations in question as "setting up as a matter of recovery alleged profits which it is alleged could have been made by plaintiff on resale of the cross-ties mentioned in the contract sued on." Plaintiff having declined to further amend its petition, an order was made dismissing it.

The errors discussed here relate to the action of the court in sustaining the demurrers to the original and amended petitions, respectively, and in sustaining the motion to strike out the allegations of the respective petitions.

Geo. J. McComas, for plaintiff in error.

M. C. Kirk and C. B. Wheeler, for defendants in error.

Before SEVERENS and WARRINGTON, Circuit Judges, and KNAPPEN, District Judge.

KNAPPEN, District Judge (after stating the facts as above). Upon the striking out of the allegations in question, the plaintiff's petition necessarily fell to the ground, as there remained in it no allegation of an injury even in fact resulting from defendants' default. The general demurrer and the motion to strike out apparently rest upon the same grounds, and so may be considered together.

It is defendants' contention that the case presented involves only the question whether the plaintiff's petition states a case permitting recovery for loss of profits anticipated upon the resale. This contention will be again referred to.

Before discussing the specific propositions on which the action of the court is sought to be justified, it may be well to refer briefly to the general principles covering the recovery of damages by the vendee on account of the vendor's failure to make delivery. In such case, as in cases generally for breach of contract, the distinction between general and special damages is that the former are such damages as the law implies or presumes from the breach complained of, while the latter are such as have proximately resulted, but do not always immediately result, from the breach, and will not therefore be implied by law. *Lawrence v. Porter*, 63 Fed. 62, 11 C. C. A. 27, 26 L. R. A. 167; *Lillard v. Kentucky Dist. & Warehouse Co.*, 134 Fed. 168, 177, 67 C. C. A. 74. In accordance with this distinction, the usual rule is that the measure of damages for failure to deliver goods under an executory contract of sale is the difference between the contract price of the goods and their market value at the place of delivery at the time the contract was broken, and that, if the goods cannot be procured at the place of delivery, then resort must be had to the nearest available market. *Lawrence v. Porter*, *supra*; *Grand Tower Co. v. Phillips*, 23 Wall. 471, 23 L. Ed. 71. But profits which the vendee under an executory contract of sale of goods has actually lost by reason of the vendor's failure to deliver may be recovered as damages for such breach, provided, first, such loss of profits was the natural and prob-

able consequence of the breach, and within the reasonable contemplation of the parties in the making of the contract as the damages likely to result from such breach; and provided, second, the proof of such damages is not uncertain, speculative, or indefinite. Damages by way of loss of profits are not recoverable, even if within the contemplation of the parties, if so remote, uncertain, or speculative that they cannot be ascertained to a reasonable certainty. 2 Joyce on Damages, §§ 1285, 1672; *Fell v. Newberry*, 106 Mich. 542, 64 N. W. 474; *Hitchcock v. Anthony* (6th Cir.) 83 Fed. 779, 782, 28 C. C. A. 80, and following; *Central Trust Co. v. Clark* (8th Cir.) 92 Fed. 293, 34 C. C. A. 354. In accordance with the general rule of pleading that damages which the law implies as the natural and necessary result of a breach need not be alleged, but that a mere statement of the breach and a general allegation of damage is sufficient, a recovery of the difference between the contract price and the market value may be had without particularizing the same in pleading. *Peters v. Cooper*, 95 Mich. 191, 54 N. W. 694; *Lawrence v. Porter*, *supra*; *Asher v. Stacy*, 65 S. W. 603. But, on the other hand, if the plaintiff claims to have sustained other damages than those which will naturally be supposed to flow from an ordinary breach of such contract, he must in his pleading particularize such loss, so that the defendant may prepare himself with evidence to meet such claim. *Lawrence v. Porter*, 63 Fed. 64, 11 C. C. A. 27, 26 L. R. A. 167. But, upon a failure of the vendor to deliver the goods as required by the contract, the law throws upon the vendee the duty of using reasonable diligence to mitigate the loss occasioned by such breach by providing other goods to take the place of those with respect to which the vendor was in default. The vendee thus cannot throw upon the vendor any special loss incident to the failure of the vendee to mitigate the injury as far as reasonably possible. *Warren v. Stoddart*, 105 U. S. 224, 26 L. Ed. 1117; *Marsh v. McPherson*, 105 U. S. 709, 26 L. Ed. 1139; *Lawrence v. Porter*, *supra*; *Hirsh v. Georgia Iron & Coke Co.*, 169 Fed. 578, 581, 95 C. C. A. 76. But the burden of proving that the damages sustained by the vendee could have been prevented or mitigated by the latter's action rests upon the vendor, as the party guilty of the breach of the contract. *Mathesius v. Brooklyn Heights R. Co.*, 96 Fed. (C. C.) 792, 795, and cases there cited; *Lillard v. Kentucky Dist. & Warehouse Co.* (6th Cir.) 134 Fed. 168, 178, 67 C. C. A. 74, and cases cited; *Kentucky Distilleries & Warehouse Co. v. Lillard*, 160 Fed. 34, 40, 41, 87 C. C. A. 190.

Turning, then, to the specific criticisms made upon the plaintiff's petition, the first of which is that the prospective profits on resale of the ties are not alleged to have been in contemplation of the parties to the contract at the time it was made, or that the parties contracted with reference thereto. The reason of the rule which requires, in order to a recovery of loss of profits by the vendee, that the vendor should have knowledge that the goods were purchased for resale, is that in the absence of such knowledge a loss of profits could not be reasonably foreseen or anticipated as a result of the breach of contract, as such damages are not the ordinary result of a breach. The lan-

guage of the petition in this regard is that the plaintiff entered into the contract in question with the defendants "with a view of reselling the cross-ties mentioned therein for a profit, which resale thereof and anticipated or expected profits thereon, was reasonably within the knowledge and contemplation of the parties to said contract at the time of the execution of the same." It is well settled that, in order to satisfy the requirement of notice to the vendor that the vendee is buying for the purpose of reselling, it is only necessary to prove that such purpose of resale and the recovery of profits thereon was "within the contemplation of the parties to the contract at the time of its execution." Language no more specific than that just stated is found in any of the authorities cited by defendants. See *Blue Grass Cordage Co. v. Luthy*, 98 Ky. 583, 586, 33 S. W. 835, where it is stated that expected profits may be recovered where "it was fairly within the contemplation of both parties that the goods were purchased with a view to a resale for profits"; *Bates Mach. Co. v. Norton Iron Works*, 113 Ky. 372, 68 S. W. 423, where an instruction was approved that profits could be recovered if the defendants "knew at the time of purchase by plaintiffs that they purchased same with a view to a resale, and that the profits anticipated thereon were in the contemplation of both parties." See, also, to the same effect, *Moffitt-West Drug Co. v. Byrd*, 92 Fed. 290, 34 C. C. A. 351; *Central Trust Co. v. Clark*, 92 Fed. 293, 34 C. C. A. 354; *Denhard v. Hurst*, 111 Ky. 546, 64 S. W. 393; *Harrow Spring Co. v. Harrow Co.*, 90 Mich. 147, 51 N. W. 197, 30 Am. St. Rep. 421. The only criticism made upon the allegation of the petition in question as failing to sufficiently allege notice to the defendant of the intended resale is that it is manifestly "a conclusion of the pleader," and not a statement of fact. This proposition is apparently based upon the use of the word "reasonably." The allegation is not subject to the criticism referred to. The fact that the expected resale at a profit was not mentioned in the contract affects only the subject of evidence. In our opinion the petition definitely advised defendants of plaintiff's claim that the defendants knew, when the contract in question was made, that the plaintiff expected and intended to sell at a profit the ties contracted for, that such resale and expected profit were contemplated by the parties thereto at the time the contract was made, and that the loss of such profit was thus the natural and proximate result of defendants' breach.

In support of the objection that the petition does not show that the plaintiff's profit would have amounted to anything, after paying the expenses of transporting the ties from the place where defendants were to deliver them to plaintiff to the place where the latter was to deliver them under its contract of resale, the argument is presented that for all the petition shows plaintiff's contract of resale may have expired on the day after the making of the contract sued on; that there is no allegation that plaintiff failed to supply its customer with ties by reason of defendants' default; that the freight and expense of delivery might have eaten up the 10 cents per tie gross profit referred to; that for all that is shown by the petition plaintiff may have been able to buy sufficient ties to carry out its contract of resale at a price much less than ten cents per tie, in which case the loss would have

been only what was required to purchase such other ties. This argument is not persuasive. The petition plainly alleges that plaintiff could have sold "the minimum of 25,000 ties provided for in its said contract with the defendants in addition to all of the ties that your petitioner was able to and did buy up until in February, 1908," and that "had the said defendants complied with their said contract by the furnishing of the minimum of 25,000 ties provided for in said contract your petitioner would have derived a profit on the resale thereof to its said customer of \$2,500." The infirmity in the argument in support of this criticism results from overlooking the fact that the burden of proof with respect to the question of mitigating damages by repurchase is on the defendants, rather than on the plaintiff, and in treating the petition not merely as a statement of plaintiff's cause of action, but as a statement of the proofs in support thereof. The petition is not in our opinion subject to the objection just considered.

The third and fourth grounds of demurrer raise the defense that it does not appear by the petition that plaintiff could not have bought in the market sufficient ties to meet its contract of resale, or that in purchasing the same it was compelled to pay more than the price it agreed to pay defendants. As to this defense, also, the burden of proof is on the defendants. It is strenuously urged, however, that railroad ties are "found anywhere and everywhere, in any quantity that is desired," and that the court must take judicial cognizance of plaintiff's alleged ability to repurchase in the market all the ties plaintiff might need to carry out its contract with its customer. It should be sufficient to say that the court cannot take judicial cognizance of the existence of such fact. Moreover, the petition to our minds sufficiently alleges the contrary. We see nothing in the objection that the damages claimed by the plaintiff are shown by the petition to be uncertain and speculative. The petition alleges a sufficient market already contracted for, and at a fixed price, alleged to be \$2,500 in excess of the price under the contract in suit.

It results from the views we have stated that in our opinion the learned judge who heard the case erred in granting the motion to strike out and in sustaining the demurrer to the petition. The case has been argued throughout upon defendants' behalf upon the theory that the petition does not claim general damages, viz., the difference between the contract price and the market value. The petition alleges that:

"The 25,000 ties agreed to be sold and delivered to it by said defendants were reasonably worth in the market 10 cents more per tie than the amount named in said contract during all the period covered by said contract."

This fails of stating the correct measure of general damages only in that it omits the statement of market value as at the place of delivery provided by the contract. If plaintiff desires to claim general damages, such amendment of the petition as will permit such recovery should be had.

The order granting the motion to strike out and sustaining the demurrer will be reversed.

HARMON v. JENSEN.

(Circuit Court of Appeals, Sixth Circuit. December 18, 1909.)

No. 1,949.

1. CARRIERS (§§ 239, 282*)—WHO ARE PASSENGERS—PERSONS RIDING ON NON-TRANSFERABLE TICKETS ISSUED TO OTHERS.

Plaintiffs were injured in a collision while riding on a special train run by defendant railroad company to give a free excursion to its employes, but on which it also carried passengers at a reduced round trip rate of fare. A friend of plaintiffs, who was an employe of defendant, procured free nontransferable tickets in the names of members of his family, which were written therein, and gave them to plaintiffs, who used them. *Held*: That they were bound to know the contents of tickets received under such circumstances; that they were making a fraudulent use of the same; and that they were not passengers, but had no contractual relations with defendant, which was not liable for their injury, not shown to have been willful or wanton, although they in fact did not look at the tickets nor know their contents.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. §§ 239, 282.*]

2. CARRIERS (§ 254*)—PASSENGERS—CONDITIONS IN TICKETS—NOTICE.

When a passenger is riding upon a regular passenger train, has paid the usual fare, and holds a ticket which he has a right to suppose is in the common form of a ticket, a mere token that he is entitled to be carried, he might not unreasonably act upon the presumption that the ticket was what the circumstances required it to be, if nothing appeared which was likely to repel the presumption, even if on closer inspection a condition might be found in it.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1020-1026; Dec. Dig. § 254.*]

In Error to the Circuit Court of the United States for the Western District of Michigan.

Actions by Nels Jensen against Judson Harmon, receiver of the Pere Marquette Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

Charles McPherson, for plaintiff in error.

F. T. Lodge, for defendant in error.

Before LURTON, SEVERENS, and WARRINGTON, Circuit Judges.

SEVERENS, Circuit Judge. This cause was tried at the circuit with two others, numbered in our docket 1,950 and 1,951, and they all come here on writs of error. The record is identical in all, and is printed only in the case above entitled. The causes were heard and are to be disposed of upon the same facts and rules of law, and there is need of only a single opinion.

They are actions for personal injuries alleged to have been suffered from the negligence of the railroad company resulting in a collision while the plaintiffs were traveling as passengers on its road from Ionia, Mich., to Detroit, on July 20, 1907. One of these suits was by Nels Jensen for injuries to himself. Another was by him for injuries to his wife, Anna Jensen, and consequent loss of service and for doctor's bills. The other was by Anna Jensen for her personal injuries.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

There were general verdicts for the plaintiffs in each case and special findings on questions proposed by the court. Judgments were entered on the general verdicts.

The facts which the evidence tended to prove were, substantially, as follows: The railroad company proposed to give, on July 20, 1907, an excursion to its employes and their families from Ionia to Detroit and to carry them without fare over its road by a special train. It proposed also to carry other persons on the train at a reduced round trip fare. Jensen was a farmer living with his family in the country. One Hugh Brooks was an employe of the company and had for several days been on vacation visiting with the Jensens, as had also a lady friend of his, a Miss Andres, to whom he was paying attention. They proposed to all go on the excursion, and, arriving at the station, Brooks, without the knowledge of the Jensens, procured from an agent of the company fare free tickets for himself, his mother, and a sister who were of his family, and Miss Andres. When the train was about to start, Jensen, who had money for the purpose, suggested to Brooks that he would go and buy some tickets, to which Brooks replied that he had himself attended to that, or would attend to it, and before the train started handed Jensen three excursion fare free tickets for himself, his wife, and Miss Andres. He thereupon separated himself from them and went into the smoker. Jensen took the tickets, and without looking at their contents thrust them into his pocket, and did not take them out until the conductor came through the train to take them up. The conductor tore off the return coupons, handed them back, and passed on. Nothing was said about the tickets. There were 11 cars, containing 783 persons who had free fare tickets and 10 who had reduced fare round trip tickets, which were issued, in another form and color, to those who were not employes or of their families. Some time after the conductor passed through, the train came into collision with a freight train running in the opposite direction. The conductor and several passengers were killed, and many were wounded, among them, Jensen and his wife. The tickets which Jensen had and used for himself and wife were the tickets which had been issued to Brooks for his mother and sister. They were in a printed form provided for the occasion. The name of the person for whose use they were issued was left blank, in printing. This was written in when they were delivered. The following was the form of the parts of the ticket: The going coupon of the tickets contained the language: "For personal use of person named in accompanying coupon. Ionia to Detroit. * * * Not Transferable." The coupon for the return trip contained the language: "For personal use of M. Detroit to Ionia. * * * Not Transferable."

Brook's mother's name, "M. J. Brooks," was written into one of the coupons, and his sister's name, "Greta Brooks," was written into the other.

In submitting the case to the jury, the court requested special findings upon each of these three questions:

"(1) Were the tickets upon which Mr. and Mrs. Jensen rode free employes' nontransferable tickets issued to and in the name of members of Hugh Brooks' family?

"(2) Did Nels Jensen know, or have reason to believe, previous to the collision, that the ticket on which he was riding was a free nontransferable employee's ticket, issued in the name of a member of Hugh Brooks' family?"

"(3) Did Anna Jensen know, or have reason to believe, previous to the collision, that the ticket on which she was riding was a free nontransferable employee's ticket issued in the name of a member of Hugh Brooks' family?"

To the first of these the jury answered, "Yes." To the second and third they answered, "No."

The large question in the case is whether, in view of the finding of the jury in answer to the first of the above questions, taken in connection with the testimony in the case, the plaintiffs could recover. However, counsel for the plaintiffs below raise in their brief a preliminary question by affirming that the negligence of the railroad company was so gross, its recklessness so complete, that their clients were entitled to a verdict, whatever might be thought of their riding on tickets issued for the use of other named passengers. But there was no evidence as to the circumstances which led to the collision. There is nothing but the bare fact that it occurred between two trains running in opposite directions on the same track. The court below was of opinion that the evidence was not sufficient to establish wanton and willful negligence, and the jury were so charged; and in this we think there was no error. The question submitted was whether the plaintiffs were entitled to the ordinary rights of passengers; the negligence of the company not being doubted.

Coming then to the merits of the controversy, we observe that counsel for the defendant below requested the trial judge to instruct the jury as follows:

"If you find from the evidence in these causes that at the time of the accident said Nels and Anna Jensen were riding upon the employees' excursion tickets issued by said defendant company to and in the name of M. J. Brooks and Greta Brooks, then your verdict must be for the defendant company; no cause of action, in each and all of the causes now on trial before you."

This requested instruction, if given, must, or should, have led to a verdict for the defendant, for the jury found the facts to be as stated in the request. The court refused to give the instruction, to which refusal the defendant excepted. The jury were rightly instructed when the court said:

"The plaintiffs can therefore not recover unless they were at the time of the accident lawfully riding as passengers on the train in question."

But the court went on to submit the question of their being lawful passengers as one depending on their good faith in the use of the tickets, saying:

"Even though Brooks was guilty of fraud in procuring the tickets for the plaintiffs, and even though the tickets were employees' free nontransferable tickets, yet if plaintiffs without knowing and without having reason to believe and without receiving such notice as would put reasonable persons upon their inquiry as to the fact that such tickets were of the limited character named, but, on the other hand, in good faith believing that such tickets were valid, and that they gave them full right and authority to ride thereon, and that they did not contain any limitations of the nature of those shown by the forms presented here, and presented them in good faith to the conductor, and if the conductor accepted the same without fraud or mis-

representation on the plaintiff's part—and when I say misrepresentation I mean either express or implied, because it would be an implied misrepresentation to palm themselves off as somebody else—then in such case plaintiffs were lawful passengers on said train so long as the conductor continued to recognize them as such, and so long as the plaintiffs had no knowledge of or reason to believe the real character of the tickets, and so long as they had no notice to put them on inquiry in that regard."

In this we think the court erred. No doubt there are decided cases—a considerable number of them are collected in the brief of counsel for the defendant in error—which support, or give countenance to, the doctrine which the learned judge adopted. But it seems to us that they lose sight of the fundamental ground on which the liability of the carrier rests, and impose a burden which the carrier has never assumed. When the passenger is riding upon a regular passenger train, has paid the usual fare, and holds a ticket which he has a right to suppose is in the common form of a ticket, a mere token that he is entitled to be carried, he might not unreasonably act upon the presumption that the ticket was what the circumstances required it to be, if nothing appeared which was likely to repel the presumption, even if on closer inspection a condition might be found in it. But this, as the plaintiffs knew, was not an ordinary passenger train. It was a train equipped and sent out for the special purpose of carrying the employés of the company free of fare. The railroad company had prepared tickets which plainly stated that they were for the personal use of the persons named in them, and were not transferable. The names of the persons were written in the coupons which the conductor returned to the plaintiffs. In such a case the special ticket usually contains conditions and contractual stipulations, and the person who procures or uses them is bound to examine his ticket, and to know whether it is issued to the right person, and what conditions, if any, are imposed upon the holder of the ticket.

It would be a hopeless and profitless endeavor to attempt to reconcile the conflict of decisions upon this subject. It is a question of general law, and we are to look for the rule to the authoritative decisions of the federal courts for its solution. It was held by this court in *Farley v. Cincinnati, H. & D. R. R. Co.*, 108 Fed. 14, 47 C. C. A. 156, that the relation of carrier and passenger has its root in the contract, express or implied, on which the carriage is made. And when there is an express contract none can be implied which is in conflict with the stipulations of the express contract, except when, for reasons of public policy, the express stipulations are held nugatory, as, for instance, where the passenger, having paid the customary fare, is riding upon a passenger train with a ticket which entitles him to his transportation, and the carrier inserts a stipulation relieving it from a liability imposed by the common law. And the passenger may always secure the protection of such liability by paying the customary fare and taking a ticket in the ordinary form.

But the carrier, nevertheless, is accorded the privilege of carrying passengers at lesser rates than the ordinary upon conditions which limit its liability, as when it carries the passenger free of fare, or on a round trip for a reduced fare on a train organized for a special occasion. It was so held in *Bitterman v. L. & N. R. Co.*, 207 U. S. 205, 221,

28 Sup. Ct. 91, 52 L. Ed. 171, referring to earlier cases. And when the passenger accepts a ticket for such transportation he is bound to know and to assent to the conditions upon which the carrier has agreed to carry him. *Boylan v. Hot Springs R. R. Co.*, 132 U. S. 146, 10 Sup. Ct. 50, 33 L. Ed. 290, is authority for this proposition. The plaintiff had a round trip ticket from Chicago to Hot Springs and return, and was ejected on his way back because he had not complied with the conditions of his contract. He sought to prove when he first actually knew of the conditions. The court refused the evidence, and the Supreme Court upheld the ruling, saying:

"The plaintiff, having assented to that contract by accepting and signing it, was bound by the conditions expressed in it, whether he did or did not read them or know what they were."

It is true that in that case the passenger had signed the contract. But it is a rule of law that one who takes the benefit of a written contract signed by another, though not by himself, is bound by its conditions in like manner as if he had signed it. In *Boering v. Chesapeake Beach Ry. Co.*, 193 U. S. 442, 24 Sup. Ct. 515, 48 L. Ed. 742, the plaintiff brought suit to recover damages for an injury which she sustained by the negligence of the defendant while riding with her husband in one of its coaches. She had a free pass which contained an exemption from liability for negligence. But she and her husband testified that she had not had the pass in her possession, and that her attention had not been called to the stipulation above mentioned; that her husband had attended to securing transportation and had obtained passes for both of them. Mr. Justice Brewer, delivering the opinion of the court, said:

"Accepting this privilege, she was bound to know the conditions thereof. She may not through the intermediary of an agent obtain a privilege—a mere license—and then plead that she did not know upon what conditions it was granted. A carrier is not bound, any more than any other owner of property who grants a privilege, to hunt the party to whom the privilege is given and see that all the conditions attached to it are made known. The duty rests rather upon the one receiving the privilege to ascertain those conditions. In *Quimby v. Boston & Maine Railroad*, 150 Mass. 365, 367 [23 N. E. 205, 5 L. R. A. 846], a case of one traveling on a free pass, and in which the question of the assent of the holder of the pass was presented, the court said: 'Having accepted the pass, he must have done so on the conditions fully expressed therein, whether he actually read them or not. *Squire v. New York Central Railroad*, 98 Mass. 239 [93 Am. Dec. 162]; *Hill v. Boston, Hoosac Tunnel & Western Railroad*, 144 Mass. 284 [10 N. E. 836]; *Boston & Maine Railroad v. Chipman*, 146 Mass. 107 [14 N. E. 940, 4 Am. St. Rep. 293].' So in *Muldoon v. Seattle City Railway Company*, 10 Wash. 311, 313 [38 Pac. 995, 996 (45 Am. St. Rep. 787)]: 'We think it may be fairly held that a person receiving a ticket for free transportation is bound to see and know all of the conditions printed thereon which the carrier sees fit to lawfully impose. This is an entirely different case from that where a carrier attempts to impose conditions upon a passenger for hire, which must, if unusual, be brought to his notice. In these cases of free passage the carrier has a right to impose any conditions it sees fit as to time, trains, baggage, connections, and, as we have held, damages for negligence; and the recipient of such favors ought at least to take the trouble to look on both sides of the paper before he attempts to use them.' See, also, *Griswold v. New York, etc., Railroad Company*, 53 Conn. 371 [4 Atl. 261, 55 Am. Rep. 115]; *Illinois Central Railroad Company v. Read*, 37 Ill. 484, 510 [37 Am. Dec. 260]. As was well observed by Circuit Judge Putnam in

Duncan v. Maine Central Railroad Company [C. C.] 113 Fed. 508, 514, in words quoted with approval by the Court of Appeals in this case: "The result we have reached conforms to the laws applicable to the present issue and to that moral sense which justly holds those who accept gratuities and acts of hospitality to perform the conditions on which they are granted."

In the present case a fraud was perpetrated upon the company and the tickets which it had issued for, and in the names of, persons whom it was proposed to benefit, were perverted to the use of those not so intended. There can be no doubt that when Brooks procured the tickets he contemplated the fraudulent use that was afterwards made of them. He presumed that in the press of crowded cars the conductor would not detect the imposition even if there were slight indications which, if carefully observed, might expose it. And there can be no reasonable doubt that this was what happened. There were a few, one or two in a hundred, of the passengers who likewise had special tickets, but of another appearance than those of the employés. But it is said that the fraud was contrived by Brooks, and that the plaintiffs were innocent of it. If this be so, it brought the plaintiffs into no nearer relation to the company than if Brooks had made counterfeit tickets and handed them to the plaintiffs. The result of the whole matter is that the company never came into any contract relations, express or implied, to carry the plaintiffs, and that, not having taken any measures to ascertain from the contract what conditions it contained, they were not protected by the tickets in the character of passengers, and had no right as against the company arising from the possession of them. Brooks was an "intermediary" in the procurement of the tickets.

It is said, and it appears to have been the view taken by the learned judge at the circuit, that he was not the agent of the plaintiffs, and it might be said that their adoption of his act was not a ratification of the means by which the tickets were obtained, because there was no information had by the plaintiffs of the fraudulent scheme concocted for their benefit. Jensen testified that he had the money and was intending to buy tickets for himself and wife, and that Brooks said "he would attend to that, or that he had attended to it," the witness was not certain which. In whose behalf was Brooks acting? How did Jensen understand it? It is clear from his testimony that he intended to pay for the tickets, and that he did not understand that Brooks had procured them on his own account and therewith make a present to the Jensens. The company did not sell or issue these tickets to Jensen. It issued them to Brooks. The jury found that Jensen did not in fact know what the tickets contained. His use of them therefore would not of itself amount to a ratification of Brooks' fraudulent scheme. But Jensen now sets up those tickets as efficient to make him a passenger and justify him in being on the train as such. Can he do this without adopting the means by which the tickets were procured and came to him? We greatly doubt the conclusion that Jensen is not chargeable with the action and knowledge of Brooks. In the case of *Boering v. Railroad Co.*, supra, where the husband procured the tickets and the plaintiff had not seen them, the court held that she was not excused from an examination of the ticket by the fact that she obtained

it through an "intermediary." But we rest our decision upon the other ground, that the plaintiffs were bound to inform themselves of the contents of their tickets, and that they cannot be absolved from the consequences upon the plea that their failure to discharge this obligation was owing either to ignorance, heedlessness, or indifference; and that, upon the fact specially found and the undisputed facts shown by the testimony, the plaintiffs were not entitled to recover.

The judgments must be reversed, with instruction to enter judgments for the defendant in the several cases notwithstanding the general verdicts.

HYGIENIC CHEMICAL CO. v. PROVIDENT CHEMICAL WORKS.

(Circuit Court of Appeals, Second Circuit. February 8, 1910.)

No. 142.

1. INDEMNITY (§ 1*)—CONTRACTS (§ 206*)—CONSTRUCTION—AGREEMENT TO SHARE IN COST AND EXPENSE OF DEFENDING SUIT—"COST."

An agreement between two parties, each threatened with suit for infringement of a patent, that they would join in the defense of any suit or suits brought against them for such infringement, "the cost and expense of such defenses to be equally borne by the parties hereto," was not a contract of indemnity, and did not entitle one party, against whom suit was brought and which made an unsuccessful defense, to recover from the other one-half the amount of the costs which were taxed against it in favor of the complainant as a part of the judgment recovered; the word "cost," as used in the agreement, having a different meaning from "costs," and the costs so taxed being no part of the "cost and expense" of the defense.

[Ed. Note.—For other cases, see Indemnity, Cent. Dig. § 1; Dec. Dig. § 1; Contracts, Cent. Dig. § 843; Dec. Dig. § 206.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1631, 1632.]

2. CONTRACTS (§ 206*)—CONSTRUCTION—AGREEMENT TO SHARE IN EXPENSE OF DEFENDING PATENT SUIT.

Two parties, each charged with infringement of a patent, being desirous of co-operating in testing its validity, entered into an agreement to share equally the cost and expense of defending any suit brought against either. Suit was brought against one, and both contributed to the defense; the result being that the patent was adjudged valid. Held, that the purpose of the contract had been fulfilled, and that the defendant in that suit could not be held liable for one-half the cost of defending a subsequent suit against the other; the only question open to litigation being that of infringement.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 843; Dec. Dig. § 206.*]

In Error to the Circuit Court of the United States for the Southern District of New York.

Action by the Provident Chemical Works against the Hygienic Chemical Company. Judgment for plaintiff (170 Fed. 523), and defendant brings error. Reversed in part.

In the following statement and opinion the parties are designated as in the Circuit Court. The plaintiff and the defendant are both corporations engaged in the drug and chemical trade. The Rumford Chemical Works is a corpora-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tion carrying on a similar business and claiming to own a certain patent, known as the "Catlin patent," for manufacturing granular phosphate. Prior to May 17, 1900, said Rumford Chemical Works claimed that the plaintiff and the defendant were infringing said patent and threatened suits against them and their customers. The plaintiff and the defendant, upon the advice of counsel, decided to test the validity of said patent, and for that purpose on said May 17, 1900, entered into the written agreement which is printed in full in the footnote,¹ but the especially relevant clause of which reads as follows: "The cost and expense of such defenses to be equally borne by the parties hereto."

About June 15, 1900, a suit for the infringement of said patent was brought by said Rumford Chemical Works against the present plaintiff, and it was defended by the attorneys appointed in pursuance of said agreement. Such suit was tried in the Circuit Court for the Southern District of New York (*Rumford Chemical Co. v. New York Baking Powder Co. et al.*, 125 Fed. 231), and was appealed from a decision therein dismissing the bill to this court, which reversed the decision of the Circuit Court and sustained the validity of said patent (134 Fed. 385, 67 C. C. A. 367). An application was made to the Supreme Court of the United States for a writ of certiorari to review the decision of this court, and such application was denied (195 U. S. 635, 25 Sup. Ct. 792, 49 L. Ed. 354). All the expenses connected with said suit have been paid by the parties to said agreement as therein provided, except as follows: The defendant has failed to pay its share of \$312.90 for attorney's fees in the matter of retaxation of costs, and it is conceded that the judgment to the extent that it includes one-half of said sum, viz., \$156.45, is correct; also, assuming that the costs taxed and awarded in said suit are a part of the "cost and expense" of the defense thereof, the defendant has not paid its proportion of the same. These taxable costs amount to \$4,646.46, and the plaintiff seeks to recover in this action one-half the amount thereof, viz., \$2,323.23, with interest.

About August 2, 1904, and subsequent to the decision of this court in the suit against the present plaintiff sustaining the validity of said patent, said Rumford Chemical Works brought a suit against the present defendant, charging the infringement of said patent, and alleging that the defendant, by participating in the defense of said first suit, became bound by the decision therein. Upon the evidence presented the Circuit Court dismissed the bill; but upon appeal this court reversed the decree of the Circuit Court, held that the defendant was privy to said first suit and that infringement was established,

¹ Memorandum of agreement, made this 17th day of May, 1900, by and between the Provident Chemical Works, a corporation of St. Louis, Missouri, and the Hygienic Chemical Co., a corporation of New York. Witnesseth:

Whereas the Rumford Chemical Works claims to be the owner of letters patent No. 474,811, dated May 17th, 1892, and further claims that the parties hereto and their respective customers and consumers are infringing said letters patent; and,

Whereas, the parties hereto are desirous of joining and co-operating for their mutual interests and protection herein:

Now, therefore, it is agreed between them as follows:

First. That any and all suits brought by said Rumford Chemical Works, its successors or assigns, under the said letters patent against the parties hereto, or any of their said customers and consumers, shall be fully and faithfully defended, as follows: If brought against any person or persons, firms or corporations, resident west of the Mississippi river or in the states of Wisconsin, Illinois, Mississippi, and Tennessee, the same shall be defended under the supervision of the said Provident Chemical Works through attorneys appointed by it; and if brought against a resident of any other of the United States the same shall be defended under the supervision of said Hygienic Chemical Company through attorneys appointed by it; the cost and expense of such defenses to be equally borne by the parties hereto.

Second. It is further distinctly understood and agreed that no settlement or agreement of any kind shall be entered into by either of the parties hereto with said Rumford Chemical Works, its successors or assigns in relation to such suits or said letters patent without the consent of the other party hereto in writing first obtained thereto.

Third. It is further agreed that the parties hereto shall give to each other immediate notice of any actions brought, or of any expense incurred from time to time.

In witness whereof, the parties have hereunto set their hands and seals the day and year first above mentioned.

Provident Chemical Works,
F. E. Udell, Pres't. [Seal.]
Hygienic Chemical Co.,
J. E. Heller, Pres't. [Seal.]

In presence of Felix Jellenix.

and directed a decree for the plaintiff. 159 Fed. 436, 86 C. C. A. 416. On writ of certiorari, however, the Supreme Court of the United States held that the evidence presented was insufficient to show that the defendant was privy to said first suit, and, consequently, that the only evidence showing infringement—a deposition in the first suit—was inadmissible. Therefore the Supreme Court reversed the decree of this court. 215 U. S. 156, 30 Sup. Ct. 45, 54 L. Ed. —.

After the decision of this court in the first-mentioned suit, the plaintiff herein notified the defendant that it would not be liable for any further costs or expenses connected with litigation between the Rumford Chemical Works and the defendant, upon the ground that the validity of said patent had been adjudged and that the defendant was bound by the decision. The defendant, however, denied that the plaintiff had any right to give such notice, and insisted that it would hold the plaintiff to said agreement of May 17, 1900. The defendant expended \$2,065.83 for attorney's fees and disbursements in the defense of said second suit subsequently to the entry of the final decision of this court sustaining the validity of said patent, and in its counterclaim in this action seeks to recover from the plaintiff one-half the amount thereof, viz., \$1,032.91. This action was tried upon an agreed statement of facts by the Circuit Court, which rendered a judgment for the plaintiff for the full amount of its demand, but dismissed the defendant's counterclaim upon the merits.

Jellenik & Stern (Nathan D. Stern, of counsel), for plaintiff in error.

Gardenhire & Jetmore (A. P. Jetmore, of counsel), for defendant in error.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

NOYES, Circuit Judge (after stating the facts as above). The first question in this case is whether the obligation of the defendant, under its agreement to defend suits and to bear equally with the plaintiff "the cost and expense of such defenses," required it to pay one-half the costs which the decree adjudged that the Rumford Chemical Works should recover from the plaintiff. If the agreement relates only to the cost and expense actually incurred in the conduct of the defense to the suit, it manifestly does not include these taxable costs. On the other hand, if the agreement amounts to an indemnity contract, it may embrace them.

We are unable to construe the agreement as one of indemnity. Suits were threatened against both the parties. If they had not defended jointly, they would have been obliged to defend separately or else default. They were "desirous of joining and co-operating for their mutual interest and protection." They undoubtedly believed that by aiding each other the suits could be more economically and successfully defended. They entered into a defensive alliance. But they were not voluntarily undertaking a joint venture. Considering the agreement as a whole, we see nothing in it to indicate an intention to assume each other's burdens—to pay jointly a decree for damages, profits, and costs, or any item thereof, which might result from an unsuccessful defense.

Nor is the clause in question, taken by itself, one of indemnity. It strains the words "cost and expense of such defenses" to hold that they embrace a judgment for costs rendered after the defenses have been concluded. The amount of the judgment rendered in an action is hardly a part of the expense of defending such action. The words

"cost" and "costs" do not always mean the same thing. The word "cost" and the phrase "taxable costs" generally have quite different meanings. "Cost" may be considered as synonymous with "expense." "Taxable costs" are allowances made to the successful party to reimburse him for his disbursements made in prosecuting or defending a suit. But to the unsuccessful party they are of the same nature as the damages awarded against him. He pays them because they are an incident to the judgment, not because they are any part of the expenses of his own defense.

But it is urged that the taxed costs should in this case be treated as a part of the expense of the defense, for the reason that, if there had been no defense, there would have been no costs. This reason is not entirely true. Some costs would have been taxed against the defendant, had no defense been interposed. And, if true, it cannot be regarded as a good reason. There is no ground for assuming that, in the absence of any agreement with the defendant the plaintiff would have permitted the Rumford Chemical Works to take a decree pro confesso against it. It cannot be said that suits would not have been separately defended if the agreement for mutual assistance had not been entered into.

For these reasons, we think that the trial court erred in rendering judgment for the plaintiff to recover one-half of the decree for costs.

The next inquiry relates to the defendant's counterclaim. The evident object of the agreement was that the parties should unite in the defense of suits, so as to test the validity of the patent. When the test suit had been decided by this court, and certiorari had been denied by the Supreme Court, we think that the contract did not contemplate new and further litigation. Its purpose had been fulfilled. There was no reason why the plaintiff should have borne any part of the subsequent expense in the second suit of trying the question whether the defendant had made or sold the infringing article.

But the defendant apparently contends that the recent decision of the Supreme Court of the United States in the second suit affords ground for the claim that the defendant was not bound by the decision of this court in the test suit, and could try the question of the validity of the patent on its own account. We do not so interpret that decision. It was wholly based upon the insufficiency of the evidence actually offered to show privity, and the Supreme Court intimated that, had the testimony in this case been present, its conclusion would have been different. And in view of the terms of the agreement in question, it is impossible to see why the defendant was not bound by the decree in the test case. It participated in, contributed to the expenses of, and had full right of control over, such litigation. The decision of the Circuit Court in dismissing the counterclaim was right.

The judgment of the Circuit Court in favor of the plaintiff is modified, by reducing it to \$156.45, with interest from February 1, 1905, and costs, and, as so modified, is affirmed, without costs in this court.

BIG BRUSHY COAL & COKE CO. V. WILLIAMS.

(Circuit Court of Appeals, Sixth Circuit. January 24, 1910).

No. 1,972.

1. TRIAL (§ 420*)—MOTION TO DIRECT VERDICT—EXCEPTION—WAIVER.

An exception to the denial of defendant's motion to direct a verdict in its favor at the close of plaintiff's evidence was waived by defendant's introduction of evidence in its own behalf.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 983; Dec. Dig. § 420.*]

2. TRIAL (§ 139*)—MOTION TO DIRECT VERDICT—WEIGHT OF EVIDENCE.

It is not the province of a court to weigh the evidence, when considering a motion to direct a verdict at the close of all the testimony; and that motion must be overruled when the testimony offered by plaintiff, if believed, supports the petition.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341; Dec. Dig. § 139.*]

3. MASTER AND SERVANT (§ 286*)—INJURIES TO SERVANT—MINES—NEGLIGENCE.

In an action for injuries to a miner by the fall of material from the roof, evidence held to require submission to the jury of defendant's negligence in permitting plaintiff to work in the room with knowledge that the roof was dangerous.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1026; Dec. Dig. § 286.*]

4. NEW TRIAL (§ 157*)—EVIDENCE—WEIGHT.

It is the duty of a trial judge, in considering a motion for a new trial, to weigh the evidence.

[Ed. Note.—For other cases, see New Trial, Dec. Dig. § 157.*]

5. APPEAL AND ERROR (§ 977*)—MOTION FOR NEW TRIAL—REVIEW.

The action of a trial court on a motion for a new trial is a matter of discretion, and not reviewable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3865; Dec. Dig. § 977.*]

6. APPEAL AND ERROR (§ 263*)—REVIEW—INSTRUCTIONS—NECESSITY OF EXCEPTIONS.

Where no exception was taken to the charge, and a special instruction was given at defendant's request, the instructions cannot be reviewed on defendant's writ of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1516-1532; Dec. Dig. § 263.*]

In Error to the Circuit Court of the United States for the Eastern District of Tennessee.

Action by William Williams against the Big Brushy Coal & Coke Company. Judgment for plaintiff, and defendant brings error. Affirmed.

This suit was brought in the circuit court of Morgan county, Tenn., and subsequently removed to the court below on the ground of diversity of citizenship. Williams commenced the action to recover \$10,000, and alleged in the declaration that the coal company owned and was operating a coal mine in Morgan county, with a tram road running into the mine; that the company employed him as a miner; that his duty was to dig and load coal into cars, and for that purpose to occupy and take care of his room; that while working in the mine he was permanently injured by the falling of rock and slate. Various acts of negligence are alleged against the company, which may be summarized thus:

*For other cases see same topic & § NUMBERS in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Failure of the company to give Williams a safe place in which to work, or to furnish him with sufficient timbers to prop, or itself duly to prop, or to inspect, or to give instructions, or to warn him of the peculiarly dangerous character of his work, owing to the presence of "many horse backs, bell splits, and hill seams" in his room, including its roof, of all of which Williams was ignorant and the company had knowledge. The company's plea was one of not guilty.

The trial took place before the court and a jury, and resulted in a verdict in favor of Williams for \$7,000. Two motions were made by the company to direct a verdict in its favor, one at the close of Williams' evidence, and the other at the close of all the evidence. Both were overruled. Certain testimony was received against exception of the company, which will be noticed in the opinion. Motion for new trial was overruled, and judgment entered. The case is pending here on proceedings in error.

R. B. Cassell, for plaintiff in error.

Forest W. Andrews, for defendant in error.

Before LURTON, SEVERENS, and WARRINGTON, Circuit Judges.

WARRINGTON, Circuit Judge (after stating the facts as above). The errors assigned are for the most part involved in the issues of fact, which were stated and submitted by the court in its charge to the jury, and are answered by the verdict and judgment. No exception was taken to the charge. The chief complaint is that there was no evidence upon which to found the verdict or judgment. It is stated in the charge:

"The controversy seems to be as to whether the rock that fell upon the miner was exposed by the plaintiff digging and removing the coal under it, and which supported the rock, or whether the rock had been exposed by those who had mined in this same room prior to the plaintiff's operations there."

There is no conflict of evidence concerning the identity of the room of the mine in which Williams was working at the time of his injury, or the fact that the rock fell from the roof of the room. There is conflict touching the exact portion of the roof from which the rock fell; some of the witnesses stating that it broke at the face of the coal, and some that it broke six or eight inches away from the face, and nearly all saying that it extended thence three to four feet. At the time the rock fell, Williams was either stepping into or walking toward the end of the track on which cars for transporting coal in the mine were operated, and must have been struck by the outer portion of the rock. It is reasonably clear that the coal formerly sustaining the rock had been removed, and the rock exposed, before Williams began to work in the room. There is conflict, however, as to whether he caused the rock to fall by certain work he was doing in the face of the coal, partially within lines corresponding to the width of the falling rock and below the roof of the room. The conflict involves both the nature and extent of this work. It was stated that he prepared a place for a shot and that he fired it; but both Williams and his son, who was working with him, denied that any shot was fired. It is sufficient to say, without going into details, that testimony was given on both sides of the question.

Several other issues of fact grew out of the controversy just commented on. One was whether Williams had been given his choice of any one of three rooms in which to mine coal, and had promised to re-

port his selection, and that he had selected room 28 without giving notice. But the testimony on this point resulted in an assertion of the company's mine foreman and a denial of Williams. Still another issue of fact arose out of a claim of the company that the room was unsafe and that Williams was employed to make it safe. This kind of service was called "company work," and was paid for by the day, while mining coal was paid for by the ton mined. The company's assistant foreman testified that, about two days before Williams began work in room 28, he told Williams that the room was in bad shape, and that some slate in it would have to be taken down before the room would be safe to work in. (In the testimony, and in the charge, the material in the roof of the room was sometimes called rock, and at other times slate.) This foreman further testified in substance that he told Williams to remove the slate and fix the place for work, and that Williams said he would. But Williams contradicted this testimony.

Further issues of fact were made concerning alleged failure of the company to cause the room to be inspected and put in a safe condition, and also failure of Williams himself to inspect it and acquaint himself with its condition. It was quite consistent for the company to claim that it had the room inspected, and so learned of its condition; for, as just shown, it claimed to have engaged Williams to make it safe. But it is not easy to reconcile the two positions taken by the company: First, that Williams was given the choice of three rooms, including room 28, in which to mine coal; and, next, that Williams was employed to put that room in safe condition for mining coal. To take the first position was to say that the company did not know that the room was in a dangerous condition; to take the second was to assert that it did.

But, apart from this seeming inconsistency, Williams testified that no officer of the company inspected the room while he was working in it. The mine foreman, who said that he gave Williams the choice of the three rooms, and his assistant, who stated that he had employed Williams to make the room safe, testified that some days before Williams began to work in the room they each discovered loose top in it. One man, however, who worked in the room shortly before Williams worked there, testified that the assistant had told him there was no danger in the room, and accused him of being afraid of it. Williams testified that, when he began his work in the room, he tested the top with a pick, and called for props, and placed them where he thought necessary for his protection. He also testified, in substance, that he had never been in the room before and had been given no warning; also that there was nothing to put him on his guard, further than he discovered and attempted to provide against. This is sufficient to show that there was also conflict in the testimony touching the last-mentioned issues of fact.

But in considering the foregoing issues of fact, and the conflict of testimony concerning them, we must not lose sight of the question: What was Williams' real employment? He testified in effect that he was employed to mine coal in this room; the mine foreman telling him to work in the room in question, and the assistant pointing it out. The testimony is reasonably clear that Williams did in fact mine coal in

that room for at least three days before his injury, and that he was paid for the work by the ton. It is true that, for purposes of his own mining, he did such propping as is usual in a place of ordinary safety; but he was not in fact occupied in what was known as "company work" for making a dangerous place safe. Could the company close its eyes to what its employé was thus in truth doing? Can the company justly complain against a finding that it was not in the exercise of ordinary care in thus engaging and permitting a person to mine coal, where its mine foreman and his assistant testified that at that very time they knew there was loose top in the room? If the company's testimony is to be believed, it should not have tolerated mining in this room until it was made safe. If Williams' testimony is to be believed, the danger claimed to have been known by the company's officers was not apparent to the average miner. But it is not necessary to pursue the subject further.

Turning, now, to the assignments of error, we think they must be overruled. The company waived the exception taken to the overruling of its motion to direct a verdict in its favor at the close of the evidence offered by plaintiff. *Leonard Martin Construction Co. v. Highbarger* (decided by this court November 2, 1909) 175 Fed. 340, 342. It was not the province of the court below to weigh the evidence, when considering the motion to direct at the close of all the testimony. The motion must be overruled, where the testimony presented by the plaintiff, if believed by the jury, will support the petition. *Mt. Adams & E. P. Inclined Ry. Co. v. Lowery*, 74 Fed. 463, 477, 20 C. C. A. 596; *Central Union Depot & Ry. Co. v. Mansfield*, 169 Fed. 614, 95 C. C. A. 142; *Norfolk & W. Ry. Co. v. Hazelrigg*, 170 Fed. 551, 95 C. C. A. 637; *L. S. & M. S. Ry. Co. v. J. Eder, Jr.* (decided December 7, 1909) 174 Fed. 944; *Noble v. C. Crane & Co.*, 169 Fed. 55, 94 C. C. A. 423; *Van Stone v. Stilwell & Bierce Mfg. Co.*, 142 U. S. 128, 135, 12 Sup. Ct. 181, 35 L. Ed. 961. In our opinion there was such testimony. The weight of evidence and the extent and effect of contradiction present questions for the jury. *Crumpton v. United States*, 138 U. S. 361, 363, 11 Sup. Ct. 355, 34 L. Ed. 958.

When, however, the trial judge came to consider the motion for a new trial, he was required to weigh the evidence. It was said by this court in regard to the duty of the trial judge in passing upon a motion for a new trial, the present Mr. Justice Lurton announcing the opinion, in *Mt. Adams & E. P. Inclined Ry. Co. v. Lowery*, supra (74 Fed. 477, 20 C. C. A. 609):

"In passing upon such motions he is necessarily required to weigh the evidence, that he may determine whether the verdict was one which might reasonably have been reached."

In the opinion of the court below overruling the motion for a new trial, this appears:

"I have gone carefully over the grounds assigned upon which the defendant bases its motion for a new trial, and am of the opinion that the motion must be disallowed. * * * The questions of the negligence of the defendant and of the contributory negligence of the plaintiff were submitted to the jury, and they found for the plaintiff. I think the proof warrants this finding by the

jury. As to the question as to the amount of the verdict, I am of the opinion that it was reasonable, in view of the severe injuries that the proof discloses were inflicted upon the plaintiff."

The case therefore falls within the settled general rule that the granting or refusing of a new trial is a matter of discretion, and not subject to review. In *Louisville & N. R. Co. v. Summers*, 125 Fed. 719, 723, 60 C. C. A. 487, 491, Judge Severens said:

"It has been often said by this court that it will not review the action of the lower court in its disposition of a motion for a new trial, or other matters addressed to its discretion."

See, also, *L. S. & M. S. Ry. Co. v. J. Eder, Jr.*, supra; *Illinois Cent. R. Co. v. Coughlin*, 145 Fed. 37, 75 C. C. A. 262; *Railway Company v. Heck*, 102 U. S. 120, 26 L. Ed. 58; *Wilson v. Everett*, 139 U. S. 616, 621, 11 Sup. Ct. 664, 35 L. Ed. 286; *Van Stone v. Stilwell & Bierce Mfg. Co.*, supra, 142 U. S. 134, 12 Sup. Ct. 181, 35 L. Ed. 961.

The assignment respecting admission of testimony in regard to the duty to place props in position for mining purposes does not, in our view of the testimony relating to the previous exposure of the rock and the apparent knowledge of the company touching the condition of the roof of the room, present any question of prejudicial error.

We have not found it necessary to consider the statute of Tennessee providing for the regulation and inspection of mines. We do not think its provisions were involved or applied, at least in any prejudicial sense. Nor is it important to consider the decisions cited and relied on so confidently by learned counsel for the coal company. We think the law applicable to the trial of the cause is to be found in the clear and impartial charge of the learned trial court. No exception was taken to it, as before stated, and the only special instruction asked by the company was given. The law, then, as stated in the charge and the special instruction, is not now open to review. *Railway Company v. Heck*, supra.

The judgment must be affirmed, with costs.

CALIFORNIA NAVIGATION & IMPROVEMENT CO. v. UNION TRANSP. CO. et al†

(Circuit Court of Appeals, Ninth Circuit. February 21, 1910.)

No. 1,769.

1. COLLISION (§ 123*)—DAMAGES—BURDEN OF PROOF.

The burden of proof to establish the amount of damages recoverable for an injury to a vessel in collision rests upon the party demanding compensation.

[Ed. Note.—For other cases, see *Collision*, Cent. Dig. §§ 259-261; Dec. Dig. § 123.*]

2. COLLISION (§ 124*)—MEASURE OF DAMAGES—EVIDENCE.

Where a vessel sunk in a river by collision was not surveyed, was allowed to remain four months before being raised, was injured by rough and unskillful handling in raising, and allowed to stand in a port for eight months longer full of water and without care or protection, whereby she

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied April 25, 1910.

was further seriously damaged, the price at which the wreck was then sold cannot be taken to indicate her value after collision; but the only way in which the damages caused by collision can be even approximately estimated is to establish her value before collision and immediately afterward before being raised, which must be shown by competent evidence, and subtract one from the other.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 265; Dec. Dig. § 124.*]

Appeal from the District Court of the United States for the Northern District of California.

Petition in admiralty by the California Navigation & Improvement Company; the Union Transportation Company and others, claimants. From the decree, petitioner appeals. Retained for further proof.

Charles Page, Edward J. McCutchen, Samuel Knight, and A. L. Levinsky, for appellant.

Nathan H. Frank (Campbell, Metson & Campbell, of counsel), for appellees.

Before GILBERT and ROSS, Circuit Judges, and HANFORD, District Judge.

HANFORD, District Judge. The litigation in this case is to determine the rights and liabilities of the respective parties consequential to a collision between the *Mary Garratt* and the *Dauntless*, two stern wheel river steamboats, which happened on the San Joaquin river, in the month of August, 1901. The *Mary Garratt* rammed the *Dauntless*, cutting a large hole in her side, admitting a flow of water which caused her to sink. By a petition filed conformably to the statutes and rules, under which a shipowner may avoid liability for a maritime tort in excess of the value of the offending vessel and her pending freight, the owner of the *Mary Garratt*, which is now the appellant in this court, contested its liability for any damages, and also prayed that its liability, if any, be limited as the statute prescribes. The owner of the *Dauntless* appeared and answered the petition, and, after a trial upon the issues joined, the District Court rendered an interlocutory decree placing the blame for the collision upon the management and navigation of the *Mary Garratt*, and granting the petition for a limitation of liability. Thereupon the case was referred to a commissioner to ascertain and report the amount of the damages. He reported the amount of damages to be \$35,834, which amount exceeds the appraised value of the *Mary Garratt* and her pending freight. That award was confirmed by the District Court, and a final decree was entered accordingly for a pro rata share of the available fund, and an appeal was then taken to this court. The appellant does not now dispute the correctness of that part of the District Court's decision which fixed the responsibility for the collision upon the officers and crew of the *Mary Garratt*, and the appeal brings to this court for decision only the remaining question as to the amount of damages which the owner of the *Dauntless* is lawfully entitled to recover.

The general principle governing courts of admiralty in assessing damages recoverable by the owner of an injured vessel free from fault, in a suit against an offending vessel or her owner, has been clearly

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

stated by this court in an opinion written by Judge Morrow, in the case of *The Rickmers*, 142 Fed. 305, 73 C. C. A. 415, as follows:

"*Restitutio in integrum* is the rule of damages in collision cases, and, where repairs are practicable, the general rule followed by admiralty courts in such cases is that the damages assessed against the respondent shall be sufficient to restore the injured vessel to the condition in which she was at the time the collision occurred. *The Baltimore*, 8 Wall. 377, 385, 19 L. Ed. 463; *The Atlas*, 93 U. S. 302, 307, 23 L. Ed. 863. If, however, the injuries are of such a character that they cannot be repaired at reasonable cost, an allowance may be made for actual or permanent depreciation, for the reason that an attempt to make complete repairs would involve an expense greatly disproportionate to the amount of such depreciation. *Petty v. Merrill*, 9 Blatchf. 449, Fed. Cas. No. 11,050. But this allowance in a collision case is subject to the general rule that damages which are uncertain, contingent, or speculative cannot be recovered, and under this rule it has been held that there is uncertainty when the nature of the damage cannot be determined. It follows that, to recover damages over and above repairs for actual cost or permanent depreciation, the nature of such damages must be clearly established, and not be left to speculation or uncertainty."

This court deems the rule thus stated to be applicable to the case in hand, and will endeavor to make an award of damages as nearly as possible commensurate with the amount of the loss proved, or which may be proved. In this connection it is to be observed that the onus probandi rests upon the party demanding compensation to prove his loss and the facts necessary to be ascertained and considered by the court in fixing the definite sum to be awarded. From the evidence it appears that the owner of the *Dauntless* declined to accept an offer made by a competent contractor to raise the steamboat promptly and deliver her at either San Francisco or Stockton for the gross sum of \$5,000, and instead of that, by intermittent efforts, under the direction of several superintendents, successively, without efficient apparatus and power, the boat was raised and delivered at Stockton four months after the collision. It will be assumed that the cost of salving was \$5,500, although the evidence as to the amount expended is secondary and unsatisfactory. Instead of proceeding promptly to repair the injured vessel, her owner waited until one year after the collision, and then sold the wreck at private sale for \$9,500. She was then in a dilapidated condition, she was waterlogged, her upper decks and cabins were gone, her hogchains and smokestack were gone, and her hull was bulged up in the middle. In his testimony, the man who made the purchase said:

"Q. She had been repaired, and was then in Stockton? A. No, sir; not repaired. She had been floated and brought to Stockton. Her hull was full of water when I bought her. * * *

"Mr. Frank: Q. You had to reset the machinery, repair it, and clean it up? A. Yes, sir; we had to lift the wheel out. In fact, the wheel was mostly all gone—the buckets gone. We had the wheel hanging on a crane while we put the boat in dock to try and get her straightened up. The center of the boat had come up in such a shape was one reason that we got her so cheap. In the judgment of most of the steamboat men I talked to, we would never be able to get her back to shape, because the middle of her had come up in the middle, and the hogchains were all gone."

Mr. Tucker, a witness called in behalf of the owner of the *Dauntless*, testified that after being floated the boat was pumped dry, and that she was not hogged when she was delivered at Stockton; and

there is uncontradicted evidence proving that the hull was weakened by loosening or removing the hogchains while the work of raising the vessel was progressing. Consideration of all the evidence necessarily leads to the conclusion that there must have been considerable diminution of value of the vessel by reason of deterioration during the period of eight months preceding the sale. It is probably impossible now to prove with proximate accuracy the necessary cost of restoring the *Dauntless* to the condition which she was in previous to the collision.

It is usual, when a vessel has been injured under circumstances giving rise to claims by her owner for damages or insurance, to have a survey for the purpose of ascertaining the extent of the injuries and estimating the cost of repairs; but the record fails to show that there was any survey in this case. This omission is the more regrettable by reason of the neglect of the witnesses who might have qualified themselves to give intelligent testimony as to facts affecting the question of damages to notice or remember the most important details or to ascertain or estimate either the value of the boat in her wrecked condition or the cost of repairs. Mr. Whitelaw sent a representative of his wrecking company to make a survey for the purpose of estimating the cost of repairing the vessel, and it is probable that he might give desirable information; but he was not called to testify.

As at present advised, the court holds that the only way in which the damages may be liquidated, consonant with equity, will be by allowing to the owner of the injured vessel a sum, as nearly as can be ascertained, equal to the difference in her value before the collision and in her condition after sinking and before any expenditure for raising her had been made. This is apparently what the commissioner endeavored to do; but his award is certainly erroneous, because not based upon proof of all the essential facts. It is obviously unfair to accept the price which the vessel was sold for at private sale after further deterioration, by rough usage in raising her and for want of care during a long period of time, as the criterion for judging her value at the time when the liability of the petitioner became fixed. To ascertain the difference between the values in the different conditions of the vessel, both factors must be given so that the lesser may be subtracted from the greater. To render a just decision, the court should be informed by evidence as to her value or condition in the situation in which she was immediately after the collision and the reasonable cost of her restoration. We do not find in the record any competent evidence covering this ground, and unless it can be supplied the court must either deny adequate compensation or make an arbitrary award as would be necessary in assessing damages for a physical injury to a person.

Being in this dilemma, the court will withhold its decision, for the purpose of giving the parties time in which to make application for leave to submit further proof, and if it can be shown that competent evidence can be produced the case will be referred to a commissioner, to report such evidence to the court.

MURPHY et al. v. TANNER et al.

(Circuit Court of Appeals, Eighth Circuit. February 14, 1910.)

No. 2,986.

PUBLIC LANDS (§ 25*)—BOUNDARIES—CONCLUSIVENESS OF SURVEY.

In an action of ejectment by one having title by patent from the United States against a mere homestead claimant, it is not competent for the latter to attack the correctness of a United States government survey of the land in controversy.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 25.*]

In Error to the Circuit Court of the United States for the District of Minnesota.

Action by William A. Murphy and others, as executors and trustees under the will of Simon J. Murphy, deceased, and others, against Malinda Tanner and Michael Cronin. Judgment for defendants, and plaintiffs bring error. Reversed in part.

This is an action of ejectment commenced in the United States Circuit Court for the District of Minnesota, to recover the possession of certain land described in the complaint and claimed to be a part of lots 1 and 2, in the south-east quarter of section 34, township 58 north, range 17 west, and of lots 1 and 2 of section 3, township 57 north, range 17 west. A jury being waived, the trial was by the court, and judgment was entered for the defendants. Plaintiffs thereupon sued out this writ of error to review that judgment. The following facts, among others, were found by the trial court:

In 1876 township 57 north of range 17 west, St. Louis county, Minn., was ordered by the General Land Office of the United States to be surveyed, and a contract for the survey thereof was made by the United States Surveyor General of the State of Minnesota with one Henry S. Howe, who, by said contract, was constituted a deputy United States surveyor for said purpose. Under said contract, said Howe was required, and undertook and agreed, to survey said township, to run all section lines, and to set posts marking all sections and quarter section corners, throughout said township where the same could be marked, and accurately to meander and establish upon the ground meander posts of all lakes and streams found to exist within said township. That under said contract, said Howe ran and marked on the ground the exterior lines of said township and located and established by the setting of corner posts and the marking of bearing or witness trees, all section and quarter section corners on said exterior lines as described in his field notes, except on the south line of said township, which line had been previously surveyed; and he marked the northwest corner of section 36, and also set a meander post and witness tree on the north line of the township, where such line running west from the northeast corner of said township encounters the east shore of Cedar Island Lake. But that said Howe did not survey the interior of said township, or establish upon the ground any corners, monuments, or lines in the interior of said township, or establish on the ground any meander post on said Cedar Island Lake other than the one above described, or mark any bearing tree therefor, other than the northwest corner of section 36. That said Howe made and filed with the Surveyor General what purported to be field notes of his survey, giving the length and direction of all section and meander lines, the location of all section and quarter section and meander corners and bearing trees, the character of the soil and timber, and all the other data required by the United States Statutes and the rules of the General Land Office.

Said field notes were approved August 7, 1876, and thereafter a plat was prepared in the Surveyor General's office showing the township as described in said field notes, a certified copy of this plat was filed in the Land Office

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

at Duluth, August 24, 1876, and another certified copy filed in the General Land Office August 23, 1876, and said plat was duly approved by the Commissioner of the General Land Office. Said field notes, with the exception of the description of the establishment of monument, and witness trees on the east, north, and west exterior lines of the township, and of said northwest corner of section 36 and the meander posts on the east side of said Cedar Island Lake, were not based upon any personal knowledge or inspection of the interior of said township, or upon any actual survey thereof, and were entirely fictitious and fraudulent. In said township there existed at said time, and still exists, numerous lakes of large size, of a deep and permanent character, at least three of which are from a mile and half to two miles in length, with sharply defined, wooded banks, which would be crossed by the section lines described by said Howe in his field notes, none of which lakes are referred to or purported to be meandered or described in said field notes; and said field notes were in fact with the aforesaid exceptions false and fraudulent. According to said Howe field notes and said plat, Cedar Island Lake existed in the northerly part of said township in sections 2, 3, 4, 9, 10, and 11; but said lake had in fact an area much smaller than represented in said field notes and plat. The land lying between the actual shore of said lake and the pretended meander thereof appeared as water on said plat. At the time of the said Howe survey and ever since said land was high and rolling, covered with a heavy growth of timber down to the edge of said lake, and the soil was well adapted to agricultural purposes, and said lake was and is a deep, permanent body of water, having steep banks except about the outlet. The said pretended meander line of said lake described by Howe in his field notes and in said plat did not approach the actual water line of said lake, nor truly conform to or delimit the same in any respect except where said line encountered the north line of said township, where the same crosses an arm of said lake, which arm projects into township 58 on the east side of the lake at the meander post on the east side thereof. The land in controversy in this action is a portion of said land in section 3, lying between said pretended meander line and the true shore of said lake. By the field notes and plat of the said Howe survey, it appears that at the points where the section lines and the town line intersect the shores of said lake meander posts were established, and the distances between such meander posts and the nearest section or quarter section corners on the same section or town lines is also stated in said field notes and shown upon the plat; whereas, in truth and in fact no such meander posts except the one on the east side of said Cedar Island Lake were ever established, nor were such distances in fact measured.

In 1878 township 58 north, range 17 west, St. Louis county, Minn., was surveyed by Frank N. Howe, deputy United States surveyor, and said survey was duly approved and the official plat accepted and filed in the Land Office at Duluth and in the General Land Office at Washington, D. C. That the field notes of said Frank N. Howe, on said survey as to the south township line of said 58—17, correspond and agree with the field notes of said Henry S. Howe in his survey of 57—17 as to all the section and quarter corners on the north township line of 57—17, the pretended meander corner 25 links east of the quarter corner on the north line of section 3, 57—17, and the meander posts on the east side of Cedar Island Lake. Between December, 1879, and March, 1887, all of the government lots in said township 57—17, shown upon the said plat of the said Henry S. Howe survey, were patented by the United States pursuant to the laws relating to the disposal of public land. All of said patents contained, after the description, the following clause usual in such patents:

"According to the official plat of the survey of the said land returned to the General Land Office by the Surveyor General."

In 1893, the settlers who settled upon the lands lying between the true shore of Cedar Island Lake and the said Henry S. Howe pretended meander line petitioned the government to survey said land, claiming it was unsurveyed government domain. Such petition was finally acted upon favorably. Pursuant to such determination, a hearing was had before the Surveyor General of Minnesota June 13, 1895, and his report, dated June 21, 1895, that said land was unsurveyed, was confirmed by the Secretary of the Interior, and

said land was then ordered by the Commissioner of the General Land Office to be surveyed. The plaintiffs in this action thereupon brought an action for injunction against the Surveyor General and deputy surveyor to restrain them from making such survey, claiming to be the owners of said land under patents from the United States, and an injunction was granted by the trial court, but the Supreme Court on April 6, 1903, held that such injunction would not lie. 189 U. S. 35, 23 Sup. Ct. 599, 47 L. Ed. 698.

After said decision of the Supreme Court of the United States had been rendered, one Edward L. Faison, an examiner of surveys in the Land Department of the United States, was duly authorized and instructed by the Commissioner of the General Land Office to survey, establish, and permanently mark on the ground the meander corners and the meander line of said Cedar Island Lake as described in the field notes of the survey of said Henry S. Howe, and as delineated upon the official plat of said survey, which meander line was described by said commissioner as the "Old Meander Boundary" between patented lands of the United States and unpatented public land to be surveyed by said Faison. Pursuant to said authority and instructions, said Faison surveyed and marked upon the ground a line which he designated as the "Old Meander Boundary of Cedar Island Lake" as described as aforesaid by the said Henry S. Howe, and surveyed all of the land lying between the said meander boundary as the same was marked upon the ground by said Faison and the actual water line of said Cedar Island Lake, and duly made return and filed field notes of such meander line and survey, which were thereafter duly approved by the proper land officials of the United States. A plat of said survey was thereafter duly made, approved, and filed in the office of the Commissioner of the General Land Office, the Surveyor General of the State of Minnesota, and the United States Land Office at Duluth, Minn. Said survey is known as the "Faison survey."

After the making of said Faison survey as aforesaid, protests against the approval thereof and of said plat were filed in the General Land Office of the United States, and a hearing thereon was duly had before the Commissioner of the General Land Office. Said protests were thereafter overruled by said commissioner, and said survey and said plat thereof were approved. Thereafter the defendant Tanner and others petitioned the Commissioner of the General Land Office of the United States to have surveyed a strip of government land in said township 57 north, range 17 west, lying between the Faison meander line as located by him on the ground and the true location of the Henry S. Howe pretended meander line, if correctly located on the ground, alleging and claiming that said Faison had not correctly located said line, and that there was a strip of government land still unsurveyed between the meander line as located on the ground by Faison and the said Howe pretended meander line, if correctly located on the ground, and which, if correctly located, would be the southern boundary line of plaintiffs' lots. This application was on the 28th day of November, 1905, refused by said commissioner. Thereupon the said applicants appealed from said decision of the Commissioner to the Secretary of the Interior, and the said secretary on the 25th day of October, 1906, affirmed the said decision of the Commissioner of November 28, 1905. That thereafter the said applicants filed a motion for review of the said decision of October 25, 1906, affirming the decision last aforesaid, which motion for review was on the 28th day of February, 1907, denied by the Secretary of the Interior. That thereafter another motion for review was made which was also denied by the said Secretary of the Interior. Thereafter said defendant Tanner filed with the Secretary of the Interior a petition for an order to set aside the survey made by said Faison as aforesaid for the purpose of including in a survey of said public lands certain land alleged by said petitioner to lie northerly of the meander boundary established by said Faison in sections 3 and 4 of township 57 north of range 17 west. Said petition, after due hearing and consideration, was denied by the Secretary of the Interior by decision dated December 13, 1907. That the plaintiffs are not the owners of or entitled to the possession of the tract of land described in the complaint by reason of being the owners of the government lots heretofore described.

There are other findings of the trial court in the record based upon the evidence introduced by the defendant in error Tanner, for the purpose of impeaching the integrity of the Faison survey, which, for reasons to be hereafter stated, will not be set forth.

M. H. Stanford, for plaintiffs in error.

J. B. Middlecoff, for defendant in error Tanner.

John R. Vanderlip (George P. Wilson, R. R. Briggs, and A. L. Agatin, on the brief), for defendant in error Cronin.

Before HOOK and ADAMS, Circuit Judges, and CARLAND, District Judge.

CARLAND, District Judge (after stating the facts as above). The plaintiffs in error, by reason of being the undisputed owners of the original government lots described in the statement of facts above set forth, claim that their ownership of such lots extend to and are bounded on the southerly side by the shore of Cedar Island Lake. It is conceded that these lots were patented by the government of the United States, and that the respective parcels of land were in the respective patents described as "according to the official plat of the survey of said lands returned to the General Land Office by the Surveyor General." It is also admitted that the respective government plats of said townships represented said lots as bordering on said lake as a boundary, and that said plats were in accordance with the field notes of the respective surveys of said townships returned to the General Land Office by the Surveyor General. It is also admitted that the meander line of said lake, as shown by said plats and field notes, is not coincident with the actual shore of said lake, and that a considerable amount of high rolling land exists between the actual shore of said lake and the meander line thereof as shown by said plat and field notes. The defendants in error, Tanner and Cronin, are homestead settlers upon the land, possession of which is asked in this action by plaintiffs in error. Defendant in error Cronin does not make claim to any land lying north of the Howe meander line as established by Faison. Therefore, in the view which we take of the case, the judgment of the trial court as to him will be affirmed. Defendant in error Tanner claims land lying north of the Howe meander line as established by Faison on the theory that Faison did not establish the Howe meander line correctly according to the field notes and the plat of survey. The trial court held that plaintiffs in error were entitled only to the number of acres called for in the patent for the government lots hereinbefore mentioned. It, therefore, not only refused plaintiffs in error the right to go to the lake for the southern boundary of their lots, but also refused to let them go to the Howe meander line as established by Faison. The question presented for decision therefore is: Where is the southern boundary line of the government lots in question? Is said line the actual shore of Cedar Island Lake, or is said line the meander boundary line of Howe established upon the ground by Edward L. Faison, or is it a proportional line which would give plaintiffs in error the number of acres mentioned in the patents for the government lots hereinbefore described?

In view of the decision of the Supreme Court of the United States in the case of Security Land & Exploration Company v. Burns, 193 U. S. 167, 24 Sup. Ct. 425, 48 L. Ed. 662, we think the claim of the plaintiffs in error that they are entitled to go to the shore of the lake for the southern boundary must be denied. It is true that some of the land now in controversy is nearer the lake than was the land involved in the case cited; but, in view of the conceded fact that the Howe survey and the plat thereof was fraudulent and fictitious so far as the lake is concerned, we do not see how any legal right can be based thereon. We, therefore, upon the authority and reasoning of the Burns Case, hold that plaintiffs in error are not entitled to go to the lake for their southern boundary. While the Supreme Court in the case cited decided that the lake could not be held to be a natural boundary and that the meander line of Howe was not a true meander line, it did decide that the meander line should be considered as a boundary line and not a meander line. At the time of the decision of the Supreme Court in the Burns Case, the Faison survey was not before that court, if, indeed, it had been made at that time. It appears, however, from the facts found, that in 1893 settlers who had settled upon the land lying between the true shore line of Cedar Island Lake and the pretended meander line of Howe petitioned the government of the United States to survey said land claiming the same to be unsurveyed government domain. Such petition was finally acted upon favorably. Pursuant to such determination, a hearing was had before the Surveyor General of Minnesota June 13, 1895, and his report, dated June 21, 1895, that said land was unsurveyed, was confirmed by the Secretary of the Interior, and said land was then ordered to be surveyed by the Commissioner of the General Land Office. That subsequently one Edward L. Faison, an examiner of surveys in the Land Department of the United States, was duly authorized and instructed by the Commissioner of the General Land Office to survey, establish, and permanently mark on the ground the meander corners and the meander line of Cedar Island Lake as described in the field notes of the survey of Henry S. Howe, and as delineated upon the official plat of said survey, which meander line was described by said commissioner as the "Old Meander Boundary" between patented lands of the United States and unpatented public lands, to be surveyed by said Faison. Pursuant to said authority and instructions, said Faison surveyed and marked upon the ground a line which he designated as the "Old Meander Boundary" of Cedar Island Lake as described by Henry S. Howe, and surveyed all of the land lying between the said meander boundary as the same was marked upon the ground by said Faison and the actual water line of said Cedar Island Lake and duly made return and filed field notes of such meander line and survey which were thereafter duly approved by the proper land officials of the United States, and a plat of said survey was also thereafter duly made, approved, and filed in the office of the Commissioner of the General Land Office, the Surveyor General of Minnesota, and the United States Land Office at Duluth. It also appears from the findings of fact made by the trial court that, ever since the Faison survey was made, it has been attacked by parties interested, including the defendant in error Tanner, before the De-

partment of the Interior, charged by law with the survey and disposal of the public lands of the United States, and that department has down to the present time consistently refused to set aside or disturb the same.

It seems beyond question to have been the intention of the Department of the Interior, in ordering the so-called "Faison survey," to finally locate a line which should ever thereafter be the boundary between the patented and unpatented lands of the United States in said township. It was a proceeding to locate upon the ground the meander boundary line of Howe which the Supreme Court decided in the Burns Case should be considered as a boundary and not a meander line. Having located this line upon the ground, the United States, through the department having charge of the survey and disposal of the public lands, has finally accepted the same as the true boundary. The defendant in error Tanner, a mere homestead settler upon the public lands of the United States, seeks in this action to overthrow the meander boundary line established by Faison by showing the incorrectness of the same as a survey. There are strong and controlling reasons why she should not be permitted to do this. The United States, through the Department of the Interior, has decided that there are no public lands of the United States in the township in question north of the Faison meander boundary line. Tanner owns no land affected by the Faison survey and may never obtain title from the Government to the land upon which she resides. The title to the land, conceding all that she claims, is still in the United States. Until the United States has finally disposed of this land, the courts have no right to question the correctness of the government survey; on the contrary, the courts ought, so far as possible, to work in harmony so far as surveys are concerned with the General Land Office. We believe, under the circumstances surrounding this case, that it was not competent for the trial court to enter upon an inquiry as to the validity and correctness of the Faison survey as a survey.

The trial court disclaimed any intention of so doing; but, in allowing defendant in error Tanner to claim land north of the Faison meander boundary line, it in effect abolished the Faison line as a boundary, which we do not think it was permitted to do.

In *Kirwan v. Murphy*, 189 U. S. 53, 23 Sup. Ct. 603 (47 L. Ed. 698), which was an attempt by the plaintiff in error to enjoin Kirwan, as United States Surveyor General for the District of Minnesota, from making a survey of the land in controversy, the Supreme Court of the United States said:

"The Land Department must necessarily consider and determine what are public lands, what lands have been surveyed, what are to be surveyed, what have been disposed of, what remain to be disposed of, and what are reserved."

Again in the same case, at page 54 of 189 U. S., at page 603 of 23 Sup. Ct. (47 L. Ed. 698), the Supreme Court said:

"The courts can neither correct nor make surveys. The power to do so is reposed in the political department of the government, and the Land Department charged with the duty of surveying the public domain must primarily determine what are public lands, subject to survey and disposal under the public land laws. Possessed of the power in general, its exercise of jurisdic-

tion cannot be questioned by the courts before it has taken final action. *Brown v. Hitchcock*, 173 U. S. 473 [19 Sup. Ct. 485, 43 L. Ed. 772]."

In *Cragin v. Powell*, 128 U. S. 698, 9 Sup. Ct. 206 [32 L. Ed. 566] the Supreme Court spoke as follows:

"That the power to make and correct surveys of the public lands belongs to the political department of the government, and that, whilst the lands are subject to the supervision of the General Land Office, the decisions of that bureau in all such cases, like that of other special tribunals upon matters within their exclusive jurisdiction, are unassailable by the courts, except by a direct proceeding, and that the latter have no concurrent or original power to make similar corrections, if not an elementary principle of our land law, is settled by such a mass of decisions of this court that its mere statement is sufficient. *Steel v. Smelting Co.*, 106 U. S. 447, 454, 455 [1 Sup. Ct. 389, 27 L. Ed. 226], and cases cited in that opinion; *United States v. San Jacinto Tin Co.* [(C. C.) 23 Fed. 279], 10 Sawy. 639, affirmed in 125 U. S. 273 [8 Sup. Ct. 850, 31 L. Ed. 747]; *United States v. Flint*, 4 Sawy. 42 [Fed. Cas. No. 15,121], affirmed in *United States v. Throckmorton*, 98 U. S. 61 [25 L. Ed. 93]; *Henshaw v. Bissell*, 18 Wall. 255 [21 L. Ed. 835]; *Stanford v. Taylor*, 18 How. 409 [15 L. Ed. 453]; *Haydel v. Dufresne*, 17 How. 23 [15 L. Ed. 115]; *West v. Cochran*, 18 How. 403 [15 L. Ed. 110]; *Jackson v. Clark*, 1 Pet. 628 [7 L. Ed. 290]; *Niswanger v. Saunders*, 1 Wall. 424 [17 L. Ed. 599]; *Snyder v. Sickles*, 98 U. S. 203 [25 L. Ed. 97]; *Fraser v. O'Connor*, 115 U. S. 102 [5 Sup. Ct. 1141, 29 L. Ed. 311]; *Gazzam v. Phillips*, 20 How. 372 [15 L. Ed. 958]; *Pollard v. Dwight*, 4 Cranch, 421 [2 L. Ed. 666]; *Taylor v. Brown*, 5 Cranch, 234 [3 L. Ed. 88]; *McIver v. Walker*, 9 Cranch, 173. 177 [3 L. Ed. 694]; *Craig v. Radford*, 3 Wheat. 594 [4 L. Ed. 467]; and *Ellicott v. Pearl*, 10 Pet. 412 [9 L. Ed. 475]."

The reason of this rule, as stated by Justice Catron in the case of *Haydel v. Dufresne* is that:

"Great confusion and litigation would ensue if the judicial tribunals, state and federal, were permitted to interfere and overthrow the public surveys on no other ground than an opinion that they could have the work in the field better done and divisions more equitably made than the department of public lands could do."

The following are later cases in the Supreme Court of the United States declaring the same principle: *Whitaker v. McBride*, 197 U. S. 510, 25 Sup. Ct. 530, 49 L. Ed. 857; *Stoneroad v. Stoneroad*, 158 U. S. 240, 15 Sup. Ct. 822, 39 L. Ed. 966; *Russell v. Maxwell Land Grant Co.*, 158 U. S. 253, 15 Sup. Ct. 827, 39 L. Ed. 971.

Upon the facts found by the trial court and the law applicable thereto as announced by the Supreme Court, we hold that the Faison meander boundary line is the southern boundary of plaintiffs' in error government lots, and that the trial court erred in restricting them to the number of acres called for in the patent, so far as the defendant in error Tanner is concerned.

We might reverse the case and order a new trial; but as the facts upon which the rights of the parties depend are all before us in the findings of the trial court, we will affirm the judgment of the trial court as to the defendant in error Cronin, and reverse said judgment as to the defendant in error Tanner, with directions to the trial court to enter judgment, upon the facts found, in favor of plaintiffs in error and against Tanner for the possession of so much of the land described in the complaint as lies north of the Faison meander boundary line, and it is so ordered.

MURPHY et al. v. SHEA et al.

(Circuit Court of Appeals, Eighth Circuit. February 14, 1910.)

No. 2,987.

In Error to the Circuit Court of the United States for the District of Minnesota.

Action by William H. Murphy and others, as executors and trustees under the will of Simon J. Murphy, deceased, and others, against William H. Shea and Elwood L. Raab. Judgment for defendants, and plaintiffs bring error. Reversed.

M. H. Stanford, for plaintiffs in error.

J. B. Middlecoff, for defendants in error William H. Shea and Mary Shea.

Richard Sleight, for defendant in error Raab.

Before HOOK, and ADAMS, Circuit Judges, and CARLAND, District Judge.

CARLAND, District Judge. This is an action of ejectment commenced in the United States Circuit Court for the District of Minnesota, to recover the possession of a parcel of land claimed to be a part of lot 2, section 8, and lots 1 and 8 of section 4, township 57 north, range 17 west, St. Louis county, Minn. The case is ruled by the case of the same plaintiffs in error v. Tanner and Cronin, defendants in error (No. 2,986, just decided) 176 Fed. 537.

The judgment of the trial court is reversed, with directions to enter judgment, upon the facts found, in favor of plaintiffs in error for the possession of so much of the land demanded in the complaint as lies north of the Faison meander boundary line.

BROWN v. ERIE R. CO.

(Circuit Court of Appeals, Sixth Circuit. February 8, 1910.)

No. 1,993.

1. LIMITATION OF ACTIONS (§ 130*)—NEW ACTION AFTER DISMISSAL OF FORMER ACTION—IDENTITY OF CAUSE OF ACTION.

Under a statute of limitations, which permits the beginning of a new suit within a certain time after the failure of a former suit brought in due time on the same cause of action otherwise than on the merits, a second suit by an employé against a railroad company for a personal injury is for the same cause of action as a prior suit where the parties and the injury are the same, the facts pleaded are the same, and the negligence charged against the company is the same in legal effect, although it may be attributed to a different agent.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 553-566; Dec. Dig. § 130.*]

2. WORDS AND PHRASES—"KICKING."

The word "kicking" in railroad parlance is the operation of giving a rapid movement to a train of cars before coming to a switch, of sufficient force to drive the cars intended to go upon the side track off the main line on which the train was moving, and then to quickly reverse the movement of the other cars which remained connected with the engine.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 5, pp. 1-2.]

In Error to the Circuit Court of the United States for the Eastern Division of the Northern District of Ohio.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Action by Patrick J. Brown against the Erie Railroad Company. Judgment for defendant, and plaintiff brings error. Reversed.

D. F. Anderson, for plaintiff in error.

W. E. Cushing, for defendant in error.

Before SEVERENS and WARRINGTON, Circuit Judges, and KNAPPEN, District Judge.

SEVERENS, Circuit Judge. The plaintiff below, who is also the plaintiff in error, was employed by the defendant, the Erie Railroad Company, in its yards at Youngstown, Ohio, as a "front" brakeman or switchman, and on October 1, 1900, was engaged at that place in breaking up a train. In doing this the train of cars was being backed down toward a switch for the purpose of shunting off some of the rear cars at the switch upon a side track. The operation consisted of giving a rapid movement to the train of cars before coming to the switch, of sufficient force to drive the cars intended to go upon the side track off the main line on which the train was moving, and then to quickly reverse the movement of the other cars which remained connected with the engine, an operation called "kicking" in railroad parlance. These movements were, of course, effected by the engine, which in this instance was moving backward. On this occasion, the persons engaged in the operation of the train were, besides the engineer and fireman, one Congdon, the conductor, Brophy, a switchman, and the plaintiff. It is alleged that under the rules and custom of the company it was the duty of said conductor when the train had reached the proper point at which he desired to uncouple the cars to give a signal to that effect to the plaintiff, and that it was the duty of the plaintiff to receive such signal and convey it to the engineer; it being likely that the conductor might be in a position where he could not be seen by the engineer. The plaintiff was standing on the top and near the end of the last car from which the cars to be detached were to be uncoupled, and was looking down at the conductor who was trying to uncouple the cars. The train was still backing when the conductor told Brophy, who had been sent down to open the switch, to signal the engineer to reverse. The plaintiff did not know that this signal had been given. The reversing gave a sudden stop and shock to the car on which the plaintiff was standing and waiting for the signal, and he was thrown down, and a wheel of one of the cars passed over one of his legs and crushed it. The negligence charged in the petition was that of the conductor in sending the signal to reverse by Brophy and giving the plaintiff no warning. The defendant demurred to the petition on the ground that the action was barred by a statute of limitation of Ohio. The demurrer was sustained, but leave to amend was given. An amended petition was filed stating that a former action for the same cause had been brought in that court in due season, which had been dismissed for want of prosecution, and further stating that the petition in the instant case was filed within the time which by said statute is allowed for the bringing of a new suit when a former one fails otherwise than on its merits. To this amended petition the defendant again demurred and upon the same ground. The demurrer was overruled,

and the defendant answered, again referring to the former action and setting up the said statute of limitation, and alleging also contributory negligence on the part of the plaintiff. The cause came on to be tried before a jury.

The plaintiff submitted evidence tending to prove his petition. The defendant offered no evidence except such as related to the former action and its disposition. By stipulation of the parties the record of that suit was admitted in evidence. The petition in that case was rested upon the same cause of action as the present, except that it alleged that the injury happened from the negligence of the engineer in giving the sudden movement to the cars by reason of which the plaintiff was thrown off, without any signal from the plaintiff, and also from the negligence of the conductor in neglecting to protect the plaintiff while in the discharge of his duties, and the petition averred that "the proximate cause of his said injuries was the negligence of said defendant company, as aforesaid." On the 1st day of May, 1906, as appears by the record, the following proceedings occurred. We copy:

"Patrick J. Brown v. Erie Railroad Company.

"This day this cause being regularly called for trial, and plaintiff not being ready to proceed, it is ordered that this case be dismissed for want of prosecution without prejudice.

"It is therefore considered by the court that the defendant recover of the plaintiff its costs herein expended, taxed at \$——, and that plaintiff pay his own costs."

This was the state of the evidence on which the present cause was tried.

The defendant thereupon preferred the following requests:

"(1) To direct the jury to return a verdict for the defendant on the ground that the evidence of the plaintiff is not sufficient to warrant a verdict in his behalf; and

"(2) To direct a verdict for the defendant on the ground that it appears from the proof that the cause of action set up in the second amended petition and on which the testimony has been taken is not the same cause of action which was set up in the original petition filed in case No. 6566, and that the statute of limitations has run against the cause of action set forth in the petition on which this case is tried."

After argument of counsel, and consideration of said motions by the court, the court sustained the motion on the second ground, and directed the jury to return a verdict for the defendant.

We think the court erred in the view which it took in regard to the identity of the cause of action in the two suits. The parties were the same, the occurrence was the same, the injury and the damages were the same, and in both cases the negligence of the company by which the injury happened was in its legal character the same. In both cases the negligence charged was that of the company. It was not an action by the plaintiff against either the conductor or the engineer. Indeed, upon the facts stated, there would seem to have been concurrent faults of the two, of the conductor in sending off the signal by the wrong intermediary, and of the engineer in acting on a signal transmitted in the wrong way. Apparently the purpose of the rule requiring the signal to be transmitted by the front brakeman was to insure the giving

him warning. The maneuver of "kicking" cars out of a train is one known to be of considerable danger, and the scheme of the company's rule would furnish protection to the front brakeman who would be in the midst of the danger.

The pleader in this case evidently found difficulty in selecting the proper agent of the company for the purpose of introducing a representative. It was more a question of metaphysics than a matter of practical consequence. If either is selected as the medium of imputing negligence to the principal, it straightway appears the other was also negligent and that his negligence contributed to the injury. But the subject does not require nor does it admit, nice distinctions, especially of matters which are formal merely and not of the essence of the complaint, which was here in its ultimate statement a charge against the railroad company of negligent conduct in the movement of its cars whereby the plaintiff suffered injury.

The question we have before us is whether the petition in this suit presents the same cause of action as was presented in the former suit. Inasmuch as the same question is involved in cases where an amendment to a petition is made after the statute has barred an action, and in cases where a new action is brought under a statute allowing it, namely, whether there is an identity in the cause of action brought in by the amendment, or stated in the new action, decisions in either class of cases upon that subject are equally pertinent to the case before us. Substantially this question was involved in the recent case of *Hernan v. American Bridge Company*, 167 Fed. 930, 93 C. C. A. 330, where an amendment of the petition in a pending case was allowed after the time when, if the suit had not been pending, the original cause of action would have been barred by the statute. The identity of the cause of action in the original petition with that of the amended petition was the test of the question whether the case could be proceeded with upon the amended petition against a plea in bar of the statute. It therefore became necessary to consider with care the circumstances which should distinguish a case so as to make it a new cause of action. We did not doubt that, if the amendment brought in a new cause of action, the statute was well pleaded. This has long been settled. 1 *Encycl. of Pl. & Pr.* 518. After referring to the liberality of the power which the federal statutes give to the courts on the subject of amendments, we said:

"We think the statutes extend the power of the court to allow an amendment which shall correct the description of the cause of action and of the parties at any stage of the case, and in respect to any proceeding in it, whether in the process or pleadings, and that it should be exercised in every case where right and justice require it."

The still earlier case of *C., N. O. & T. P. Ry. Co. v. Gray*, 101 Fed. 623, 41 C. C. A. 535, 50 L. R. A. 47, also decided by this court, is distinctly pertinent here; and is of itself a sufficient authority for the decision of the question we are considering in the present case. But further, in the case of *Texas & Pacific Ry. Co. v. Cox*, 145 U. S. 593, 12 Sup. Ct. 905, 36 L. Ed. 829, the action was for negligence of the company resulting in the death of a freight conductor. The accident occurred on January 6, 1887. The original petition was filed Septem-

ber 3, 1887. The local statutes required the action to be brought within one year from the date of the injury. On February 16, 1888, more than a year after the injury, an amended petition was filed. The original petition alleged that the injury occurred while the conductor "was attempting to make a coupling of cars, because of the defective condition of the cross-ties and of the roadbed." In the amended petition it was alleged that the conductor was injured "on account of the draw-head and coupling pin not being suitable for the purpose and of the defective condition of the tracks." To this amended petition the defendant pleaded the statute of limitations. Upon this point, the court said:

"As the transaction set forth in both counts was the same, and the negligence charged in both related to defective conditions in respect of coupling cars in safety, we are not disposed by technical construction to hold that the second count alleged another and different negligence from the first."

See, 25 Cyc. 1319, note citing cases. The subject is well illustrated by the law relating to the conclusiveness of judgments. In 1 Ency. of Pl. & Pr. at page 556, it is said:

"It has been declared to be a fair test in determining whether a new cause of action is alleged in an amendment to inquire if a recovery had been had upon the original complaint it would be a bar to any recovery under the amended complaint, or if the same evidence would support both, or if the same measure of damages is applicable, or if both are subject to the same plea" [citing many cases where this test has been applied.]

And in 31 Cyc. 416, upon the authority of many decisions, it is stated that "so long as the facts added by the amendment, however different they may be from those alleged in the original pleading, show substantially the same injury in respect to the same transaction, the amendment is not objectionable as setting up a distinct cause of action," mentioning as an instance included, "varying the acts of negligence from which it is alleged the injury resulted." Suppose the first suit had been carried forward on the petition of the plaintiff therein filed, and the judgment had been against him; would it have been possible for him to have maintained a new action brought for the same injury varied only by the circumstance that the injury occurred from the negligence of the conductor instead of the engineer? Clearly not. And so, if he had obtained a judgment in his favor, could he have brought another suit for the same injury founded on the distinction that the conductor was negligent? The answer is equally obvious. Every fact or circumstance which the plaintiff or defendant might have brought forward in support of his action or in defense becomes indifferent when the judgment is pronounced, and cannot be again used in a new suit upon the same cause of action to support or defeat a recovery. *Cromwell v. County of Sac*, 94 U. S. 351, 24 L. Ed. 195; *Southern Minnesota Ry. Co. v. St. Paul & S. C. K. Co.*, 55 Fed. 690, 694, 5 C. C. A. 249, per Thayer, J.; *Manhattan Trust Co. v. Trust Co. of North America*, 107 Fed. 328, 46 C. C. A. 322; *Freeman on Judgments*, § 249 (3d Ed.); *Lawrence v. Stearns* (C. C.) 79 Fed. 878; 23 Cyc. 1295. In an action against the principal, the negligence of the servant is not of itself a substantive factor, except as it is contemplated as the negligence of the principal. Or suppose an action to be brought

upon a promissory note against the maker and it is alleged that it was made by an agent on behalf of the maker and the plaintiff is defeated; could he maintain a fresh action against the same defendant on showing that another person executed the note on behalf of the maker? The material question in either case is whether the defendant made the note. The question is identical in both.

Another point remains to be considered. It is contended that even if it should be held there was error in instructing the jury that the cause of action was barred by the statute of limitation, still the ground, namely, that the evidence would not justify a verdict for the plaintiff, was valid, and that for that reason the instruction was in substance correct, and therefore the judgment ought to stand. There is an implication that the court was unwilling to put its instruction upon the ground now urged and the exception by defendant's counsel would indicate that the action of the court was construed as a refusal to give their first request. However, we have read the evidence and are satisfied that a peremptory instruction would not have been proper. As we think there was evidence enough to raise a question of fact for the jury upon all points necessary to a recovery, it was not for that court, nor is it for this, to estimate its relative weight or value.

The judgment must be reversed with costs, and a new trial awarded.

LEWIS et al. v. HITCHMAN COAL & COKE CO.

(Circuit Court of Appeals, Fourth Circuit. March 11, 1910.)

No. 949.

1. COURTS (§ 407*)—APPELLATE JURISDICTION OF CIRCUIT COURTS OF APPEALS
—“ORDER CONTINUING INJUNCTION.”

Under Act March 3, 1891, c. 517, § 7, 26 Stat. 823, as amended by Act June 6, 1900, c. 803, 31 Stat. 660 (U. S. Comp. St. 1901, p. 550), and Act April 14, 1906, c. 1627, 34 Stat. 116 (U. S. Comp. St. Supp. 1909, p. 220), which gives a right of appeal to the Circuit Court of Appeals from an interlocutory order or decree granting or continuing an injunction, to be taken within 30 days, an order overruling a motion to dissolve or modify an injunction previously granted is not one continuing the injunction within the meaning of the statute, and is not appealable.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1100; Dec. Dig. § 407.*

Jurisdiction of Circuit Court of Appeals, see notes to 1 C. C. A. 6; 32 C. C. A. 475.]

Appeal from the Circuit Court of the United States for the Northern District of West Virginia, at Philippi.

Suit in equity by the Hitchman Coal & Coke Company against T. L. Lewis, individually and as vice president of the United Mine Workers of America, and others. Defendants appeal from an order overruling a motion to dissolve and modify a preliminary injunction. 172 Fed. 963. Appeal dismissed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes

Charles E. Hogg, for appellants.
George R. E. Gilchrist, for appellee.

Before GOFF and PRITCHARD, Circuit Judges, and BOYD, District Judge.

BOYD, District Judge. On the 24th of October, 1907, the Hitchman Coal & Coke Company, the appellee here, filed its bill of complaint in the Circuit Court of the United States for the Northern District of West Virginia, at Philippi, seeking an injunction against the defendants upon the grounds alleged in the bill, and to the extent prayed for.

A temporary restraining order was issued on plaintiff's motion, and set down for hearing on the 14th day of January, 1908, and on that day the said hearing, on motion of defendants, was postponed until March 18, 1908, and the restraining order theretofore issued continued until the last-named date. On the 18th of March, 1908, the hearing was further postponed at the instance of defendants until the 26th day of May, 1908, and the restraining order continued until that day. On the 26th day of May, 1908, a hearing was had, and the injunction was granted as prayed for in the bill, the said injunction being in the same language as the temporary restraining order theretofore granted. On the day, to wit, May 26, 1908, that the hearing was had, and the injunction granted, certain of the defendants who had been served moved to dissolve the injunction, and this motion was continued until the 3d day of November, 1908. So far as appears from the record, the defendants took no further action on the motion to dissolve, but on the 15th of December, 1908, they filed in writing a motion to dissolve in part and to modify in certain respects the injunction of May 26, 1908. The latter motion was argued orally, and submitted on briefs of counsel for the parties April 7, 1909, and on September 21, 1909, the court entered an order denying the motion to modify, and continuing in force the injunction as granted on the 26th of May, 1908. From this order the defendants appealed to this court.

The interlocutory decree granting the injunction was entered, as before stated, on May 26, 1908, and 30 days elapsed thereafter without appeal. The question is presented to us upon a motion to dismiss as to whether the order of September 21, 1909, is appealable. This question arises under section 7, Act March 3, 1891, c. 517, 26 Stat. 828, to establish Circuit Courts of Appeals as amended by Act June 6, 1900, c. 803, 31 Stat. 660 (U. S. Comp. St. 1901, p. 550), and Act April 14, 1906, c. 1627, 34 Stat. 116 (U. S. Comp. St. Supp. 1909, p. 220). The said section as amended reads as follows:

"Sec. 7. That where, upon a hearing in equity in a District or in a Circuit Court, or by a judge thereof in vacation, an injunction shall be granted or continued, or a receiver appointed by an interlocutory order or decree, in any cause an appeal may be taken from such interlocutory order or decree granting or continuing such injunction, or appointing such receiver, to the Circuit Court of Appeals: Provided, that the appeal must be taken within thirty days from entry of such order or decree, and it shall take precedence in the appellate court; and the proceedings in other respects in the court below shall not be stayed unless otherwise ordered by that court, or by the appellate court, or a judge thereof, during the pendency of such appeal: Provided further, that the court below may, in its discretion, require as a condition of the appeal an additional bond."

The order entered by the court upon the motion of the defendants to dissolve in part and modify the injunction of May 26, 1908, is in the following language:

"And the court, now being advised of its decision, in accordance with its written opinion filed in this cause at Philippi, September 21, 1909, delivered for convenience of court and counsel in open court at Wheeling, September 21, 1909, doth overrule the said motion of the served defendants for a partial dissolution and correspondent modification of said temporary injunction of May 26, 1908, as made by said defendants December 15, 1908, and the court doth hereby continue in full force and effect in all respects the temporary injunction heretofore awarded in this cause, until the further order of the court."

After considering the point involved, and the argument orally, and by briefs of counsel, we have come to the conclusion that under the law an appeal from the order of the Circuit Court entered December 15, 1909, in this case denying the motion of defendants to dissolve in part and modify the injunction granted on May 26, 1908, does not lie. We might stop here and dismiss the appeal, but we think it well to give at least a brief statement of the grounds upon which our conclusion is based. Our views upon the question are so well expressed in the case of *Dreutzer v. Frankfort Land Company et al.*, 65 Fed. 642, 13 C. C. A. 73, that we take the liberty of quoting from that case. The proceeding which had been taken in that case was substantially the same as here. The Frankfort Land Company et al. had filed a bill in the Circuit Court of the Sixth Circuit, and on the 23d of January, 1894, an injunction had been granted against Dreutzer restraining him from prosecuting certain proceedings at law. Subsequently, on the 2d of March, 1894, the defendant moved to dissolve the injunction on the same grounds upon which he had originally opposed it, and on the additional ground that sureties on bond of complainant were insufficient. This motion was denied by an order entered March 9, 1894. An appeal was taken from this last order on the 6th of April, 1894. The Circuit Court of Appeals for the Sixth Circuit, Taft, Circuit Judge, delivering the opinion, after stating the facts and inserting a copy of section 7 of the Circuit Court of Appeals act, says:

"The section introduced into federal appellate procedure a novelty. Before its enactment, there was no method of reviewing on appeal an interlocutory order or decree of the District or Circuit Courts. Congress accompanied this remedial provision with the condition that it should be taken advantage of by the aggrieved party within 30 days after it accrued. The condition is to be given effect, and is not to be made nugatory by a construction which would put it in the power of the aggrieved party to extend the limitation indefinitely. It is clear, therefore, that when, after a hearing of both sides, an injunction has been granted by the circuit court to continue in force for a fixed time—as, for example, until a hearing on the merits—the enjoined party cannot, after the expiration of 30 days from the order granting the injunction, acquire a new right of appeal by the filing of a motion to dissolve the injunction, and an order of the court denying the motion. Such an order neither grants nor continues the injunction within the meaning of section 7 of the act. Even if such order is made, the injunction remains in force until the time fixed in the order granting it for its expiration. And the denial of the motion to dissolve the injunction adds nothing to its force or effect."

As the decision in the *Dreutzer Case*, which we have cited, and from which we have quoted, was rendered in 1895, it may be suggested that

the amendments of June 6, 1900, and April 14, 1906, to section 7 of the Circuit Court of Appeals act, may have the effect to weaken the force of it, but upon examination of the original statute and the amendments it will be seen that, so far as the point involved in the Dreutzer Case and the case before us is concerned, the statute as originally passed, and as amended, is substantially the same.

We do not deem it necessary to further discuss the proposition. The appeal is dismissed.

Dismissed.

In re T. A. MCINTYRE & CO.

(Circuit Court of Appeals, Second Circuit. February 8, 1910.)

No. 119.

1. BANKRUPTCY (§ 328*)—ADMINISTRATION OF ESTATE—CLAIMS TO ASSETS—POWER OF COURT.

A court having as a necessary incident to its power to administer a bankrupt's estate the power to summarily dispose of claims to assets in its possession may limit the time for claimants of funds to prove their title to less than the year which the statute allows for the proof of claims of creditors, providing notice be given to the claimants and a reasonable time afforded them.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 328.*]

2. BANKRUPTCY (§ 328*)—ADMINISTRATION OF ESTATE—CLAIM TO FUNDS—TIME FOR PRESENTATION.

Where a claim of title to a fund in the possession of trustees in bankruptcy was not presented till nearly 11 months after the time fixed for such claims had expired, during which time the referee had passed on all claims to title and was ready to file a report, and the affidavit of the petitioner's attorney does not state of whom he inquired nor the information he got, as to the possession by the trustees of the fund he claimed, nor whether he could not have sooner obtained the necessary information by the exercise of ordinary diligence, the court did not abuse its discretion in denying a motion to permit him to file his claim.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 328.*]

Appeal from the District Court of the United States for the Southern District of New York.

In the Matter of the Bankruptcy of T. A. McIntyre & Co. From an order denying the petition of Edward Pierce for leave to file a claim of title against moneys and securities in the hands of the trustees after the time for filing such claims fixed by the court had passed, he appeals. Affirmed.

Charles O. Brewster (S. J. Rosensohn, of counsel), for appellant.

Irving L. Ernst and D. Raymond Cobb (M. N. Schwarzschild, of counsel), for appellee.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

WARD, Circuit Judge. April 10, 1908, Edward Pierce, the petitioner, bought through McIntyre & Co. 100 shares of Great Northern preferred stock which he paid for and left in their hands. They wrongfully sold the same and deposited the proceeds in their account

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

in the National Bank of Commerce. May 21st McIntyre & Co. were adjudicated bankrupts. They had borrowed \$200,000 from the bank upon various securities as collateral, a large part of which the bank sold out under the collateral note. After applying the balance to the credit of the bankrupt and the proceeds of sale of the securities, there remained in the hands of the bank \$32,177.62 in cash and certain securities. May 26th the court ordered the bank to pay over the cash and securities to the receivers, which was done, and also ordered all persons making any claim thereto to file their claims on or before June 26th in the office of the referee or be forever barred. May 15, 1909, the petitioner, upon the affidavit of his attorney that he had inquired in June, 1908, whether the stock or its proceeds had reached the hands of the receivers and been informed that they had not, but that recently he had received information indicating that a part of the proceeds of the stock was on deposit in the bank, moved for leave to prove his right to share in the fund, notwithstanding the fact that the time fixed for so doing had expired. This motion the court denied, as made too late.

The petitioner contends that the court had no power to so limit the time for claimants of the fund to prove their title, because the bankruptcy act permits claims of creditors to be filed within a year from the adjudication. But the court was dealing with strangers, and not with creditors; and, if the estate is to be distributed within a year from adjudication, claims of title to funds or securities in the hands of the trustee must be sooner disposed of. We think the court of bankruptcy has as a necessary incident to its duty to administer the bankrupt's estate the power to summarily dispose of claims to assets in its possession. *Collier on Bankruptcy* (7th Ed.) 408. Of course, notice must be given to the claimants, and a reasonable time afforded them within which to prove their claims. This petitioner had notice, and, as he made no objection to the time fixed, he is not now in a situation to say that it was too short. What he seeks to do is to be relieved of the time limit, and for that purpose he suggests to the court grounds for exercising its discretion in his favor. When, however, it is considered that he did not ask for relief until nearly 11 months after the period fixed had expired, during which time the referee had passed upon all claims of title and was ready to file an elaborate report, and, further, that the affidavit of his attorney does not state of whom he inquired in June, 1908, nor what information he got, nor when nor from whom he got the subsequent information, what that information was, and whether it could not have been sooner obtained by the exercise of ordinary diligence, we think the court cannot be said to have abused its discretion in denying the motion.

The order is affirmed, with costs.

MARTIN v. BURFORD et al.

(Circuit Court of Appeals, Ninth Circuit. February 7, 1910)

No. 1,712.

1. APPEAL AND ERROR (§ 454*)—JURISDICTION OF APPELLATE COURT—PROCEEDINGS FOR TRANSFER OF CAUSE.

Where a writ of error has been sued out in due time, and duly returned and filed in the Circuit Court of Appeals, together with a transcript of the record and assignment of errors in proper form, the court acquires jurisdiction of the case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2215; Dec. Dig. § 454.*]

2. APPEAL AND ERROR (§ 407*)—SERVICE OF CITATION.

A citation in error should be served personally on the attorneys of record, or upon all of the parties in whose favor judgment was entered, and service by mail is insufficient; but where service was so made, but the court has acquired jurisdiction of the case, a new citation may be issued and properly served.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2121; Dec. Dig. § 407.*]

In Error to the District Court of the United States for Division No. 1 of the District of Alaska.

Action by J. W. Martin against George C. Burford, Jules B. Caro, Charles E. Hooker, and J. B. Caro, partners as J. B. Caro & Co., to recover damages alleged to have been sustained by the plaintiff by reason of false representations as to the ownership of property purchased by the plaintiff from the defendants. Judgment for defendants, and plaintiff brings error. On motion to dismiss writ of error. Overruled.

E. M. Barnes, for plaintiff in error.

Winn & Burton and Hellenthal & Hellenthal, for defendants in error.

Before GILBERT and MORROW, Circuit Judges, and HUNT, District Judge.

MORROW, Circuit Judge. The defendants in error have appeared specially and interposed a motion to dismiss the appeal on the ground that the court has no jurisdiction to entertain the appeal, and on the further ground that the court is without jurisdiction of the persons of the defendants in error George C. Burford, Jules B. Caro, and Charles E. Hooker, or the partnership doing business under the firm name and style of J. B. Caro & Co., for the reason that the citation issued there was never served on George C. Burford, or Jules B. Caro, or Charles E. Hooker, or the partnership of J. B. Caro & Co. The plaintiff in error was the plaintiff in the court below, and the judgment appealed from was in favor of all the defendants in error. We assume that the motion was intended to be a motion to dismiss the writ of error, and will treat it as such. The writ of error was sued out in due time after the entry of the judgment, and was returned and docketed in this court, together with an authenticated transcript of the record

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and the assignment of errors, with the prayer for reversal of the judgment, as provided by law. The court has therefore acquired jurisdiction of the case upon the writ of error, and the motion to dismiss the writ of error must be denied.

Whether the court has obtained jurisdiction of the defendants in error by the serving of the citation is another question. It appears from the evidence of service that the citation was not served upon the attorneys for the defendants in error nor upon George C. Burford, one of the defendants in error; that service was made upon the partnership of J. B. Caro & Co. by depositing a copy of the citation in the post office at Juneau, Alaska, postage prepaid, addressed to "J. B. Caro & Co., Juneau, Alaska"; and that no service of any kind was made upon Charles E. Hooker and J. B. Caro, the individual members of the partnership of J. B. Caro & Co. Service by mail was insufficient. *Tripp v. Santa Rosa Street R. Co.*, 144 U. S. 126, 129, 12 Sup. Ct. 655, 36 L. Ed. 371. The citation should have been served upon the attorneys of record (*Bacon v. Hart*, 66 U. S. 38, 17 L. Ed. 52; *Bigler v. Waller*, 79 U. S. 142, 147, 20 L. Ed. 260), or upon all the parties in whose favor the judgment was entered in the court below (*Knickerbocker Life Ins. Co. v. Pendleton*, 115 U. S. 339, 341, 6 Sup. Ct. 74, 29 L. Ed. 432). It has been held that the appellate court cannot take jurisdiction of a writ of error which describes parties by the name of a firm. Where, however, the record discloses the names of the individuals who comprise the firm, the writ of error can be amended under section 1005, Rev. St. (U. S. Comp. St. 1901, p. 714). *Estis v. Trabue*, 128 U. S. 225, 228, 9 Sup. Ct. 58, 32 L. Ed. 437. But this rule of amendment does not apply to the citation, which is a notice to the adverse party or parties to appear in the appellate court and show cause why a judgment should not be corrected. In such case all parties in whose favor the judgment is rendered must have notice. The notice may be waived; but if not waived, and the defendants in error are not served with notice, either personally or by their attorney, they have not been brought within the jurisdiction of the court. The proper practice in such case is to issue a new citation. *Knickerbocker Life Ins. Co. v. Pendleton*, *supra*; *Jacobs v. George*, 150 U. S. 415, 14 Sup. Ct. 159, 37 L. Ed. 1127; *Altenberg v. Grant*, 83 Fed. 980, 28 C. C. A. 244.

Let a new citation issue in this case, to be served upon the attorneys of record representing the defendants in error in the court below, or the attorneys who have appeared specially in this court, or upon all the parties in whose favor the judgment was entered.

KENTUCKY STATE BOARD OF CONTROL FOR CHARITABLE INSTITUTIONS et al. v. LEWIS et al.

(Circuit Court of Appeals, Sixth Circuit. February 21, 1910.)

No. 1,995.

COURTS (§ 405*)—FEDERAL COURTS—JURISDICTION OF CIRCUIT COURT OF APPEALS.

The Circuit Court of Appeals is without jurisdiction of an appeal in an ancillary suit where the only question presented by the assignments of error is the jurisdiction of the court below in the principal suit, jurisdiction in such case being exclusively vested in the Supreme Court by Act March 3, 1891, c. 517, § 5, 26 Stat. 827 (U. S. Comp. St. 1901, p. 549), creating the Circuit Courts of Appeals.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1099; Dec. Dig. § 405.*

Jurisdiction of Circuit Court of Appeals in general, see notes to *Lau Ow Bew v. United States*, 1 C. C. A. 6; *United States Freehold Land & Em. Co. v. Gallegos*, 32 C. C. A. 475.]

Appeal from the Circuit Court of the United States for the Western District of Kentucky.

In Equity. Suit by Edward C. Lewis and John H. Kitchen, partners as Lewis & Kitchen, against the Kentucky State Board of Control for Charitable Institutions and others. Defendants appeal from a decree granting an injunction. Appeal dismissed.

W. S. Mendel, for appellants.

W. W. Crawford, for appellees.

Before SEVERENS, WARRINGTON, and KNAPPEN, Circuit Judges.

PER CURIAM. In this cause the assignments of error are directed solely to the question of the jurisdiction of the court below in the case whereunto the bill in this case is ancillary. This bill depends for the jurisdiction, not upon the conditions of jurisdiction requisite to an independent suit, but upon the jurisdiction of the case which it is filed to promote. No question of merits of the controversy is presented.

In these circumstances, the jurisdiction of an appeal is exclusively vested in the Supreme Court by section 5 of the act creating the Court of Appeals (Act March 3, 1891, c. 517, 26 Stat. 827 [U. S. Comp. St. 1901, p. 549]). *Pope v. Louisville, N. A. & C. R. Co.*, 173 U. S. 573, 19 Sup. Ct. 500, 43 L. Ed. 814, and cases cited in that case. *United States v. Severens*, 71 Fed. 768, 18 C. C. A. 314; *Coler v. Grainger County*, 74 Fed. 21, 20 C. C. A. 267. And the appeal to this court must be dismissed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

AMERICAN SPECIALTY STAMPING CO. v. NEW ENGLAND ENAMELING CO.

(Circuit Court of Appeals, Second Circuit. February 8, 1910.)

No. 214.

1. PATENTS (§ 312*)—INFRINGEMENT—SUFFICIENCY OF EVIDENCE.

Where a defendant, which admittedly made and sold an article which infringed a patent, of which, however, it had no knowledge, made an agreement with the patentee conceding the validity of the patent and agreeing to discontinue the manufacture and sale of the infringing article, the fact that it retained in its circulars cuts apparently representing such article is not alone sufficient to establish subsequent infringement.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 549; Dec. Dig. § 312.*]

2. PATENTS (§ 283*)—SUIT FOR INFRINGEMENT—DEFENSES—ESTOPPEL BY CONTRACT—CONSTRUCTION OF PATENT.

An agreement by which a defendant conceded the validity of complainant's patent and agreed to discontinue the manufacture and sale of an infringing article, in consideration of the waiver of all claims for past infringement, while it estops defendant, when sued for infringement by a different article, from denying the validity of the patent or a construction of the claims covering the article previously made, does not preclude it from denying infringement by the new article; and in considering that question the court may look into the prior art and construe the specification in the light of the file wrapper, in order to determine whether the new article infringes.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 448-452; Dec. Dig. § 283.*]

3. PATENTS (§ 167*)—CONSTRUCTION OF CLAIMS—REFERENCE TO SPECIFICATION.

In construing the claims of a patent, whether or not the phrase "substantially as described" is repeated in each one, the first, and generally the best, source of information is the specification.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 243; Dec. Dig. § 167.*]

4. PATENTS (§ 328*)—INFRINGEMENT—COOKING UTENSIL.

The Obermann patent, No. 507,281, for a cooking utensil, construed, and the evidence of infringement held insufficient to warrant the granting of a preliminary injunction.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Suit in equity by the American Specialty Stamping Company against the New England Enameling Company. From an order granting a preliminary injunction, defendant appeals. Reversed.

Steinhardt & Goldman (Robert N. Kenyon and Walter F. Rogers, of counsel), for appellant.

Arthur von Briesen, for appellee.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge. Prior to April 30, 1906, defendant was manufacturing and selling a kettle, apparently a Chinese copy of the device of the patent. It is contended, and not disputed, that at that time defendant did not know of the patent. Being called upon to desist, it entered into an agreement with complainant whereby the latter waived all claims for past infringements and defendant conceded

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the validity of the patent and agreed to discontinue, from the date of the agreement, the manufacture and sales of kettles covered by the patent. We find in the record no satisfactory evidence that since April 30, 1906, it has manufactured or sold any kettles exactly like those which it then conceded to be infringements of a valid patent. The utmost that the evidence seems to establish is that the illustrations which defendant issues with its circulars to the trade are so drawn as to indicate kettles of both types. It is thought that complainant must show more than this to make out infringement subsequent to 1906. If defendant really is selling the old type of kettle under these advertisements, it should not be difficult to show that fact. It has made and sold kettles of a somewhat different type, and contends that these are not infringements.

While defendant may not dispute the validity of the patent, nor such a construction of its claims as will cover kettles of the type it first made, it may show, if it can, that those of the later type are not within the patent; and in considering this question the court may look into the prior art and construe the specifications in the light of the file wrapper, in order to determine whether the new style of kettle also infringes the patent.

The patent is a simple one, for an improvement on five prior patents to Obermann, and deals with the cover of a kettle. The differences between the two types above referred to are these: In the earlier type the cover, which has a flange that rests on the kettle, is movable towards and from the spout—its diameter relative to that of the kettle being such as to permit a sliding movement—and, when it is desired, is thus slid backward by an operating handle, and locked by such handle at the close of the backward movement. In the later type the operating handle merely pinches or locks the cover to the kettle in situ, without imparting to the cover any prior backward movement.

The three claims relied upon are:

"1. The combination of a vessel having a spout in its upper edge, a cover for said vessel provided with an extension which serves as a cover for the spout and having a peripheral flange bent upward and outward extending over the upper edge of the vessel, and an operating handle pivotally secured on side the vessel and provided with a hook-like portion which is adapted for engaging the flange of the cover, all parts operating substantially as described.

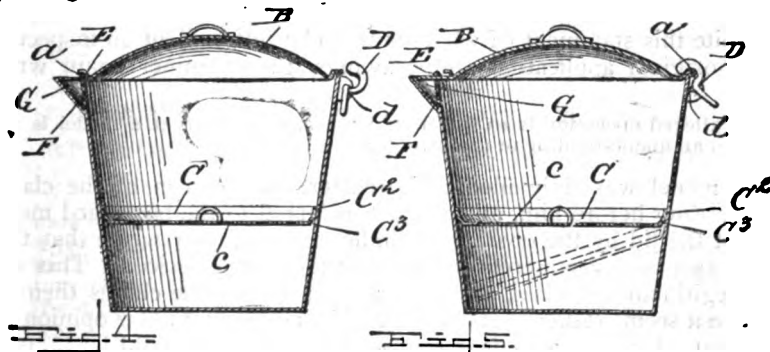
"2. The combination of a vessel having an open top spout and an aperture E, a cover for the vessel having at one edge a projection which serves as a cover for the spout and provided with a peripheral flange bent upward and outward and extending over the upper edge of the vessel, and an operating handle pivoted to the outer upper side of the vessel opposite the spout and provided with a hooked portion which is adapted for engaging the flange of the cover, substantially as described.

"3. The combination of a vessel having an open top spout at its upper edge, a closely fitting cover for said vessel having at one edge an extension which serves as a cover for the spout and provided with a peripheral flange bent upward and outward and extending over the upper edge of the vessel, and the locking handle pivoted to the outer side of the vessel opposite the spout, and provided with a hooked portion which is adapted to pass over the flange of the cover, the distance from the tip of the spout cover to the edge of the vessel cover, which is opposite thereto, being less than the distance from the tip of the spout to the upper edge of the vessel, which is opposite."

In construing claims, whether or not the phrase "substantially as described" is repeated in each one, the first, and generally the best, source of information is the specifications. In this case no change was

made in the description of the patented improvement while the application was pending in the Patent Office. It states that the invention has for its object to produce a cooking vessel of such construction that the water can be drained from the article being cooked and steam allowed to escape without the necessity of lifting the cover from the vessel, and that it consists in the "novel arrangement and combination of parts more fully hereinafter described and specifically pointed out in the claims." After describing a "perforated steamer," claims for which were subsequently withdrawn, it proceeds:

"This invention still further consists in the novel construction of the operating handle for the purpose of opening and closing the lid or cover; furthermore the invention consists in the employment of suitable means to hold said cover in position. * * * Fig. 2 is vertical sectional view showing the cover in a closed position over the vessel. Fig. 3 is a vertical sectional view showing the cover drawn back and the vessel open sufficiently to allow draining and the escape of steam. Fig. 4 is a top plan [corresponding to Fig. 2]. Fig. 5 is a top plan corresponding to Fig. 3. Fig. 6 is a detail perspective view of the operating handle."



It is sufficient to reproduce Figs. 4 and 5, which show very clearly the combination of parts; B being the cover, with its annular flange, a, and D the operating handle.

The inventor next describes the operation of his device. After a reference to the so-called "steamer" he proceeds:

"When it becomes necessary to drain the water from the vessel the operator lifts the vessel by the handle with left hand, which leaves the right free to manipulate the handle which engages with the cover and draws it back a sufficient distance to allow water and steam to escape; and in this connection particular attention is called to the operating handle which is so formed as to engage in its operation with the flanged portion of the lid or cover and thereby withdrawing its projecting portion from over the spout a sufficient distance to allow the water to drain and steam to escape as shown in Figs. 3 and 5 of the drawings. * * * The rim on top of the vessel is so formed as to coincide with that of the lid or cover. It is so constructed, however, as to allow enough room or play as to effectually operate as heretofore described."

The application as filed contained six claims. Nos. 3 and 4 related to the "steamer," and were promptly rejected, and rejection acquiesced in. Nos. 1, 2, and 6 enumerated the "steamer," and were rejected, and thereafter modified, so as to eliminate that element. No. 5, which was merely for "operating handle, D, pivoted at d," was rejected on prior English patent to the same inventor. Four claims were then submitted, which contained no reference to a "steamer." No. 2 reads:

"In a cooking vessel having a spout, a lid completely covering said vessel and spout to close the same, and an operating handle engaging said lid to effect a forward or backward movement of the same to open and close said spout, substantially as described."

In the other three proposed claims this movement of the cover by the operating handle is set forth.

In reply the Office wrote:

"The examiner is unable to see how the operating handle draws the cover from over the spout, since from the drawings it appears to merely bind the cover to the vessel."

The examiner's investigation of the application must have been very superficial, because the drawings quite clearly show just how the operating handle draws the cover from over the spout. Replying to this inquiry applicant wrote:

"The backward movement of the lid is effected through oppositely arranged inclines of the annular projecting flange of the lid and of the operating handle."

Despite this statement of what seems to be self-evident on inspection of the original application and drawings, the examiner again wrote that:

"The alleged operation is so far from a reasonable one that a model is necessary to an understanding of the invention."

The model was duly filed. Thereafter, in criticism of the claims then pending before him, all of which referred to the backward movement of the lid by the operating handle, the examiner wrote that they "are drawn to cover merely the capabilities of the device." This was more legitimate criticism, although as to some of the claims then before him it seems rather overstrained. He added that in his opinion the real point which the applicant was seeking to cover would be brought out by a claim which he suggested, and which is identical with claim 3 of the patent as issued, adding that such a claim would probably receive favorable consideration, and "is held to cover all the patentable novelty in the case." Inasmuch as throughout the specification this movement of the lid is made the one prominent feature, as indicated in the drawings, was explained in applicant's letter as to "oppositely arranged inclines," and—if the model conformed to the specifications—was practically embodied therein, it cannot be supposed that even the examiner could then suppose that the "real point" which applicant was "seeking to cover" was a locking handle which merely held the cover in place without operating at all to shift its position. The latter part of this proposed claim, as to the relative longitudinal diameters of cover and kettle, indicates that it was contemplated that there should, in the language of the specifications, be "room or play to effectually operate as heretofore described." Moreover the examiner had before him Obermann's prior patent, No. 334,459, referred to in applicant's specification, which showed a "handle provided with a hook, the whole being suitably pivoted upon the vessel and so arranged that the hook will overlap the edge of the cover when turned to the position shown in dotted lines Fig. 2." This hook has a straight finger. The one of the patent in suit is curved; but certainly there could be no patentable invention in this mere change of form, unless it accomplished some

useful result, and the only result hinted at is the effecting of a backward movement of the cover before it is locked in place.

The applicant accepted the awkwardly drawn claim which the examiner offered him, and from the other two claims, which at the end he had pending, eliminated the words "to effect a backward movement of the cover," which the examiner had criticised as "attempting to claim the apparatus, by referring to its capabilities, instead of its construction," and the three claims issued as set forth supra. But in view of the specifications, which remained unchanged from first to last, we cannot hold that the action of the Patent Office so broadens these claims as to warrant a construction that would cover a type of operating handle which merely holds the cover in place, without first shifting it so as to allow the escape of water and steam.

The order is reversed, with costs, but without prejudice to a renewed application for injunction, should complainant be able hereafter to show the manufacture or sale by defendant of kettles similar to those manufactured before the agreement of April 30, 1906.

FOREST CITY FOUNDRY & MFG. CO. v. BARNARD.

(Circuit Court of Appeals, Sixth Circuit. February 8, 1910.)

No. 1,979.

1. PATENTS (§ 66*)—ANTICIPATION—UNCLAIMED FEATURE OF PATENTED DEVICE.

A patentee is entitled to a beneficial use of a feature of his device if it actually exists, although he did not specifically claim it, and it may constitute an anticipation of a later patent.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 79-81; Dec. Dig. § 66.*]

2. PATENTS (§ 828*)—ANTICIPATION—FLUID DISTRIBUTOR.

The Barnard patent, No. 580,151, for a fluid distributor, *held* not anticipated, and valid.

Appeal from the Circuit Court of the United States for the Northern District of Ohio.

In Equity. Suit by William N. Barnard against the Forest City Foundry & Manufacturing Company. Decree for complainant, and defendant appeals. Affirmed.

W. T. Arnos, for appellant.

W. T. Read, for appellee.

Before SEVERENS and WARRINGTON, Circuit Judges, and SANFORD, District Judge.

SEVERENS, Circuit Judge. The complaint made by the bill in this case is of the infringement of letters patent No. 580,151, granted to W. S. Barnard as assignor to William Nichols, April 6, 1897, for improvements in fluid distributors. The defense is that the patent is invalid because of anticipation by earlier patents; and by two, especially, one of which is a patent to Rhodes, No. 185,965, granted

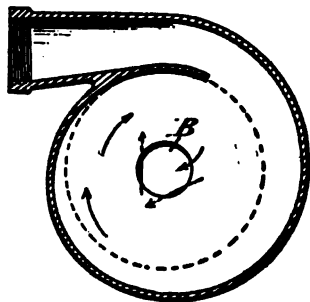
*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

January 2, 1877, and the other a patent to Forster, No. 220,277, granted October 7, 1879. The first of these last-mentioned patents was for improvements in water distributors, and the second, for improvements in lawn sprinklers. The court below held that the patent in suit was not anticipated, and that it was valid. This is the sole question controverted here.

Barnard's invention, as he says in his specification, contemplated two leading features; a chamber wherein the fluid is caused to receive a reverberatory and gyratory motion, and a discharge-opening through which the fluid is delivered from the chamber and immediately released without passing, as in other distributors, through an elongated passage or tube. For these purposes he devised a discoid form of chamber—that is to say, consisting of two circular plates parallel to each other and a few inches apart which were connected at their outer edges by a circular band or plate of the same diameter, the whole resembling a very short drum. Tangentially to this structure he attached at its periphery an inlet tube through which the incoming fluid would enter the chamber and striking against the inside of the wall of the chamber would be whirled around the inside of the wall until it made the circle, and impinging upon the stream still coming in would be diverted inwardly thereby and would proceed in another circle inside of the first and so on until the convolutions came to the center of the chamber where, through an opening in one of the circular plates or heads of the drum-shaped chamber, the fluid would be discharged and scattered by the force and direction already given to it over an area somewhat proportioned to the force and violence with which it was moving when discharged. No other "mouth piece" was contemplated. The theory is that the fluid is converted into spray by its impinging upon the inner wall of the chamber, and by its impinging one part upon another by its convolutions, and also by its being impeded where its course is changed to leave the chamber. A witness likened the operation of the fluid to that of a "whirlpool."

Fig. 3 of the drawings shows a cross-section of the chamber, the adit pipe and the discharge-opening, B. The outer rim is the circular wall of the chamber. The claims are these:

Fig. 3.



"(1) In a nozzle for spraying liquids a chamber substantially circular in one plane of section provided with an outlet-port and with an inlet-passage, the axis of which lies in the plane of a circular section and between a diameter and a tangent of such section; whereby a rotary motion is imparted to the liquid in the chamber by the force of the inflow which motion is retained after it escapes from the chamber, substantially as described.

"(2) In a nozzle for spraying liquids a chamber of substantially circular form in cross-section, provided with a tangential inlet-port, the axis of which lies in the plane of the circular section, and with an outlet-port delivering in a direction transverse to the axis of the inlet-port.

"(3) A spraying-nozzle comprising a chamber of approximately circular form in cross-section, provided at its periphery

with a tangential inlet-port, and at its center with an outlet-port, the axis of which is transverse to that of the inlet-port.

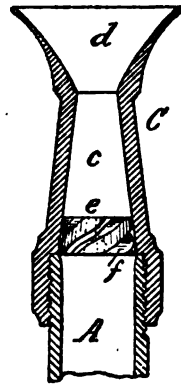
"(4) A spraying-nozzle comprising a chamber having two approximately circular side walls, and an approximately circular peripheral connecting portion, said chamber provided with an inlet-port adapted to deliver the incoming fluid against the connecting portion, and one of the said side walls being provided with an opening for the discharge of the fluid."

No question is made of the efficiency and utility of this device; and it seems to us, in view of the object sought to be attained, to exhibit a good deal of ingenuity in contriving the means for the method. But it is contended by the defendant, the appellant here, that similar devices to accomplish the same purposes had been invented and patented by Rhodes in 1877 and Forster in 1879. Of these, the Forster patent is the one most worthy of consideration as an anticipation, and we shall therefore dismiss the other remarking only that we find nothing in it which contains a suggestion of Barnard's invention.

Forster's was a device for a lawn sprinkler. Fig. 2 of the drawings with a brief explanation will suffice for an understanding of it.

A is an up-standing water pipe, e is a plug having several spiral grooves, f, in its periphery, C is the sprinkler-nozzle composed of a tubular body, c, and a flaring mouthpiece, d. The plug, e, is driven tight into the lower end of the tubular body, c, and the function of the spiral grooves upon its edge is to provide water passages which impart a spiral movement to the water as it passes through the nozzle, and, in connection with the flaring open mouthpiece, break up the stream of water into a fine spray. We have followed the inventor's language closely. The points of resemblance to Barnard's device are very scanty. Counsel for the appellant claim that the spiral grooves perform the same function as the inside of the circular sides of Barnard's chamber does. It is possible that in Forster's device the water, to some extent, impinges upon the inside of the "tubular body" though he does not suggest it. But he would be entitled to the benefit of that feature, if in fact it existed. *Goshen Sweeper Co. v. Bissell Carpet Sweeper Co.*, 72 Fed. 67, 19 C. C. A. 13; *Goodyear Rubber Tire Co. v. Rubber Tire Wheel Co.*, 116 Fed. 363, 53 C. C. A. 583; *Stilwell-Bierce, etc., Co. v. Eufaula Cotton Oil Co.*, 117 Fed. 410, 415, 54 C. C. A. 584; *Eames v. Worcester Polytechnic Institute*, 123 Fed. 67, 71, 60 C. C. A. 37. But he seems to construct his device in such form that the spiral streams of water shall converge at the nozzle and be there broken into spray. Assuming that some slight disintegration is effected by directing the water upon the sides of the tubular body, this would be only one of the several united means of effecting the desired object employed by Barnard; and taken as a whole his method is a very different way of breaking up the water from that of driving it through the reverberatory chamber of Barnard's patent. There is not in Forster's invention the provision of means at all adapted to effect such a violent tumult of the fluid as

Fig. 2.



is created by the means contrived by Barnard. Again in the Barnard patent there is no nozzle which co-operates with antecedent means in reducing the water to spray. That has been done in the chamber, and the orifice is a mere exit for the spray.

We think there is no fair ground for regarding any previous invention to which our attention has been called as an anticipation of the patent in suit. This result accords with that of the Circuit Court, and its decree should be affirmed, with costs.

LURTON, Circuit Judge, participated in the hearing and decision of this case, but is no longer a member of this court.

AMERICAN STEEL & WIRE CO. OF NEW JERSEY v. DENNING WIRE & FENCE CO.

(Circuit Court, N. D. Iowa, Cedar Rapids Division. January 11, 1910.)

No. 46.

1. PATENTS (§ 234*)—INFRINGEMENT—MACHINE PATENT.

To constitute infringement of a patent for a machine the infringing machine must be substantially identical with that of the patent in the result attained, the means of obtaining that result, and the manner in which its different mechanisms operate and co-operate to produce that result.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 370; Dec. Dig. § 234.*]

2. PATENTS (§ 235*)—INFRINGEMENTS—MACHINES—INTERMITTENT AND CONTINUOUS OPERATION.

Machines or devices in which the different parts are arranged and constructed to operate continuously are different in principle from those in which the parts are arranged to operate intermittently and alternately with each other, and one is not an infringement of the other.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 371; Dec. Dig. § 235.*]

3. PATENTS (§ 328*)—INFRINGEMENT—WIRE FENCE MACHINES.

The Bates patent, No. 577,639, for a machine for making wire fence, construed, and *held* not infringed.

4. WORDS AND PHRASES—"CUT."

The word "cut" most usually signifies to make an incision with a sharp instrument; to cut or sever by the application of a sharp knife or edged instrument of some kind.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 2, pp. 1807-1809.]

In Equity. Suit by the American Steel & Wire Company of New Jersey against the Denning Wire & Fence Company. On motion for preliminary injunction. Motion denied.

Clarence P. Byrnes and Charles C. Linthicum (J. H. Preston and Charles MacVeagh, on the brief), for complainant.

Thos. A. Banning, for defendant.

REED, District Judge. Bill for an alleged infringement by defendant of claims 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 19, 27, and 35 of letters patent

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes

No. 577,639, issued by the United States to Albert J. Bates February 23, 1897, and now owned by the complainant. Preliminary and permanent injunctions are prayed restraining defendant from further infringing said claims. The defendant denies the alleged infringement, and resists the granting of a preliminary injunction. The single question for determination is, Has the defendant infringed complainant's patent?

The patent is for a combination of four groups of mechanisms into a machine for making woven wire fence fabric. It was adjudged valid by a decree of this court in March, 1908 (160 Fed. 108), in a suit between these same parties, and the defendant restrained from further infringing the claims above mentioned and claim 5. The decree was affirmed by the Court of Appeals in April, 1909. 169 Fed. 793. Since the former suit was commenced the defendant has made, and authorized to be made, four kinds of machines, other than the two involved in that suit, with which it makes and authorizes others to make a woven wire fence fabric substantially the same as that made by the complainant's machine; two of which are made under letters patent of the United States No. 816,538 issued to Joseph M. Denning, president of the defendant company, March 27, 1906; one under letters patent No. 923,778, issued to said Denning June 1, 1909; and one upon which there is no patent. It is the use of these machines with which to make such wire fence fabric, and the sale of them to others for that purpose, that complainant now seeks to enjoin as an infringement of its patent. The two machines involved in the former suit are referred to in the preliminary proofs upon this hearing as machines Nos. 1 and 2, and those involved in this suit as Nos. 3, 4, 5, and 6. Models of the latter named machines are in evidence and numbered accordingly. To sustain the charge of infringement of a patented machine the infringing machine must be substantially identical with the one alleged to be infringed in (1) the result attained; (2) the means of obtaining that result; and (3) the manner in which its different mechanisms operate and co-operate to produce that result. If the machines are substantially different in either of these respects, the charge of infringement is not sustained. *Machine Co. v. Murphy*, 97 U. S. 120, 24 L. Ed. 935; *Gill v. Wells*, 22 Wall. 1-14, 22 L. Ed. 699; *Fuller v. Yentzer*, 94 U. S. 288-296, 24 L. Ed. 103; *Fay v. Cordesman*, 109 U. S. 408, 3 Sup. Ct. 236, 27 L. Ed. 979; *Rowell v. Lindsay*, 113 U. S. 97, 5 Sup. Ct. 507, 28 L. Ed. 906; *Adams Electric Ry. Co. v. Lindell Ry. Co.*, 77 Fed. 432, 23 C. C. A. 223; *National Hollow B. B. Co. v. Interchangeable B. B. Co.*, 106 Fed. 693, 45 C. C. A. 544.

In *Machine Co. v. Murphy*, above, it is said:

"In determining the question of infringement, the court or jury, as the case may be, are not to judge about similarities or difference by the names of things, but are to look at the machines or their several devices or elements in the light of what they do, or what office or function they perform, and how they perform it, and to find that one thing is substantially the same as another, if it performs substantially the same function in substantially the same way to obtain the same result, always bearing in mind that devices in a patented machine are different in the sense of the patent law when they perform different functions or in a different way, or produce a substantially different result. * * * It is necessary in every such investigation to look at the mode of operation or the way the device works, and at the result, as well as at the means by which the result is attained."

The complainant's patent being for a combination only, it must be limited to the parts specified, or to their mechanical equivalents, and there is no infringement of it unless the combination is infringed, even though the same ingredients are used, if arranged and used in a substantially different manner.

In *Rowell v. Lindsay* above, it is said, quoting from *Prouty v. Rugles*, 16 Pet. 336-341, 10 L. Ed. 985:

"This combination composed of all of the parts mentioned in the specification, and arranged with reference to each other and to other parts of the plow in the manner therein described, is said to be the improvement and is the thing patented. The use of any two of these parts only, or two combined with a third which is substantially different, in form or in the manner of its arrangement and connection with the others, is therefore not the thing patented. It is not the same combination if it substantially differs from it in any of its parts."

In *Gill v. Wells*, 22 Wall. 1-14, 22 L. Ed. 699, above, it is said:

"Valid letters patent may be granted for * * * a new combination of old ingredients, * * * but the rule is equally well settled, in such a case, that the invention consists merely in the new combination of the ingredients, and that a suit for an infringement cannot be maintained against a party who constructs or uses a substantially different combination, even though it includes the exact same ingredients."

In the light of these principles the defendant's machines may be compared with that of complainant's patent. In defendant's machines Nos. 1 and 2 involved in the former suit, the combination was the same, and the different parts composing it were arranged to operate intermittently and alternately, substantially as claimed and as described in the specifications and drawings of the complainant's or Bates patent. Claim 1 of the Bates patent specifies the mechanism combined, and for which the patent is claimed. It is as follows:

"(1) In a wire fence machine the combination of (1) mechanism for intermittently feeding a plurality of longitudinal strand wires, (2) mechanism for intermittently feeding a plurality of stay wires simultaneously and transversely of the strand wires, (3) mechanism for cutting off suitable lengths of the stay wires to span the space between the strand wires, and (4) mechanism for simultaneously colling the adjacent ends of the stay wires around the strand wires."

Claims 2, 3, 4, and 6 are for the same combination, and are substantially the same, but claim 6 adds thereto "mechanism for taking up the fencing as it is formed." It is plain that the design of this combination is that two at least of its parts are to act simultaneously, but alternately with the others, or, as it is expressed in the claims, "intermittently." For instance, the specifications of the patent and a model of the machine show that the mechanism for feeding the strand and stay wires into the machine so feed them simultaneously, the stay wires transversely of and in close relation with the strand wires, while the mechanism for cutting and coiling the stay wires are inactive or at rest. When the wires are so fed into their proper position the feed mechanisms stop and become inactive; the cutting device then comes into action, cuts stay wire sections of the requisite lengths from the stay strand, while it and the strand wires are at rest; the coiling mechanism, which up to this time has been at rest, then comes into

action, seizes the ends of the stay wire sections and coils and intercoils them around the strand wires simultaneously and stops, thus completing the fence fabric. The stay wire sections are then released from their confinement, the cutting and coiling mechanisms assume a position of rest or inactivity, and the completed fence fabric is carried forward by the take-up mechanism; the wire feeding mechanisms then come into action again simultaneously and the operation is repeated. This is the principle upon which the machine as a whole is constructed, and every element of the combination is arranged to so act alternately with each other and can only effectively so act, for if the wire feed mechanisms should be called into action at the same time the other mechanisms are the operation of the machine would be wholly ineffective for the purpose for which it is constructed. Defendant's machines Nos. 3 and 4, also spoken of in the preliminary proofs as the Colorado and the Cedar Rapids machines respectively, are substantially alike, and are made according to the Denning patent, No. 816,538, and are presumptively not infringements of the complainant's machine. Claim 3 of this patent sufficiently shows the combination, the different elements included therein, and in a general way the principle upon which the machine is organized. It is as follows:

"In a wire fence machine the combination of (1) mechanism for continuously feeding forward a plurality of strand wires, (2) mechanism for continuously feeding forward a plurality of stay wires, (3) mechanism for severing the advance portion of each stay wire to form a section of a transverse stay wire across the plurality of strand wires, (4) mechanism for carrying forward and delivering the stay wire sections into position for coiling their ends around the strand wires, and (5) a reciprocating mechanism for coiling the ends of the stay wire sections around each other and then around the strand wires as the strand wires are fed forward, substantially as described."

The features of this claim which distinguish the operation of the defendant's machines from that of the complainant's patent are that each of its parts operate continuously and simultaneously. For instance, the specifications of the patent and a model of the machine show that the strand and stay wires are fed forward into the machine simultaneously and continuously, but at some distance from, and transversely to, each other; the stay wire sections are then cut the requisite lengths and pushed into contact with the strand wires, when their ends are then engaged by the coiler shafts, which move upon and in line with the strand wires, and coiled around the strand wires, thus completing the fence fabric as the strand and stay wires are carried forward from the machine; the coiler shafts then recede from the stay wires, move back upon the strand wires to meet the oncoming stay wires and repeat the operation. The principle upon which the Bates machine is constructed, therefore, is that its component parts shall operate intermittently and alternately with each other; while that of defendant's machines Nos. 3 and 4 is that their component parts shall operate continuously and simultaneously. Machines or devices in which the different parts are arranged and constructed to operate continuously, are different in principle from those in which the parts are arranged and constructed to operate intermittently and alternately with each other, and one is not an infringement of the other. *Dryfoos v. Wiese* (C. C.) 19 Fed. 315, affirmed 124 U. S. 32, 8 Sup. Ct. 354,

31 L. Ed. 362. To avoid the effect of this difference in the operation of the Bates and defendant's machine counsel for complainant contend that, while the defendant's machines operate continuously, the stay wires are in fact at rest relatively to the strand wires while the coiling operation is in progress; the contention being that when sections of stay wires are cut from the spool of continuous stay wire and pushed directly into contact with the strand wires to be finally attached thereto, they are then at rest with reference to the strand wires while the coiling operation is in progress, and, therefore, that the coilers operate intermittently only, relative to the stay wire sections; also, that while the coilers are returning upon and along the strand wires to engage the ends of the oncoming stay wire sections, they are then at rest relatively to both the strand and stay wires, and though continuously in motion they operate intermittently only relatively to them. The contention is ingenious and plausible, but it fails to distinguish between the movement of the stay wire sections after being cut from the spool of stay wire, and the operation of the stay wire feed mechanism by which the stay wire is continuously fed into the machine. The language of the claims of the Bates patent is (?) "mechanism for intermittently feeding a plurality of stay wires simultaneously and transversely of the strand wires," while that of the defendant's patent is, "mechanism for continuously feeding forward a plurality of stay wires." That this mechanism does continuously feed forward the stay wires from which stay sections of the requisite length are cut in the continuous operation of the machine is obvious. It would be more nearly correct to say that the coiling mechanism of the defendant's machines 3 and 4 only acts intermittently with the stay wire feed mechanism and cutting mechanism because it does not commence to perform its function until the feed mechanism and the cutting mechanism has each fully performed its function with reference to the stay wire sections and they have been delivered to the coilers. But though this be true there can be no doubt that in these machines the wire feeding mechanism of both the strand and stay wires and the coiling and cutting devices are each in continuous and simultaneous operation while the machine is in motion, and this continuous operation of the coilers is essential to enable them to fully perform their functions, and is an essential element of the organization of the machines. In the Bates machines, and the Denning machines Nos. 3 and 4, the strand wires are fed through openings in the center of the coiler shafts, but in the former the coilers have but one movement, and that a rotary one upon the strand wire while the feed mechanisms of both wires are at rest. In the latter the coilers have this same rotary movement, also a reciprocating movement upon, and in a direct line with, the strand wires. This second or reciprocating movement is wholly absent in the coilers of the Bates machine and cannot be imparted to them without rearranging and rebuilding the machine upon a different principle. But in the Denning machines this movement is an essential element of their organization and cannot be eliminated therefrom without rearranging and reconstructing the machines upon a different principle. The coiling mechanisms of the two machines as constructed are not therefore interchangeable. So in the Denning

machines the cutting mechanism consists of a fixed or stationary cutter bar or plate with an aperture therein through which the stay wires are fed, and a companion cutter mounted upon the periphery of a continuously revolving disk, the cutters being so adjusted to each other and the stay wires that a section of stay wire is cut the requisite length, as it is projected through the opening in the fixed cutter, at each revolution of the disk. But the movement of the disk upon which the cutter blade is mounted is circular and continuous, while the movement of the cutter bar of the Bates patent is in a direct line reciprocating, and intermittent. The result attained by each is identical, viz., the cutting of the stay wires into sections of the requisite length, but this result is attained in a substantially different manner. Claim 7 of the Bates patent is as follows:

"In a wire fence machine the combination of (1) a plurality of collers through which longitudinal strand wires are fed; (2) a plurality of guides through which stay wires are fed transversely to the collers; (3) mechanism for cutting off suitable lengths of stay wires to span the spaces between the strand wires; and (4) mechanism for holding the stay wires intermediate of the collers while their ends are being coiled around the strand wires."

This claim and claims 8, 9, 10, 19, 27, and 35 relate to the same subject-matter, and in different ways call for a plurality of coilers, through which the strand wires are fed, in combination with a plurality of guides through which stay wires are fed transversely to the strand wires, and with mechanism for cutting the stay wires into the requisite lengths, and with mechanism for holding them in position intermediate the coilers while their ends are being coiled and intercoiled around the strand wires. Claim 11 is for a combination of mechanism for rotating the coilers in one direction only, with mechanism for locking them against rotating during the intermission of the coiler-rotating mechanism. It is not urged that this claim is infringed by any device of defendant's machines, nor could it well be, for there is no intermission between the coiler-rotating, or reciprocating, movement of the coilers in those machines. Parts of some of these claims, notably 8, 9, 19, 27, and perhaps 35, may describe the functions of certain of the ingredients included in the combination; but this does not invalidate the claims for the combination of the different elements into a single machine, which is the thing invented, and for which the patent is claimed, or, as said in the opinion of the former suit, "the patent is for a machine endowed with certain functions, and not for the functions of a machine."

It is the contention of the defendant that there are no guides between the coilers in defendant's machines Nos. 3 and 4, and that this element is wholly omitted from these machines. Literally this may be true, for the stay wires in these machines are not fed directly from one coiler to another as in the Bates machine, but are projected across the intervening space between the strand wires at one side of, and a short distance from, the coilers, and after being cut the requisite lengths are then pushed transversely towards and in contact with the strand wires to be acted upon by the coilers. There are, however, between the strand wires and at one side of the coilers, plates, in which are shallow uncovered grooves or passageways that act as guides for

the stay wires across the intervening spaces between the strand wires, and fingers that hold the stays in position while their ends are being coiled around the strand wires, which it is contended by counsel for complainant are the mechanical equivalents of the spring-hinged plates that perform the same function in the Bates machine. But the difference in the construction of these two devices is so marked, and the manner in which each operates is so unlike, that one cannot properly be regarded as the mechanical equivalent of the other.

In defendant's machine No. 5, also called the "Hopper Machine," upon which there is no patent, there is no mechanism for cutting the stay wire into sections, and this element of the Bates combination is wholly omitted. In lieu of it are hoppers, from which the machine takes its name, into which the requisite stay sections are deposited and from which they are fed directly into position transverse to the strand wires ready for the coilers to act upon. The stay sections are previously prepared outside of, and apart from, the machine, and placed in the hoppers by some means other than by the machine itself. It is perfectly obvious that this mechanism and its mode of operation are wholly unlike any element of the Bates machine, and yet it is claimed to be the mechanical equivalent of the Bates cutting mechanism and operates in substantially the same way. The preliminary proofs show that defendant cuts stay wire sections of the requisite lengths with an ordinary wire cutting machine in no way connected with its fence machine, and then by means other than the fence machine transfers them to and deposits them in these hoppers. While this machine contains in equivalent form (1) mechanism for simultaneously feeding a plurality of longitudinal strand wires, and (4) mechanism for simultaneously coiling the adjacent ends of the stay wires around the strand wires, as called for in the first and other claims of the Bates patent, its similarity to the Bates machine ends there, for obviously it does not have in equivalent form or otherwise any (3) "mechanism for cutting off suitable lengths of stay wires to span the spaces between the strand wires," for it has no cutting device whatever. Nor has it any (2) "mechanism for intermittently feeding a plurality of stay wires simultaneously and transversely to the strand wires," within the meaning of the specifications and claims of the Bates patent, for the hopper device of this machine is intended only to hold and distribute stay wire sections, previously prepared and placed therein, into position for coiling, while the stay wire mechanism of the Bates patent is intended to intermittently feed the uncut or continuous stay wire from the spool into the machine where it may be cut into stay wire sections of the required length immediately preceding the coiling, by the cutting device, which is entirely absent in this machine. As well might it be claimed that the separate cutting machine used by the defendant is the equivalent of the Bates cutting mechanism; or if the defendant should arrange with the wire factory to furnish it stay wire sections of the requisite sizes and lengths, that the mechanism of the factory for cutting and preparing such stay sections, and the means by which they were delivered to the defendant and placed in these hoppers were together the mechanical equivalents of the cutting and stay wire feed mechanism of the Bates patent.

In *Fay v. Cordesman*, 109 U. S. 408-420, 3 Sup. Ct. 236, 244 (27 L. Ed. 979), it is said:

"The claims of the patents sued on in this case are claims for combinations. In such a claim, if the patentee specifies any element as entering into the combination, either directly by the language of the claim, or by such a reference to the descriptive part of the specification as carries such element into the claim, he makes such element material to the combination, and the court cannot declare it to be immaterial. It is his province to make his own claim and his privilege to restrict it. If it be a claim to a combination, and be restricted to specified elements, all must be regarded as material, leaving open only the question whether an omitted part is supplied by an equivalent device or instrumentality."

But it is urged with apparent sincerity, and some of complainant's experts say, that the hoppers are the mechanical equivalent of the mechanism of the Bates patent "for cutting off suitable lengths of stay wires to span the space between the strand wires." The word "cut" is doubtless used in different senses, but its meaning in a given association with other words must be determined from its connection and association with such other words. A common, and perhaps its most usual, significance is: "To make an incision with a sharp instrument; to cut or sever by the application of a sharp knife or edged instrument of some kind." *Century Dictionary*. To interpret it as it is used in the Bates patent, as synonymous with separate, divide, set apart, or segregate would obviously not be the sense in which it is used in that patent. The specifications and drawings of the patent, as well as a model of the machine prepared by the complainant, show beyond any doubt that the stay wire sections are to be cut from spools of continuous stay wire by knives or cutter blades passing each other in close relation, substantially as the blades of shears pass each other, and the word "cut," as used in the patent, is undoubtedly intended to convey that meaning. The conclusion is therefore unavoidable that the cutting mechanism of the Bates machine is wholly omitted from defendant's machine No. 5, and that it contains no substitute therefor which is its mechanical equivalent.

Defendant's machine No. 6, also called the "Automatic Hand" machine, is made according to the Denning patent, No. 923,778, in which the claim for transferring the stay wire sections into a position transverse to the strand wires and ready for the coilers is as follows:

"(5) In a wire fence machine, the combination of (1) a plurality of coilers, and (2) a plurality of swinging and oscillating stay section carriers adapted to clamp stay sections and convey the severed sections bodily through the air and deliver them to the coilers in position for coiling, substantially as described."

A model of these swinging carriers, spoken of in the preliminary proofs as an "automatic hand," in association with the coilers and wire feed mechanisms, show that the stay wires are continuously fed into the machine simultaneously with, and parallel to, the strand wires, but at some distance from them and from the coilers, and after being cut the requisite length, are immediately clamped, or seized by the carriers, which are located between the strand and stay wires, and carried by a swinging or elbow-like movement, through the arc of a circle and while being so carried are turned by an oscillating or wrist-like

movement of the device from their position parallel to the strand wires to one transverse, or crosswise to them and placed upon the coils in proper position for coiling. These carriers and their mode of operation are so unlike the tubes of the Bates machine for guiding the stay wires from their position parallel with the strand wires to one transversely of them and in position for coiling that they cannot rightly be adjudged to be the mechanical equivalent of that device. Machine No. 6 need not therefore be further considered.

Conceding, without deciding, that complainant's patent is entitled to a wide range of equivalents, the range must not be so broad as to include all other mechanisms and devices for making by machinery a woven wire fence fabric like that made by complainant's machine.

In *Gill v. Wells*, 22 Wall. 1-15, 22 L. Ed. 699, the rule for equivalents in patents for a combination is stated as follows:

"Old ingredients known at the date of letters patent granted for an invention, consisting of a new combination of old ingredients, if also known at that date as a proper substitute for one or more of the ingredients of the invention secured by the letters patent, are the equivalents of the corresponding ingredients of the patented combination. Such old ingredients, so known at the date of the letters patent granted, are the equivalents of the ingredients of the patented combination, and no others, and it may be added that that, and that only, is what is meant by the rule that inventors of a new combination of old ingredients are as much entitled to claim equivalents as any other class of inventors."

There is no evidence upon this hearing that a device like either the hopper of defendant's machine No. 5, or the automatic hand of its machine No. 6, was, at the time of the Bates patent, known as a proper substitute for the stay wire feed or cutting mechanism of the Bates machine, or that either could then have been used for that purpose in the same or any other relation to the other parts of the machine. On the contrary, the evidence is conclusive that neither was then so known and cannot now be so used.

In the former suit it was urged with great force that the claims of the Bates patent were so broad as to include any and every other means of making such a fence by machinery, and that the claims therefore were invalid under the rule held in *O'Reilly v. Morse*, 15 How. 62, 112, 113, 14 L. Ed. 601, and subsequent case. This contention was not sustained because the specifications and drawings of the Bates patent specifically describe, and the claims distinctly call for, a particular machine made up of certain elements combined and co-operating in a certain manner to produce a woven wire mesh fence, but that the claims were not so broad as to prevent the use of other machines, substantially different, for making the same kind of a fence. If complainant's contention is now correct, that defendant's machines Nos. 3, 4, 5, and 6 infringe the coiling, cutting, and stay wire feed mechanisms of the Bates patent, then the holding in the former suit was wrong, for if the coiling mechanism of defendant's machines Nos. 3 and 4, the method of preparing the stay wire sections for, and placing them in, machine No. 5, and the "automatic hand" of machine No. 6 are not each substantially different in its construction and mode of operation from those of the Bates machine, it would seem to be impossible to make a machine that is substantially different from the ma-

chine of the Bates patent, and the claims would therefore be so broad as to include any and every device for making a woven wire fence fabric by machinery. Such a construction of the claims of the Bates patent would render it invalid. It is the right of the defendant or of any one else to construct a machine substantially different from that of the complainant's patent with which to make the same kind of a fence that the machine of that patent makes, and the fact that Denning in constructing such a machine endeavored to avoid infringing the Bates machine, is to be commended rather than condemned. The conclusion, therefore, is that the charge of infringement is not sustained by the proofs submitted.

Upon the argument at the bar it was conceded by counsel for both parties that all the facts were as fully and accurately shown by the preliminary proofs as they could be upon final hearing, and that the motion for a preliminary injunction might well be considered and determined upon the merits regardless of any technical grounds that might be deemed sufficient to defeat the same. The question has therefore been considered as upon the merits and at much greater length than ordinarily would have been done in considering a motion for a temporary injunction. No stipulation, however, was made or filed that the matter might be considered and determined as upon final hearing, and the only order that can now be made is one denying the preliminary injunction; and it is accordingly so ordered only.

I. E. PALMER CO. V. PATTERSON.

(Circuit Court, E. D. Pennsylvania. February 17, 1910.)

No. 143.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—HAMMOCK ATTACHMENT.

The Palmer patent, No. 574,078, for a hammock attachment, comprising a frame adapted to cause the hammock body or a portion thereof to assume a different position from that which it would normally assume when suspended, to form a seat or leg rest, or both, was not anticipated, and discloses patentable invention; also *held* infringed.

In Equity. Suit by the I. E. Palmer Company against James B. Patterson. On final hearing. Decree for complainant.

Emery & Booth and Fraley & Paul, for complainant.
Augustus B. Stoughton, for respondent.

J. B. McPHERSON, District Judge. It is well known that, when a hammock of the usual make is suspended by its ends, it will conform itself closely to the person of the occupant in all his movements. This characteristic often causes discomfort when a change of position is sought; and a principal object of the patent in suit—No. 574,073, granted to I. E. Palmer on December 29, 1896—is to afford relief from this inconvenience. The specification states:

"My invention relates to an improvement in seat attachments for hammocks, in which provision is made for causing a portion of the hammock body

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to assume at pleasure a position other than that which it would normally assume when suspended, for the purpose of affording the occupant a seat and leg rest, or both, which shall conform to the position which the body of the occupant would naturally assume when at rest and lying on the back."

In order to accomplish these results the inventor devised a frame that may be conveniently attached to the fabric, or body, of the hammock, and is provided with bearing points upon which the fabric may rest and be supported. These points are so arranged that portions of the hammock's length are compelled to assume positions at varying angles with other portions, and thus furnish a seat or a leg rest, or both. In other words the frame is intended (using the language of the plaintiff's brief)—

"* * * to interrupt the natural line of pendent curvature between its points of support, and form a distinct seat or reclining portion or couch, of definite length and shape, and upon which the occupant may sit, recline, or lie, as upon an ordinary seat or couch, and upon which he may change his position at will without any of the embarrassment and discomfort which follow any attempt to change one's position in an ordinary hammock, which has no well-defined seat portion, and which, as above stated, follows and conforms always and automatically to any change of position of the occupant."

There can be no doubt—to continue the quotation—that:

"The result of the invention of the patent in suit is to give to the commercial hammock a well and permanently defined seat or couch portion, which does not follow every movement of the occupant, and therefore does not interfere with his movements to change position, but which still retains the elasticity, flexibility, lightness, and swinging capacity characteristic of the ordinary commercial hammock."

The inventor declared his device to consist—

"* * * broadly in a rigid frame capable of attachment to the hammock body, and provided with bearing points for the hammock body, such that the latter will be caused—throughout a portion of its length—to assume a position to form a natural seat or leg rest, or both."

Among frames of this description, two kinds are described and illustrated in the specification and drawings. One may be adjusted by the use of side rails in two sections, and of stay rods, slots, and lugs, so as to assume different angular positions; and the other is made without a joint in a single piece of such shape as may be described. In the use of either kind the hammock body or fabric is passed over and under the bearings, so that the fabric supports the frame, while the frame also supports the fabric in part and helps to keep it stretched. The claims involved are as follows:

"1. A hammock attachment comprising a frame independent of the body of the hammock and provided with bearings for the body of the hammock, the said bearings being so located with respect to one another that the hammock body when engaged therewith and suspended will have its natural curve interrupted to form a seat, substantially as set forth.

"2. A hammock attachment comprising a rigid frame provided with bearings for the body of the hammock, the said bearings being so located with respect to one another that the hammock body when engaged therewith and suspended will have its natural curve interrupted to form a seat, substantially as set forth."

The essential features of the invention are the frame and the engagement of the bearings with the fabric. The shape of the frame de-

termines the shape that the hammock must assume. Either a seat or a leg rest, or both a seat and a leg rest, may be presented; and these may be in effect united in one plane, so as to present a flat surface like a bed, or they may incline to each other at angles that differ in degree. But, whatever the shape of the frame may be, the hammock body is so engaged with the bearings that it has more or less movement lengthwise, and is continually adjusting itself, loosening or tightening as the weight of the occupant is applied or removed. One method of attaching the frame to the fabric is described by the inventor as follows:

"The framework as thus constructed may be attached to the hammock by passing the body, A, of the hammock over the rung, d¹, at the foot rest, thence under the rung, d, thence over the rung, E, thence over the flat cross-brace, D, and under the brace, D¹, and thence to the point of support."

The hammock body may thus have a bearing at three or more points on the frame, and when suspended the bearings will force it to follow the angle or angles of the frame. In the shape illustrated by Figs. 1, 2, and 3:

"A person seated upon that portion occupied by the seat section will be prevented from slipping along down the body of the hammock, and the legs of the occupant when so seated will be allowed to rest naturally upon the leg rest section of the frame, without bearing the weight at the heels and leaving the leg intermediate of the heel and the body unsupported, as is common in connection with hammocks as commonly in use."

In the shape illustrated by Fig. 6, the same method of attaching the frame is shown, but the frame itself is flat, and of course there is no leg rest in this particular structure. Both shapes, however, have the hammock body engaged in the same way with the bearings, and in both of them longitudinal tension is present.

For the purposes of this case, the two claims may be regarded as identical, and the defendant's hammock is, I think, a clear infringement of both. The points of likeness in the two devices are very well summarized in the plaintiff's brief:

"Inasmuch as defendant uses a straight frame, like Fig. 6 of the patent in suit; uses the end bearings, under and over which the fabric is passed, as in all of the figures of the patent in suit; has a frame which deforms the hammock fabric from its natural curve, like that of the patent in suit; has a frame which is independent of the fabric and capable of removal therefrom while the fabric is suspended, like that of the patent in suit; and has an arrangement such that the longitudinal tension automatically takes up the slack in the hammock seat—all like the patent in suit, defendant is in no position to assert that he does not infringe, even though he may prefer to add some features of his own design, like the lacing, and like the attaching of the end bars or rungs temporarily to the frame, to be held in position by the fabric instead of fixedly by the frame, as in the patent in suit."

In only two particulars that need be noticed does the defendant's hammock or couch differ from the patented article. One difference is to be found in the lacings under the seat. These give additional strength to the fabric and keep it more tightly stretched, by adding lateral tension to the longitudinal tension that is common to both hammocks. Lacing may perhaps be an improvement; but it does not produce a different result, or produce an old result by distinctly different means. Longitudinal tension is still an important object in the defend-

ant's hammock, as it is in the hammock of the plaintiff. Both parties use the same means to attain it—a more or less loose engagement of the fabric with the bearings of the frame; but the defendant gets a little more lateral stability, or rigidity, by the use of lacing. If he had frankly given up longitudinal tension altogether, and had merely suspended a bed or couch from the four corners of a rectangular frame, a different situation might be presented, although no definite opinion on that question need be expressed.

The second point of difference lies in the fact that the end bearings or rungs in the defendant's frame are either loose, being then held in place by the pressure of the fabric, or are temporarily attached, for example, by rubber bands, to the hooks provided to receive them; while in the plaintiff's frame such bearings are rigidly fixed and permanent. This, I think, is an unimportant distinction. The bearings perform precisely the same function in both frames, and it seems to be of little consequence that in one frame they are always in place, while in the other they are put into place whenever they are needed.

The case does not appear to require further discussion. The drawings of the patent are mainly confined to a preferred form, which is not the flat bedlike article manufactured by the defendant; but a flat bed or couch is plainly shown in Fig. 6, and is also clearly deducible from Figs. 1 and 2. It is not necessary that the cushion in Fig. 6 should be always of the shape there shown; and, indeed, it is not at all an essential part of the frame. But, even if it is to be regarded as a usual accompaniment of the flat frame shown in the figure, it is obvious that the angle shown in the drawing is not obligatory. Undoubtedly, as it seems to me, the angle may be gradually flattened, so that the cushion will soon become an ordinary mattress; and, when that point is reached, the substantial identity of the defendant's seat or couch can hardly be disputed. While the claims in controversy are broader than the drawings, I do not think that the drawings operate as a limitation. They are not inconsistent with the specification or the claims, but only show certain forms of the inventor's device.

The prior art is of little importance. I do not understand that any previous patent is seriously relied on to show anticipation.

The usual decree may be entered, with costs.

WILLIAMS PATENT CRUSHER & PULVERIZER CO. v. PENNSYLVANIA CRUSHER CO.

(Circuit Court, E. D. Pennsylvania. February 12, 1910.)

No. 109.

1. PATENTS (§§ 160, 161*)—CONSTRUCTION—CONSIDERATION OF REJECTED CLAIMS.

A patent must be read and construed with reference to the claims rejected and to the prior art, and cannot be so construed as to cover either what was rejected by the Patent Office or disclosed by the prior art.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 234, 235, 236½; Dec. Dig. §§ 160, 161.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. PATENTS (§ 328*)—INFRINGEMENT—CRUSHER AND PULVERIZER.

The Williams patent, No. 843,729, for a dumping cage for crushers and pulverizers, claims 1 and 2, as limited by the prior art and proceedings in the Patent Office, *held* not infringed.

In Equity. Suit by the Williams Patent Crusher & Pulverizer Company against the Pennsylvania Crusher Company. Decree for defendant.

Henry N. Paul, Jr., Joseph C. Fraley, and Frederick R. Cornwall, for complainant.

George W. Rea, for respondent.

HOLLAND, District Judge. This is a bill in equity brought for an alleged infringement of claims 1 and 2 of patent No. 843,729, dated February 12, 1907, for an improvement in cages for crushers and pulverizers, which patent was granted to Milton F. Williams, and by him assigned to the complainant company.

The defenses are noninfringement and invalidity of claims 1 and 2 of the patent, a consideration of the first of which defenses will necessarily dispose of this bill. The patent is for a "new and useful improvement in dumping-cages for crushers and pulverizers." It comprises a casing in which is arranged a horizontal shaft carrying pivotally mounted hammers or beaters, a cage pivotally mounted in the casing below said shaft, and comprising a frame carrying a rigid grinding surface, and a windlass arrangement, connected to the free end of the cage, comprising a chain, a shaft upon which the chain may be wound, a ratchet wheel on said shaft, a co-operating pawl, and a hand wheel on said shaft for rotating the same. It is claimed in the specifications that, in the event that the machine chokes, the pawl may be raised, and the dumping portion of the cage permitted to drop, discharging the major portion of the contents through the bottom, and, after the discharge, the winding drum may be manipulated through the hand wheel to raise the cage to its normal operating position.

Claims 1 and 2, which are alleged to be infringed by the defendant, are as follows:

"1. In a machine of the character described the combination of a casing, a shaft arranged horizontally in the casing and carrying pivotally-mounted hammers, a frame pivotally mounted in the casing below said shaft, a rigid grinding surface carried by said frame, a flexible device connected to said frame and winding mechanism for said flexible device, the pivot of said frame being located below the grinding surface when the frame is in operative position.

"2. In a machine of the character described, the combination of a casing, revolving hammers or beaters mounted therein, a frame pivotally mounted in said casing, a grinding surface carried by said pivotally-mounted frame, said frame being adapted to be actuated to dump the material resting on said grinding surface, a chain connected to the free end of said frame, a winding shaft around which said chain is wound to restore said frame and grinding surface to normal position, a hand wheel on said shaft for rotating same, a ratchet-wheel carried by said shaft, and a co-operating pawl for engaging said wheel to prevent retrograde movement of said shaft; substantially as described."

It will be noted that in claim 1 this improved pulverizing machine is one "of the character described" in the specification, and having a

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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"frame pivotally mounted in the casing below." The shaft and the pivot of this frame are "located below the grinding surface when the frame is in operative position," and in the second claim we find that "said frame is adapted to be actuated to dump the material resting on said grinding surface," and this actuating device is a chain connected to the free end of the said frame, a winding shaft "around" which said chain is "wound" to restore the said frame and the grinding surface to its normal position, a hand wheel "on said shaft" for rotating the same.

These are the claims allowed by the Patent Office. In the first the "frame pivotally mounted in the case below" is restricted to a "frame" which is "located below the grinding surface when the same is in operative position"; and, in the second, the machine of the character described, to wit, a pulverizing machine capable of being dumped, is restricted to a "frame being adapted to be actuated to dump the material resting on said grinding surface" by a chain connected to the free end of the frame and wound at the other end around a winding shaft, and a hand wheel "on said shaft" for rotating the same and a ratchet wheel, etc. This part of the machine embodied in the dumping device attached is restricted to the precise parts used. An examination of the prior art as found in patents heretofore granted embodies devices for raising and lowering a frame carrying a grinding surface in pulverizers of this character, and actuating machinery for that purpose. Some of these patents were cited against the claims submitted by the complainant, and, after a number of broader claims submitted were rejected, the Patent Office finally allowed claims as now appears in patents 1 and 2 only after they had been limited as hereinabove indicated. If the complainant is permitted to broaden the scope of his claim so as to include the defendant's device, it at the same time makes them sufficiently broad to cover what already existed in the prior art at the time his patent was granted.

In *Hubbell v. United States*, 179 U. S. 80, 21 Sup. Ct. 24, 45 L. Ed. 95, it is said the claim as allowed must be read and interpreted with reference to the rejected claim and to the prior art, and cannot be so construed as to cover either what was rejected by the Patent Office or disclosed by prior devices. See, also, *Corbin Cabinet Lock Co. v. Eagle Lock Co.*, 150 U. S. 40, 14 Sup. Ct. 28, 37 L. Ed. 989; *Royer v. Coupe*, 146 U. S. 524, 13 Sup. Ct. 166, 36 L. Ed. 1073; *Brill v. St. Louis Car Co.*, 90 Fed. 667, 33 C. C. A. 213; *Walker on Patents*, § 187a.

It will not be necessary to consider the question of the validity of the two claims of complainant's patent in question. The file wrapper of the Patent Office makes it very clear that this dumping cage for crushers and pulverizers is restricted in its structural limitations to one in which "the pivot of the frame is located below the grinding surface when the frame is in operative position"; and in the second claim these limitations are to "a chain connected with the free end of the said frame, a winding shaft around which said chain is wound, * * * and a hand wheel on said shaft." As to its functional limitations, it is limited to the dumping feature of the actuated frame. The device used by the defendant is not a dumping cage, nor is the pivot of the frame located below the grinding surface when the frame is in opera-

tive position, nor is the actuating device used by it like the one described in claim 2 of complainant's patent. It is evident that the pivot of the complainant's cage is located sufficiently low down under the grinding surface, which location, in connection with the short section of the lower half of the casing, enables the cage to swing down quite or nearly to a vertical line, resulting in the dumping of all material that may be resting upon the cage. In the defendant's cage, however, the pivot is not located below the grinding surface when the cage is in operative position. It is located more to the side of the casing, and the cage, which is the grinding surface of the machine, comprises nearly the whole lower half of the casing. When it is swung down, it will not dump the material resting upon it, but it is so arranged that any foreign substance can be removed by the hand. The arrangement, however, is intended for the purpose of adjusting the grinding surface to the hammers as they shorten from wear. The actuating device is entirely different from the one used by the complainant, although it performs the same function, which is to lower and raise the cage, but the lowering and raising of a cage was old in the art and other devices had been used for that purpose. The complainant in claim 2 was restricted to the mechanism therein set forth, and it cannot now enlarge that claim to include other devices, such as the one adopted by the defendant.

Having concluded that the defendant's machine as manufactured by it and set forth in a stipulation made part of this record does not infringe claims 1 and 2 of complainant's patent, the prayer of the complainant's bill is refused, and the bill dismissed, with costs.

KUTHE v. FARRINGTON, Chief of Police.
(District Court, D. Oregon. December 20, 1909.)

No. 5,072.

INTOXICATING LIQUORS (§ 10*)—POWER OF MUNICIPAL CORPORATION TO CONTROL—CONSTRUCTION OF CHARTER.

Where the only authority of a city in Oregon to license, regulate, or prohibit drinking places or the sale of liquors was given by a provision of its charter, which was superseded, as held by decisions of the state courts, by the adoption of prohibition at an election held under a county option statute, the city was without power to enact an ordinance prohibiting the sale of nonintoxicating liquors.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 10.*]

Application by Charles F. Kuthe, against E. A. Farrington, Chief of Police, for a writ of habeas corpus. Petitioner discharged.

Woodcock & Potter and John M. Pipes, for plaintiff.

WOLVERTON, District Judge. The petitioner was, on November 13, 1908, accused of violating Ordinance No. 788 of the city of Eugene, entitled "An ordinance to prohibit the sale of nonintoxicating malt liquor in the city of Eugene." He entered a plea of guilty, and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

was duly taken in charge by the Chief of Police. Whereupon this proceeding was begun by habeas corpus to secure his liberation.

The sole question presented is whether the city of Eugene is authorized, under its charter, to adopt an ordinance of the kind under which the petitioner was being prosecuted. By subdivision 18 of section 48 of the charter, adopted in 1905 (Sp. Laws 1905, p. 252), the city was empowered "to license, tax, regulate or prohibit barrooms, drinking shops, tippling houses, billiard rooms, dance houses, and all places where spirituous, malt or vinous liquors are sold." The adoption of this provision of the charter, although slightly changed in wording, is but a re-enactment of the same provision contained in a previous charter of the city, adopted by the Legislative Assembly in 1893 (Sp. Laws 1893, p. 574). So it has been held in the state court (*Renshaw v. Lane County Court*, 49 Or. 526, 89 Pac. 147), with reference to this provision, that it was but a continuation of the former provision, and not a new enactment of the date of the later charter. What is known as the "local option" statute was adopted in the state June 6, 1904 (Laws 1905, p. 41). Under this statute an election was held June 4, 1906, within the county of Lane, in which the city of Eugene is located, to determine whether or not the sale of intoxicating liquors should be prohibited in the entire county, which resulted favorably to prohibition. Such election, within the purview of the local option law, had the effect to suspend the charter provisions with reference to licensing saloons or places where intoxicating liquors are sold. *Renshaw v. Lane County Court*, *supra*; *Baxter v. State*, 49 Or. 353, 88 Pac. 677, 89 Pac. 369; *State v. County Court*, 101 Pac. 907.

So that the city of Eugene is without authority to regulate the sale of intoxicating liquors. But the authority to regulate the sale of non-intoxicating malt liquors is referable, if at all, to the same charter provision. This having been superseded, as I have shown, by the force of the local option law, the authority in any form does not exist. But, however this may be, the question has been determined by the state court, namely, the circuit court of the state of Oregon for Lane county, in accordance with this view, and I feel bound by that adjudication, being a construction of the laws of the state, especially as it is based upon identical facts.

The petitioner will therefore be discharged.

UNITED STATES v. BENNETT & LOEWENTHAL.

(Circuit Court, S. D. New York. November 27, 1909.)

No. 5,356.

CUSTOMS DUTIES (§ 75*)—APPRAISEMENT—APPROVAL OF PRO FORMA INVOICE.

Entry was made on a pro forma invoice and the value stated therein was approved by the appraiser, who also, however, approved the lower value given in a consular invoice subsequently produced by the importer. *Held*, that duty should have been assessed on the basis of the latter value.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 75.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

On Application for Review of a Decision by the Board of United States General Appraisers.

The decision below sustained the importers' protest against the assessment of duty by the collector of customs at the port of New York; the Board's opinion reading as follows:

HAY, General Appraiser. In this case entry was made on a pro forma invoice. From the testimony it appears that when the consular invoice arrived it was found to bear a lower value for the merchandise in question than that contained in the pro forma invoice. The collector assessed duty upon the value given in the pro forma invoice, rejecting as illegal and unwarranted the second appraisement made by the appraiser approving the value given in the consular invoice.

The merchandise should have been assessed upon the value stated in the consular invoice, the appraiser having approved that value. *Foard's Case*, G. A. 8,723 (T. D. 23,796).

The protest is sustained, and the collector directed to reliquidate the entry accordingly.

D. Frank Lloyd, Deputy Asst. Atty. Gen., for the United States.
Oppenheimer & Arnold, for importers.

MARTIN, District Judge. Decision affirmed.

RICE & HOCHSTER v. UNITED STATES.

(Circuit Court, S. D. New York. November 10, 1909.)

No. 5,495.

CUSTOMS DUTIES (§ 24*)—CLASSIFICATION—PYROXYLIN RODS.

Pyroxylin rods partly finished are dutiable as partly finished "articles" of pyroxylin, under Tariff Act July 24, 1897, c. 11, § 1, Schedule A, par. 17, 30 Stat. 152 (U. S. Comp. St. 1901, p. 1628).

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 24.*]

On Application for Review of Decision by the Board of United States General Appraisers.

Kammerlohr & Duffy (John G. Duffy, of counsel), for importers.

D. Frank Lloyd, Deputy Asst. Atty. Gen. (Charles D. Lawrence, of counsel), for the United States.

MARTIN, District Judge. The importation in controversy consists of pyroxylin in the form of rods. It was assessed for duty at the rate of 65 cents per pound and 25 per cent. ad valorem under Tariff Act July 24, 1897, c. 11, § 1, Schedule A, par. 17, 30 Stat. 152 (U. S. Comp. St. 1901, p. 1628). The importers protested, claiming that duty should have been assessed at the rate of only 60 cents per pound under said paragraph.

Paragraph 17 is as follows:

"Collodion and all compounds of pyroxylin, whether known as celluloid or by any other name, fifty cents per pound; rolled or in sheets, unpolished, and not made up into articles, sixty cents per pound; if in finished or partly finished articles and articles of which collodion or any compound of pyroxylin

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

is the component material of chief value, sixty-five cents per pound and twenty-five per centum ad valorem."

The Board has found as a fact that this was a partly finished product as imported, and therefore held the same to be properly dutiable under the third clause of said paragraph 17. It is a simple question of fact. I have examined the record, and can see no reason why the court should disturb this finding of the Board.

Decision affirmed.

In re DIX.

(District Court, E. D. Pennsylvania. February 10, 1910.)

No. 2,924.

BANKRUPTCY (§ 323*)—PROVABLE CLAIMS—AMOUNT—PURCHASE OF MORTGAGED PROPERTY BY CREDITOR.

Where the holder of mortgages given by a bankrupt foreclosed and bid in the property for a nominal sum, there being no competing bid, on his filing a claim against the bankrupt estate for the balance of his debt, the actual value of the property may be inquired into, and his claim will be allowed only for the amount equitably due.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 503, 513; Dec. Dig. § 323.*]

In the matter of Charles H. Dix, bankrupt. On review of order of referee. Affirmed.

Lewis L. Smith, for claimant.

George J. Edwards, Jr., for trustee.

J. B. McPHERSON, District Judge. The facts of this case are as follows:

The bankrupt owed James L. Cocker \$6,655.40 upon two bonds, secured by two mortgages upon two houses and lots of ground. The mortgages were foreclosed, and the sheriff sold the property to Cocker for \$100. There was no other bidder at the sale, and the sum paid by Cocker was applied to the costs. He received official deeds and went into possession. Afterwards, he presented a claim against the bankrupt estate for the full amount of the bonds. In his examination before the referee he testified that the houses rented for \$53 a month; that their combined value was about \$5,000; that he would have bid \$5,500 at the sheriff's sale in order to protect his mortgages; and that he was willing to take now \$6,500 for the property, as he had spent about \$400 in improvements since the sale. He summed up his position very frankly by saying that he thought in fairness the bankrupt owed him about \$500; but when the referee took him at his word, and reduced his claim to that sum, he declined to acquiesce and had the question certified.

The allowance of the claim in full was resisted on the ground that only a small part, if any, of the debt was equitably due, and this contention was sustained by the learned referee (George E. Darlington, Esq.), who allowed only \$500, as has already been stated. The pre-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

cise question now involved was recently decided by the Court of Appeals for the Third Circuit in Winter's Appeal, 174 Fed. 556, and I refer to the opinion of the court in that case for the reasoning that justifies the approval of the referee's order. It may perhaps be advisable to call particular attention to the fact that both in Winter's Appeal and in the present controversy there was no competitive bidding, and that the mortgage creditor was therefore not opposed in the process of transforming his interest from the ownership of a mortgage to the ownership of the fee. In neither case did the amount bid at the sale throw any light on the real value of the property, and in both cases the real value affirmatively appeared in the bankruptcy proceedings.

On the authority of Winter's Appeal, the order of the referee is affirmed.

In re BEIHL.

(District Court, E. D. Pennsylvania. February 10, 1910.)

No. 3,511.

BANKRUPTCY (§ 184*)—PROPERTY PASSING TO TRUSTEE—INVALID MORTGAGE OF PERSONALTY.

An insolvent conveyed personal property of which he was the absolute owner to a creditor for the expressed consideration of \$1, and took back a lease of the same, also giving a nominal consideration, with the right in the lessee to repurchase if he had paid his indebtedness to the lessor. *Held*, that the transaction was an attempted mortgage, invalid under the law of Pennsylvania for want of delivery, and that on the bankruptcy of the debtor the property passed to his trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 275-277; Dec. Dig. § 184.*]

In the matter of Ernest H. Beihl, bankrupt. On review of order of referee. Affirmed.

Franklin Spencer Edmonds, for George W. Edmonds.
George P. Rich, for trustee.

J. B. McPHERSON, District Judge. The facts of this dispute are not in question, and may be thus stated:

A voluntary petition was filed by the bankrupt on July 2, 1909. A few days before—on June 25th—his landlord had distrained for rent upon the horses and wagons now in controversy. The District Court restrained the sale, and thereupon George W. Edmonds claimed to be the owner of the articles levied upon, averring that Beihl had sold them to him on May 10th, and was in possession under a lease made by Edmonds on the same day. The transaction was as follows: Beihl, who was a retail dealer in coal, owed Edmonds \$255.53 for coal previously bought. In consideration of this debt, and of Edmonds' promise to furnish more coal to be used by Beihl in his retail trade, the bankrupt made a bill of sale of the horses and wagons. This document sells the property for an expressed consideration of \$1, saying

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

nothing about the other considerations. On the same day Edmonds made a lease of the horses and wagons to Beihl for one year from May 15th, at a rental of \$1 a month. The agreement provides for the return of the property at the end of the year in good order, save for reasonable wear, and gives to Beihl an option to buy for \$10 within one month thereafter, but expressly declares that Beihl may only exercise this option if he has then paid all his indebtedness to Edmonds. Under these agreements Edmonds delivered to the bankrupt a further quantity of coal, valued at \$925. The landlord's claim amounted to \$487.73, and it was finally arranged before the referee that Edmonds should pay this sum, should take over the horses and wagons at a valuation of \$1,250, and should pay to the trustee the balance in excess of the landlord's claim if it should be decided that the lease was not valid against the general creditors of the bankrupt. The transaction of May 10th was in good faith, but there was no delivery of possession; Beihl continued to use the horses and wagons in his business until the petition in bankruptcy was filed.

Upon these facts the referee (Richard S. Hunter, Esq.) held that "the net result of this arrangement was undoubtedly under the Pennsylvania law a pledge or mortgage of this property," and ordered Edmonds to pay \$717.73 to the trustee. In my opinion this order was right. I see no difference in principle between this case and *In re Millbourne Mills Co.* (C. C. A., 3d Circuit) 172 Fed. 177. There the milling company was the absolute owner of grain and flour in its own possession, and undertook to pledge it by issuing warehouse receipts, but without delivering the property itself. The attempted pledge was held to be invalid, and, of course, therefore the absolute title had passed to the trustee. This is precisely what happened here. The bankrupt had an absolute title to the horses and wagons in his own possession, and undertook to pledge them by a somewhat roundabout method, but without delivering the property. The bill of sale and the so-called "lease" and the parol contract concerning the payment of the past-due claim for coal—taken together, as they should be taken—clearly amount to a pledge or mortgage of the property. The bill of sale is equivalent to the deed, and the lease and parol agreement constitute the defeasance. *Davis v. Crompton*, 20 Am. Bankr. Rep. 53, 158 Fed. 735, 85 C. C. A. 633, is not in point. In that case the bankrupt (the Arkonia Fabric Company) never had been the unqualified owner of the looms then in question. A qualified title by a conditional sale was all that the company had ever acquired, and this therefore was all that the trustee could take in succession to the bankrupt's right. No lien by levy or attachment had been gained by any creditor of the bankrupt, and the only disputed point was the extent of the trustee's title. It was held that the trustee did not get more than the bankrupt had to give, and must therefore take the looms subject to the conditions of sale. Here, however, there is no conditional sale. The bankrupt was originally the unqualified owner of the property, and the trustee succeeded to that kind of ownership unless the bankrupt had previously transferred it. He had tried to transfer it; but the effort was of no avail owing to his failure to deliver possession, and

therefore the trustee, although merely the representative of the bankrupt, succeeded to the absolute title. The difference between Davis v. Crompton and In re Millbourne Mills Co. seems to be clear.

The decision of the referee is affirmed.

In re KULLBERG.

(District Court, D. Minnesota. October 1, 1909.)

1. BANKRUPTCY (§ 166*)—LIENS—EVIDENCE OF INTENT TO DEFRAUD CREDITORS.

The mere fact that a preference resulted from the giving of a mortgage by a bankrupt does not render it void under Bankr. Act July 1, 1898, c. 541, § 67e, 30 Stat. 564 (U. S. Comp. St. 1901, p. 3449), as a transfer made "with intent" to hinder, delay, or defraud his creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 252; Dec. Dig. § 166.*]

2. BANKRUPTCY (§ 166*)—LIENS—GOOD FAITH OF MORTGAGEE.

The fact that a mortgagee, to whom a bankrupt gave a mortgage for a present consideration within four months prior to his bankruptcy, knew that the proceeds were to be used to pay debts, does not impeach his good faith, nor render the mortgage void under Bankr. Act July 1, 1898, c. 541, § 67d, 30 Stat. 564 (U. S. Comp. St. 1901, p. 3449), unless he also knew, or had reasonable cause to believe, that the borrower was insolvent.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 255-257; Dec. Dig. § 166.*]

In the matter of John Kullberg, bankrupt. On review of decision of referee. Affirmed.

Stevens & Stevens, for creditors.

Dougherty & Dahl, for bankrupt.

WILLARD, District Judge. The bare fact that a preference resulted from this transaction does not make the mortgage void under the provisions of section 67e of the bankrupt act (Act July 1, 1898, c. 541, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449]).

Judge Sanborn, speaking for the Circuit Court of Appeals, Eighth Circuit, in the case of Coder v. Arts, 152 Fed. 943, 947, 82 C. C. A. 91, 95 (15 L. R. A. [N. S.] 372), said:

"A transfer made in good faith to pay or to secure an honest antecedent debt by an insolvent within four months of the filing of the petition in bankruptcy by or against him constitutes no evidence of an intent on his part to hinder, delay, or defraud other creditors, within the meaning of section 67e of the bankrupt law, notwithstanding the fact that its necessary effect is to hinder and delay them, and to deprive them of the opportunity they might otherwise have had to collect their claims in full."

Having been given for a present consideration, the mortgage in question is valid under the provisions of section 67d if it was made in good faith, and not in contemplation of or in fraud of the act.

The fact that the mortgagee knew that the proceeds were to be used to pay existing creditors does not make the mortgage void. This has

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

been held by the Circuit Court of Appeals of this circuit in *Stedman v. Bank of Munroe*, 117 Fed. 237, 54 C. C. A. 269. It has also been held in the Circuit Court of Appeals for the Sixth Circuit in *Re Scudan Manufacturing Company*, 113 Fed. 804, 51 C. C. A. 473. Anything which may have been held to the contrary, in *Re Pease* (D. C.) 129 Fed. 446, relied upon by the trustee, cannot prevail against the ruling of the Circuit Court of Appeals of this circuit.

No fraud upon the act could have been contemplated unless Hassinger had reasonable cause to believe at the time the mortgage was made that Kullberg was insolvent, and this is the real question in the case. It is a question of fact upon which the referee found in favor of the validity of the mortgage. The evidence presented before him was not, in my opinion, stronger than the evidence presented in other cases where it has been held by the Circuit Court of Appeals of this circuit, and in the Circuit Court of Appeals of other circuits, that the creditor did not have reasonable cause to believe that the debtor was insolvent. *Coder v. Arts*, 152 Fed. 943, 82 C. C. A. 91, 15 L. R. A. (N. S.) 372; *Hussey v. Richardson-Roberts Dry Goods Co.*, 148 Fed. 598, 78 C. C. A. 370 (8th Circuit); *In re Eggert*, 102 Fed. 735, 43 C. C. A. 1 (7th Circuit); *Sharpe v. Allender*, 170 Fed. 589, 96 C. C. A. 104 (5th Circuit); s. c. *In re Wolf Co.* (D. C.) 164 Fed. 448.

The order of the referee dated March 27, 1909, whereby the application of the trustee for the canceling and vacating of the chattel mortgage of \$1,000 made to Robert M. Hassinger by the bankrupt Kullberg on the 8th day of December, 1908, was denied is in all things hereby confirmed.

PULVER v. LEONARD et al.

(Circuit Court, D. Minnesota, Second Division. December 24, 1909.)

1. COURTS (§ 202*)—UNITED STATES COURTS—JURISDICTION.

A Circuit Court of the United States has no jurisdiction in proceedings to probate a will, even in the case of diverse citizenship, for such a proceeding is neither an action at law nor a suit in equity. For the same reason, it has no jurisdiction to set aside the probate of a will; but, if the statutes of the state in which the property of the deceased is being administered give to its courts of general jurisdiction the right to entertain an original action to set aside the probate of a will, such a suit may be maintained in a Circuit Court of the United States, in case the parties are citizens of different states and more than \$2,000 is involved.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 797, 798; Dec. Dig. § 262.*]

Probate jurisdiction of federal courts, see note to *Bedford Quarries Co. v. Thimlinson*, 38 C. C. A. 276.]

2. COURTS (§ 262*)—UNITED STATES COURTS—JURISDICTION.

A person entitled to a distributive share of the estate of a deceased person may maintain a suit in a Circuit Court of the United States against the administrator concerning his right to such share.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 797, 798; Dec. Dig. § 262.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. EXECUTORS AND ADMINISTRATORS (§ 421*)—ACTIONS—NATURE AND FORM—LEGAL AND EQUITABLE.

A suit against an administrator, executor, or guardian in reference to the proper execution of his duty is equitable in its nature, for such persons are considered as trustees.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1663, 1667; Dec. Dig. § 421.*]

4. COURTS (§ 311*)—UNITED STATES COURTS—JURISDICTION.

A Circuit Court of the United States has jurisdiction of a suit by the guardian of the person and estate of an incompetent, the guardian residing in North Dakota, where she was appointed, to compel an accounting by a guardian first appointed, residing in Minnesota, where the amount involved is over \$2,000.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 858; Dec. Dig. § 311.*]

5. EQUITY (§ 150*)—PLEADING—PARTIES.

A guardian of the person and estate of an incompetent, the guardian residing in North Dakota, where she was appointed, and where she and the incompetent resided, sued in a Circuit Court of the United States a guardian in Minnesota, who was first appointed, and alleged that such guardian held, as guardian, a note signed by others, secured by mortgage, and that he had wrongfully satisfied the mortgage under a pretended authority of a probate court of Minnesota, which license was procured by fraud, and an accounting was sought. *Held*, that the bill was not multifarious, and that makers of the note were properly joined as defendants.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 342, 371-379; Dec. Dig. § 150.*]

6. COURTS (§ 509*)—CONFLICTING JURISDICTION—STATE AND UNITED STATES COURTS.

The fact that the Minnesota probate court had approved the release did not deprive the federal court of power to set it aside, if obtained by fraud.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1364-1371; Dec. Dig. § 509.*]

7. GUARDIAN AND WARD (§ 170*)—ACTION BY FOREIGN GUARDIAN.

A guardian, as such, cannot maintain an action in a state other than the one in which he was appointed. Such an action can be maintained in a foreign state only by virtue of a statute of that state permitting it.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 570-573; Dec. Dig. § 170.*]

8. GUARDIAN AND WARD (§ 170*)—ACTION BY FOREIGN GUARDIAN—PLEADING.

Rev. Laws Minn. 1905, § 3842, provides that a guardian appointed in another state may sue in the state, but that he must file an authenticated copy of his letters in the probate court of the county where the ward's property is situated. *Held*, that a bill by a guardian was not demurrable for failure to allege a filing of a copy.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 570-573; Dec. Dig. § 170.*]

9. GUARDIAN AND WARD (§ 130*)—ACTION BY GUARDIAN—PLEADING.

Where a bill by a guardian, as such, showed that the suit was brought in her representative capacity, but the title did not show it, if necessary, the title might be amended.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 440-446; Dec. Dig. § 130.*]

In Equity. Suit by Bernice L. Pulver against Edmund P. Leonard and others. Demurrer to the bill overruled.

Charles G. Laybourn, for complainant.

Seager & Seager, for defendants.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

WILLARD, District Judge. This case stands upon a demurrer to the bill, which alleges, among other things, that on January 23, 1903, there were issued out of the office of the judge of the probate court of Watonwan county, Minn., to the defendant Edmund P. Leonard, letters of guardianship over the estate of Byron C. Leonard, then and there adjudged by said probate court to be incompetent to have the management of his property; that in the spring of 1905 Byron C. Leonard removed from the state of Minnesota, and took up his residence in the state of North Dakota, and continued thereafter to reside with the oratrix, his sister, in the county of Ward, in the state of North Dakota; that thereafter the county court of said county of Ward, said court then having jurisdiction of the administration of the estates of incompetent persons, and jurisdiction over the person and estate of Byron C. Leonard, duly issued to the oratrix, on the 17th day of March, 1906, letters of guardianship over the person and estate of Byron C. Leonard; and that the oratrix is the duly authorized, qualified, and acting guardian of the person and estate of said Byron C. Leonard. The bill further alleges that the defendant Edmund P. Leonard has under his control in said county of Watonwan personal property belonging to the estate of Byron C. Leonard of the value of more than \$5,000, and that he has wrongfully and unlawfully diverted the funds and property of said Byron C. Leonard to his own use, and that he has failed to report and account for certain sums of money which have come into his hands as guardian of the estate of said Byron C. Leonard; that the oratrix has, since her appointment as guardian as aforesaid, demanded that the said Edmund P. Leonard turn over to her the property and estate of the said Byron C. Leonard; and that said defendant has neglected and refused so to do. In the prayer of the bill it is asked, among other things, that the defendant Edmund P. Leonard be required to account to the oratrix for the funds and property belonging to said Byron C. Leonard which have come into his hands as guardian of this estate.

One of the grounds specified in the demurrer to the whole bill is that this court has no original jurisdiction of the subject-matter of the action, and it is urged by the defendants that the probate court of Watonwan county has exclusive jurisdiction of the matters set out in the bill, so far as they relate to any accounting by the defendant Edmund P. Leonard as guardian of the estate of Byron C. Leonard. The question thus presented, namely, to what extent the courts of the United States have jurisdiction over wills and the settlement of estates of deceased persons, has frequently come before the Supreme Court, and certain propositions have been established.

The Circuit Court of the United States has no jurisdiction in proceedings to probate a will, even in the case of diverse citizenship, for such a proceeding is neither an action at law nor a suit in equity. For the same reason it has no jurisdiction to set aside the probate of a will; but, if the statutes of the state, in which the property of the deceased is being administered give to its courts of general jurisdiction the right to entertain an original action to set aside the probate of a will, such a suit may be maintained in the Circuit Court of the United States, in case the parties are citizens of different states and more than

\$2,000 is involved. *Farrell v. O'Brien*, 199 U. S. 89, 25 Sup. Ct. 727, 50 L. Ed. 101.

"Foreign creditors may establish their debts in the courts of the United States, and the adjudications of those courts prevail, notwithstanding the fact that the laws of the states limit the right to prove such demands to proceedings in the probate courts of the states where the administrations are pending." *Brun v. Mann*, 151 Fed. 145, 80 C. C. A. 513, 12 L. R. A. (N. S.) 154 (Eighth Circuit); *Security Trust Company v. Black River National Bank*, 187 U. S. 211, 23 Sup. Ct. 52, 47 L. Ed. 147.

A person entitled to a distributive share of the estate of a deceased person may maintain a suit in the Circuit Court of the United States against the administrator concerning his right to such share. *Payne v. Hook*, 7 Wall. 425, 19 L. Ed. 260. So may an administrator appointed in Pennsylvania maintain in the Circuit Court of the United States a suit against an administrator appointed in New Jersey. *Hayes v. Pratt*, 147 U. S. 557, 13 Sup. Ct. 503, 37 L. Ed. 279.

In connection with such suits it has been held, however, that when the probate court of a state is administering the estate of a deceased person, the assets thereof are in the custody of the court, and that a judgment in such a suit against the administrator cannot have the effect to deprive said probate court of such possession. *Byers v. McAuley*, 149 U. S. 608, 13 Sup. Ct. 906, 37 L. Ed. 867; *Ingersoll v. Coram*, 211 U. S. 335, 29 Sup. Ct. 92, 53 L. Ed. 208. In such cases the judgment must be made out of the administrator personally, or out of his bondsman. *Byers v. McAuley*, *supra*.

While it may be true that all of the relief asked in this suit cannot be granted, it is apparent from the foregoing authorities that the probate court of Watonwan county has not exclusive jurisdiction concerning the accounts of Edmund P. Leonard as guardian.

A suit against an administrator or executor in reference to the proper execution of his duty is equitable in its nature, for such persons are considered as trustees. *Green v. Creighton*, 23 How. 90, 16 L. Ed. 419. If an executor or an administrator is a trustee, so must be a guardian.

The oratrix resides in the state of North Dakota, Edmund P. Leonard resides in the state of Minnesota, the matters set forth in the complaint are equitable in their nature, and the amount involved is more than \$2,000. This court, therefore, has jurisdiction of the suit.

In addition to Edmund P. Leonard, Edmund E. Leonard, and his wife, Jennie E. Leonard, are joined as defendants. The plaintiff alleges that Edmund P. Leonard, as guardian of Byron C. Leonard, held a note for \$6,000, signed by the defendants Edmund E. Leonard and Jennie E. Leonard, that this note was secured by a mortgage upon certain real estate in Watonwan county specifically described in the bill, and that Edmund P. Leonard, assuming to act as the guardian of Byron C. Leonard, wrongfully and unlawfully satisfied and discharged said mortgage of record, and that this discharge was made under a pretended authority and license of the probate court of Watonwan county, which said license was wrongfully procured from the court by misrep-

resentation made thereto by Edmund P. Leonard. The bill prays, among other things, that the satisfaction of this mortgage may be canceled and annulled, and that the mortgage itself be reinstated, and that the same be foreclosed.

One of the grounds of the demurrer to the bill is that it is multifarious, and it is said that Edmund E. Leonard and Jennie E. Leonard are improperly joined as defendants. The purpose of the bill is to secure a full accounting from Edmund P. Leonard, and such accounting cannot be had without determining whether the mortgage of \$6,000 ought or ought not to have been discharged. In the case of *Payne v. Hook*, 7 Wall. 425, 433, 19 L. Ed. 260, it is said:

"It is said the bill is multifarious, but we cannot see any ground for such an objection. A bill cannot be said to be multifarious unless it embraces distinct matters, which do not affect all the defendants alike. This case involves but a single matter, and that is the true condition of the estate of Fielding Curtis, which, when ascertained, will determine the rights of the next of kin. In this investigation all the defendants are jointly interested. It is true the bill seeks to open the settlements with the probate court as fraudulent, and to cancel the receipt and transfer from the complainant to the administrator, because obtained by false representations; but the determination of these questions is necessary to arrive at the proper value of the estate, and in their determination the sureties are concerned, for the very object of the bond which they gave was to protect the estate against frauds, which the administrator might commit to its prejudice."

The fact that the probate court approved this release does not deprive this court of the power to set it aside, if the order of the probate court was obtained by fraud. *McDaniel v. Traylor*, 196 U. S. 415, 25 Sup. Ct. 369, 49 L. Ed. 533. Edmund E. Leonard and Jennie E. Leonard are proper defendants, for the reasons stated. It is not necessary now to decide whether all the relief asked against them, including the foreclosure of the \$6,000 mortgage, can or cannot be granted.

Another ground set out in the demurrer is that it does not appear from the bill that the plaintiff has the legal right and authority to maintain this suit. A guardian, as such, cannot maintain an action in a state other than the one in which he was appointed. *Lawrence v. Nelson*, 143 U. S. 215, 222, 12 Sup. Ct. 440, 36 L. Ed. 130. Such an action can be maintained in a foreign state only by virtue of a statute of that state permitting it. *Lawrence v. Nelson*, supra; *Hayes v. Pratt*, 147 U. S. 557, 13 Sup. Ct. 503, 37 L. Ed. 279. The statutes of Minnesota do permit a guardian appointed in another state to sue in this state. Rev. Laws Minn. § 3842. The Minnesota law, however, provides that the plaintiff must file an authenticated copy of his letters in the probate court of the county in which his ward's property is situated. There is no allegation in the bill that this has been done. That the suit cannot be maintained unless it has been done seems clear; but the question is whether the bill is demurrable for failure to allege a compliance with the statute. The case of *Pope v. Waugh*, 94 Minn. 502, 103 N. W. 500, seems decisive upon this point. The court there said:

"The failure of plaintiff to file the certified copy of his letters of administration went to his capacity to sue, and, not having been raised by answer, was waived. Section 5235, Gen. St. 1894, provides, in effect, that, when the legal capacity of the plaintiff to sue does not affirmatively appear upon the face of the complaint, objection must be taken by answer; if it does affirma-

tively appear, it must be taken by demurrer. Want of capacity to sue did not affirmatively appear from the complaint in this case."

In the title of the suit the complainant named is Bernice L. Pulver. The title does not say as guardian of Byron C. Leonard. It, however, sufficiently appears from the body of the bill that the suit is brought in her capacity as guardian, and, if necessary, the title can be amended, so as indicate that fact. The body of the bill shows the capacity in which she in fact sues.

The result is that the demurrer must be, and the same is, overruled, without costs, and the defendants shall answer the bill by the first Monday in February, 1910.

In re JOHNSON.

(District Court, D. Minnesota, Fourth Division. March 9, 1910.)

1. BANKRUPTCY (§ 396*)—TITLE OF TRUSTEE—EXEMPT PROPERTY—INSURANCE.

Bankr. Act July 1, 1898, c. 541, § 6, 30 Stat. 548 (U. S. Comp. St. 1901, p. 3424), authorizing the allowance to a bankrupt of exemptions prescribed by the state law, is not limited by section 70a (5), requiring a bankrupt to pay to the trustee the cash surrender value of insurance, or to transfer the insurance as assets.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 201, 664; Dec. Dig. § 396.*]

2. BANKRUPTCY (§ 396*)—TITLE OF TRUSTEE—EXEMPT PROPERTY—INSURANCE.

Under Rev. Laws Minn. 1905, § 1691, providing that, whenever insurance is effected in favor of another, the beneficiary shall be entitled to its proceeds against the creditors and representatives of the insured, and all premiums paid in fraud of creditors, with interest thereon, shall inure to their benefit, if the company be specifically notified thereof before payment, and section 1692, providing that every policy made payable to the wife of the insured shall inure to her separate use, and that of her children, subject to section 1691, and that the person applying for or procuring such policy may change the beneficiaries, if the consent of the beneficiary be obtained or the power to do so is reserved in the contract, a bankrupt, holding a policy payable to his wife, cannot be required to pay the surrender value of the policy to the trustee, though it reserves to him the right to change the beneficiary.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 201, 664; Dec. Dig. § 396.*]

In the Matter of Otto M. Johnson, Bankrupt. Proceeding to review an order of the referee relating to insurance held by bankrupt. Reversed, and case remanded.

Ingman S. Winland, for bankrupt.

S. M. Finch, pro se.

WILLARD, District Judge. At the time Johnson was declared a bankrupt he had a policy of insurance on his own life for \$1,000, issued on November 25, 1902, by the John Hancock Mutual Life Insurance Company, of Boston. The policy was payable to Maia Johnson, the wife of the bankrupt, and contained the following clause:

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"The insured may change the beneficial interest herein from time to time, subject, however, to the rights of any assignee, upon filing a written request with the company at its home office in such form as it may require; but no change shall take effect unless and until indorsement thereon shall have been made thereon by the president or secretary."

The cash surrender value of the policy is \$115.08. At the time Johnson was adjudicated a bankrupt the policy had not been surrendered, nor had any surrender been sought, and at that time there had been no change in the beneficiary. The referee held that the bankrupt must pay the trustee the cash surrender value, to wit, \$115.08, before he would be entitled to retain the policy. The bankrupt is now seeking by this proceeding a review of that order.

Section 6 of the bankrupt act (Act July 1, 1898, c. 541, 30 Stat. 548 [U. S. Comp. St. 1901, p. 3424]), relating to exemptions, is not limited by the provisions of the same act found in section 70a (5). The provisions of the latter section, relating to the payment by the bankrupt of the cash surrender value of an insurance policy before he can retain it, can only be applied in a state where such policy is not exempt. *Holden v. Stratton*, 198 U. S. 202, 25 Sup. Ct. 656, 49 L. Ed. 1018; *Hiscock v. Mertens*, 205 U. S. 202, 27 Sup. Ct. 488, 51 L. Ed. 771. The only question in the case, therefore, is whether this policy is exempt under the laws of Minnesota.

Sections 1691 and 1692 of the Revised Laws of Minnesota of 1905 are as follows:

"Sec. 1691. Whenever any insurance is effected in favor of another, the beneficiary shall be entitled to its proceeds against the creditors and representatives of the person effecting the same. All premiums paid for insurance in fraud of creditors with interest thereon, shall inure to their benefit from the proceeds of the policy, if the company be specifically notified thereof in writing before payment.

"Sec. 1692. Every policy made payable to, or for the benefit of, the wife of the insured, or after its issue assigned to or in trust for her, shall inure to her separate use and that of her children, subject to the provisions of section 1691. But the person applying for or procuring such policy may change the beneficiary or beneficiaries, if consent of the beneficiary or beneficiaries named in the policy be obtained, or if a power so to do is reserved in the contract of insurance, or in case of the death or divorcement of the married woman named as beneficiary."

If it were not for the provision contained in the policy giving the insured a right to change the beneficiary, there could be no doubt but that it would come within the terms of section 1691. The doubt, if there be any, arises from the existence of this right on the part of the bankrupt. As far as appears, the question thus presented has not been decided by the Supreme Court of the state of Minnesota. The only case decided by that court to which attention has been called is the case of *Nellie Remley v. Travelers' Ins. Co.*, 108 Minn. 31, 121 N. W. 230.

The rights of the trustee are fixed as of the date of the adjudication. When the rights of the trustee in this proceeding were thus fixed, the beneficiary named in this policy was the wife. The insurance was then for her benefit, and in my opinion it should be held exempt from the claims of the bankrupt's creditors by virtue of the provisions of section 1691. It was held in the District Court in the District of Ken-

tucky (In re Pfaffinger, 164 Fed. 526) that a policy which contained a clause similar to the one in this case was nevertheless exempt under the Kentucky law, which is substantially the same as the Minnesota law. In Re Booss (D. C.) 154 Fed. 494, the policy provided for the payment of \$2,000 to the bankrupt in 1917 if he were living at that time; but if he died before that time the money was to go to his wife if living, and if not to his executors. The statute provided that a policy expressed to be for the benefit of a married woman should inure to her benefit, and not to the benefit of the creditors of the husband. It was held by the District Court for the Eastern District of Pennsylvania that the trustee had no interest in such a policy. The New York statute, construed in the Matter of White (C. C. A.) 174 Fed. 333, is substantially different from the Minnesota statute.

The trustee, in my opinion, has no interest in this policy, and cannot compel payment by the bankrupt of its cash surrender value.

The order of the referee is reversed, and the case remanded for further proceedings.

UNITED STATES v. WHITNEY et al.

(Circuit Court, D. Idaho, Central Division. February 7, 1910.)

1. WATERS AND WATER COURSES (§ 32*)—RESERVOIR SITES—FORFEITURE—STATUTES—CONDITIONS SUBSEQUENT.

Act Cong. March 3, 1891, c. 561, 26 Stat. 1095 (U. S. Comp. St. 1901, p. 1571), authorizing the grant of public land for reservoir sites, section 20 provides that, if any section of the canal shall not be completed within five years after location, the rights granted shall be forfeited as to any uncompleted section of the canal, ditch or reservoir. *Held* that, such requirement being in the nature of a condition subsequent, a failure to comply did not ipso facto operate to divest the grantee of title and revest it in the government, but that, to be effectual, the default must be followed by a declaration of forfeiture by some competent authority, and, the grant being of a public nature, the declaration can only be by act of Congress or in an appropriate judicial proceeding.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 21, 22; Dec. Dig. § 32.*]

2. WATERS AND WATER COURSES (§ 32*)—IRRIGATION RIGHTS—FORFEITURE—DECLARATION.

Where a grantee of public land for an irrigation reservoir site failed to complete his improvement for five years, as required by Act Cong. March 3, 1891, c. 561, 26 Stat. 1095 (U. S. Comp. St. 1901, p. 1535), so that the same was subject to forfeiture under section 20, it was not necessary to the enforcement of a forfeiture that it should be first declared by act of Congress, but a forfeiture could be enforced by the executive in judicial proceedings.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 21, 22; Dec. Dig. § 32.*]

Suit by the United States of America against Mamie L. Whitney, individually and as executrix of the estate of W. Grant Whitney, deceased. Decree for complainant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
176 F.—38

C. H. Lingenfelter, U. S. Atty., and B. E. Stoutemyer, for the United States.

T. D. Cahalan, Chas. H. Carey, James B. Kerr, and Ernest W. Hardy, for defendants.

DIETRICH, District Judge. The suit is brought to enforce a forfeiture of the title to a reservoir site located on public land on account of an alleged breach by the grantee of a condition subsequent embraced in the original grant. From the bill and answer, upon which the cause is submitted, it appears that W. Grant Whitney, to all of whose property interests the defendant has succeeded, in the year 1900 acquired such rights in, and title to, a certain reservoir site in the state of Idaho as accrue to a qualified person who fully complies with all the terms and conditions of sections 18 to 21, inclusive, of an act of Congress entitled "An act to repeal timber culture law, and for other purposes," approved March 3, 1891 (Act March 3, 1891, c. 561; 26 Stat. 1095, 1101, 1102 [U. S. Comp. St. 1901, pp. 1535, 1570, 1571]), and an act amendatory thereof, approved May 11, 1898 (Act May 11, 1898, c. 292, § 2, 30 Stat. 404 [U. S. Comp. St. 1901, p. 1575]), and with the rules and regulations of the Secretary of the Interior, adopted in pursuance thereof, excepting only the requirement that actual construction of the contemplated works be completed within the prescribed period of five years. Whitney located the site within 12 months prior to December 13, 1899, upon which date he properly filed maps thereof in the local land office and with the Secretary of the Interior, who upon October 18, 1900, duly approved the same and indorsed his approval thereon. Some preparation—the nature of which is not clearly disclosed—was made to finance and carry out the project, but no actual construction work was done upon the ground, which still remains in its natural condition. The only excuses offered for the default in completing the work within the time prescribed by law are that the grantee was greatly harassed by litigation involving the title to certain privately-owned lands embraced within the site, and, further, that some of complainant's agents circulated reports tending to cast a cloud upon the validity of his claims, and calling into question his right to hold the site for reservoir purposes. These excuses are not seriously urged by the defendant, and are dismissed as not presenting any substantial defense.

In its general features the act of March 3, 1891, is very similar to the railroad right of way act (Act March 3, 1875, c. 152, 18 Stat. 482 [U. S. Comp. St. 1901, p. 1568]). The language of section 18 is:

"That the right of way through the public lands and reservations of the United States is hereby granted * * * to the extent," etc.

Section 19 provides that, upon the approval of the map by the Secretary of the Interior, such approval shall be noted upon the plats in the local land office, "and thereafter all such lands over which such rights of way shall pass shall be disposed of subject to such right of way." It is accordingly held that as in the case of a railroad right of way the grant is in præsenti, and that title to the land shown upon the applicant's maps vests in him upon the approval thereof by the Secretary of the Interior. *Noble v. Union River Logging Co.*, 147 U. S.

171, 13 Sup. Ct. 271, 37 L. Ed. 123; *Min., St. P. & Sault Ste. Marie Railroad Co. v. Doughty*, 208 U. S. 251, 28 Sup. Ct. 291, 52 L. Ed. 474. Conceding that Whitney thus became vested with the title to the reservoir site, complainant contends for a forfeiture of all rights so acquired, under and by reason of section 20 of the act, which, among other things, provides:

"That if any section of said canal or ditch shall not be completed within five years after the location of said section the rights herein granted shall be forfeited as to any uncompleted section of said canal, ditch, or reservoir, to the extent that the same is not completed at the date of the forfeiture."

This requirement being in the nature of a condition subsequent, the rule undoubtedly is that failure to comply therewith does not operate ipso facto to divest the grantee of the title and reinvest the grantor therewith, but that to be effectual, the default must be followed with a declaration of forfeiture by some competent authority, and, the grant here being of a public nature, such declaration can be made only by an act of Congress, or in an appropriate judicial proceeding. *United States v. De Repentigny*, 5 Wall. 211, 267-268, 18 L. Ed. 627; *Schulenberg v. Harriman*, 21 Wall. 44, 62-64, 22 L. Ed. 551; *Farnsworth v. Minnesota, etc., Ry.*, 92 U. S. 49, 66-68, 23 L. Ed. 530; *McMicken v. United States*, 97 U. S. 204, 218, 24 L. Ed. 947; *Bybee v. Oregon, etc., Ry.*, 139 U. S. 663, 674-677, 11 Sup. Ct. 641, 35 L. Ed. 305; *St. Louis, etc., Ry. v. McGee*, 115 U. S. 469, 472-475, 6 Sup. Ct. 123, 29 L. Ed. 446; *Railroad Co. v. Mingus*, 165 U. S. 413, 430-434, 17 Sup. Ct. 348, 41 L. Ed. 770.

In *Schulenberg v. Harriman*, *supra*, the rule is stated to be as follows:

"In what manner the reserved right of the grantor for breach of the condition must be asserted so as to restore the estate depends upon the character of the grant. If it be a private grant, that right must be asserted by entry or its equivalent. If the grant be a public one, it must be asserted by judicial proceedings authorized by law, the equivalent of an inquest of office at common law, finding the fact of forfeiture and adjudging the restoration of the estate on that ground, or there must be some legislative assertion of ownership of the property for breach of the condition, such as an act directing the possession and appropriation of the property, or that it be offered for sale or settlement. At common law the sovereign could not make an entry in person, and therefore an office found was necessary to determine the estate, but, as said by this court in a late case, 'the mode of asserting or of resuming the forfeited grant is subject to the legislative authority of the government. It may be after judicial investigation, or by taking possession directly under the authority of the government without these preliminary proceedings.' In the present case no action has been taken either by legislation or judicial proceedings to enforce a forfeiture of the estate granted by the acts of 1856 and 1864. The title remains, therefore, in the state as completely as it existed on the day when the title by location of the route of the railroad acquired precision and became attached to the adjoining alternate sections."

In the present case, there has been no congressional action looking to an enforcement of the forfeiture, and the only expression of the legislative will is to be found in the provision already quoted from the original grant. The precise question submitted for decision therefore is: Was it competent for the Attorney General to institute this proceeding, and is this court authorized to enforce the forfeiture by finding the breach and decreeing a restoration of the estate? Maintain-

ing that the executive department is powerless to institute such a proceeding until Congress shall have expressly conferred special authority therefor, the defendant attaches great significance to the fact that in referring to judicial declarations of forfeiture the Supreme Court in the cases above cited almost invariably speaks of such actions not merely as judicial proceedings, but as judicial proceedings authorized by law, or instituted under authority of law.

It is, however, conceded that in none of these cases was the present question involved, and for support of her position defendant mainly relies upon *United States v. Tenn. & Coosa Ry. Co.* (C. C.) 71 Fed. 71, and *United States v. N. P. R. R. Co.*, 177 U. S. 435, 20 Sup. Ct. 706, 44 L. Ed. 836. In the former case the question arose under the provisions of a railroad land grant act and a subsequent general act declaring a forfeiture of lands theretofore granted in aid of railways where certain conditions had not been complied with. By the suit the United States sought to enforce a forfeiture of lands granted to the defendant, reliance, however, being placed not upon a condition specified in the general forfeiture act, but upon another condition subsequent prescribed by the granting act, and concerning which the general forfeiture act was silent. In the course of the opinion (by Bruce, District Judge) it is said:

"If it be correct that the lands in question are not within the terms of the forfeiture act, then how is it shown that it ever was the purpose of Congress to insist upon any forfeiture contained in any provision of the act? On the contrary, does it not show that no such purpose was ever entertained because never put into execution by the legislative act? It may be, and, indeed, the language used in the forfeiture act (cited *supra*) indicates that the lands in question may have been properly excluded from the terms of that act. * * * It is a clear implication from the action of Congress in the forfeiture act, September 29, 1890 [chapter 1040, 26 Stat. 496 (U. S. Comp. St. 1901, p. 1598)], that the Congress did not intend to insist upon any condition subsequent which existed in the granting act."

It is doubtless true that the method of declaring a forfeiture is subject to legislative control, and if, as appears to be the case, the court construed the forfeiture act, or any other congressional act, as implying an unwillingness on the part of the Congress to have the forfeiture enforced, it was not only the right, but the duty, of the court to give effect to such implication, and thus execute the legislative will. Certain expressions in *United States v. N. P. R. R. Co.*, 177 U. S. 435, 20 Sup. Ct. 706, 44 L. Ed. 836, appear to be more pointedly favorable to the defendant's contention. The particular sentence relied upon is as follows:

"As the bill in this case does not allege that it is brought under authority of Congress for the purpose of enforcing a forfeiture, and does not allege any other legislative act whatever looking to such an intention, it is plain, under the authorities cited, that this suit must be regarded as only intended to have the point of the eastern terminus judicially ascertained."

It must be borne in mind, however, that this language was used in stating the conclusion of the court upon the question whether or not the position assumed by the government at the argument was within the pleadings. After stating complainant's proposition, the court says:

"It is always safe, in approaching a question of this kind, to have regard to the pleadings in the case. Otherwise there is danger that the court and counsel may be drawn into discussions outside of the case actually presented."

It then proceeds to analyze the bill, and finds that while in the narrative part there is quoted a section of the granting act, prescribing certain conditions subsequent, "the obvious purpose of the suit was to have the question of the proper terminus of the company's road determined," and that "there is no intimation that it was the purpose of the bill to have a forfeiture of the company's rights and property, judicially ascertained and declared." And thereupon, after a somewhat extended reference to previous cases decided by the court, its general conclusion is stated in the language here relied upon by the defendant and hereinbefore quoted. It will thus be seen that primarily the court was considering the question whether or not the relief contended for could properly be held to be within the scope of the pleadings. It may be added that when the case was in the Circuit Court of Appeals the same question was raised, and the conclusion was there also reached that the relief was not within the allegations of the bill.

Moreover, it is to be noted that the act there under consideration, differing from the one here involved, contained no language expressly declaring a forfeiture. That the distinction between the two acts is not to be deemed to be one of form only is made plain by the following extract from the opinion of the Circuit Court of Appeals:

"Moreover, it is extremely doubtful, in view of the provisions of section 9 of the charter, whether or not any court would have jurisdiction to hear an application for or to declare a forfeiture in the absence of an act of Congress directing such an application. That section provides that, if the company makes any breach of the conditions of the act, and allows the same to continue for upward of one year, 'then in such case at any time hereafter the United States, by its Congress, may do any and all acts and things which may be needful and necessary to insure a speedy completion of the said road.' Courts will hesitate long, we apprehend, to declare a forfeiture of the rights under this charter in the absence of any action by Congress. However this may be, no act of forfeiture has ever been passed, no decree of forfeiture has ever been rendered." 95 Fed. 879, 37 C. C. A. 405.

The defendant further sees great significance in the fact that in the history of public land grants, both for rights of way and in aid of railways and other works, the reported cases are extremely rare where a judicial declaration of forfeiture has been sought; whereas, there have been numerous congressional acts forfeiting such grants either in whole or in part. But this fact does not necessarily imply either a legislative assumption or an administrative concession of the correctness of defendant's position. Obviously in cases where grants of the same character have been many and extensive, and where there has been default in complying with the conditions by numerous grantees, a legislative declaration of forfeiture is likely to be not only much more summary, but also much less expensive, than an enforcement of the forfeiture by resort to judicial proceedings. Moreover, the mere inaction of the executive does not necessarily imply an admission of want of authority. The facts constituting the forfeiture may not have come to the knowledge of the executive officers, or there may

have been no urgent need for declaring a forfeiture. Here the government has need for the land embraced within the reservoir site for use in connection with a reclamation project, and, the default of the grantee having thereupon and for that reason been brought to the attention of the department of justice, it has instituted this action for the purpose of having the forfeiture enforced. Had it not been for this need arising out of one of the new activities of the government, the grantee's default might have passed unnoticed or uncomplained of; but the inaction of the department of justice under such circumstances would not imply incapacity to act.

The defendant has especially urged for consideration Senate Resolution No. 48, approved April 30, 1908 (35 Stat. 571), which, together with the circumstances surrounding its adoption, it is contended, implies a legislative assertion and an administrative concession of the claim that the executive is without authority to proceed until Congress shall have first expressly and specially conferred such authority; but the history of this resolution does not warrant such a conclusion. From the proceedings it is clear that there existed in the department of justice a difference of opinion as to the right to proceed without further legislative authority, and that the question was not entirely free from doubt. Apparently the attitude of the Attorney General was that, while he was personally of the opinion that he already had the right to proceed, there was room for question, and before entering upon expensive litigation, involving vast property interests, it was thought discreet to take the precaution of procuring express authority, and thus effectually and finally setting all doubts at rest. It was in this spirit, as I read the record, that the resolution was asked and granted. Moreover, the acts to which the resolution was directed were of a special nature, and were much less definite in their terms than the one now under consideration. It is possible that a distinction should be drawn between a specific grant by special act to a designated person for a prescribed purpose, and grants effected by compliance with the provisions of general and permanent law. A grant being by special act, it may be argued that authority for its revocation should also be conferred by special act. But, however that may be, what substantial reason can be adduced for holding that the resolution referred to conferred greater power upon the Attorney General than is possessed by the executive department under the act of March 3, 1891, and the Constitution and general laws? That resolution does not purport to enlarge the jurisdiction of the courts, or vest in them any additional or peculiar power, nor does it create or provide for any new or special proceeding. It simply authorizes and directs the Attorney General by appropriate actions in the courts to assert such rights as the United States has in certain vast tracts of lands included in the original grants. The act of March 3, 1891, is general and permanent in its character, and operates continuously to convey the title to public lands to all persons complying with its provisions. It cannot be doubted that the forfeiture clause equally with the granting clause is also in the nature of general law and of a permanent character, and that, being true, it is not clear why it should not be held to be ample warrant to the Attorney General to enter the courts and there seek

the enforcement of public rights and the restoration of the title to public property, thus "executing the law." By the Constitution it is made the duty of the chief executive to "take care that the laws be faithfully executed"; and, if certain rights are granted by general law, and by the same general law it is provided that such rights shall be forfeited on the breach of certain conditions, the breach existing, it is thought that the executive has the authority to institute proceedings in the courts to have such forfeiture judicially declared, and that suits brought for that purpose are judicial proceedings authorized by law.

It may be true, as suggested, that cases will arise where on account of extraordinary conditions or great misfortune, or unforeseen accidents, the grantee, after making large expenditures in construction work, will be unable to complete the project within the prescribed period, and that, under such circumstances, forfeiture would entail great hardship. Assuming, but not deciding, that in such case the courts would be powerless to give equitable relief, it is sufficient to say that the grantee is at liberty, either in anticipation of his default or subsequently, either before suit is brought or thereafter, to appeal to Congress for an extension of the time or for a modification of the grant, or for any other proper measure of relief.

Since maturing the foregoing views, there has come to my attention the opinion of the Supreme Court of the United States, filed December 13, 1909, in the case of the Rio Grande Dam & Irrigation Co. and others v. United States, 215 U. S. 266, 30 Sup. Ct. 97, 54 L. Ed. —. The case was originally brought in one of the courts of New Mexico in 1897; the general object thereof being to obtain an injunction to prevent the Rio Grande Dam & Irrigation Company from maintaining a dam across and a reservoir near the Rio Grande river. Prior to this last decision, the case was twice before the Supreme Court, the last appeal resulting in a reversal, with directions "to grant leave to both sides to adduce further evidence." Thereafter, by leave of the trial court, the plaintiff filed a supplemental complaint, in which, after referring to the defendant's plea that it had acquired a right to construct the dam and reservoir by virtue of its compliance with the act of March 3, 1891 (the one here under consideration), it alleged facts showing the failure of defendant to complete its works within the prescribed period, and prayed for a decree of forfeiture in addition to the injunctive relief primarily sought in the original bill. The defendant failed to plead to the supplemental complaint within the time allowed by law, and, its default having been entered, the court found the allegations of the supplemental bill to be true, and, in harmony with the findings, adjudged "that the rights of the said defendants, or either of them, to so construct and complete the said reservoir and said ditch, or any part thereof, under and by virtue of said act of Congress of March 3, 1891, be and the same are hereby declared to be forfeited"; and it was further decreed that the defendants be enjoined from constructing or attempting to construct any part of the reservoir. On appeal to the Supreme Court of the territory, the action of the trial court was sustained, and a similar judgment was there entered, from which an appeal was prosecuted to the

Supreme Court of the United States, where there was an affirmance. It is true that the question here considered does not appear to have been raised, and it is further true that the general object of the suit, and the only object of the suit as originally brought, was to obtain an injunction against the defendant, upon the ground that the construction of the reservoir and dam would interfere with the navigability of the Rio Grande river. But so far as appears from the record, while the injunctive relief originally prayed for was finally granted, it was granted, not upon the theory that the defendant was threatening to interfere with the navigability of the stream, but upon the ground alone that it had, by forfeiture, lost its right to construct the reservoir and dam. In other words, the filing of the supplemental complaint in effect initiated a proceeding for the enforcement of a forfeiture under the act of March 3, 1891, and the finding and decree of forfeiture became the only basis for the injunctive relief. While, as already stated, the objection here raised by the defendant does not appear to have been made, still, if defendant's theory be correct, the failure to interpose the objection would not constitute a waiver, for it relates either to the jurisdiction of the court or to the sufficiency of the facts stated in the bill to entitle the plaintiff to relief, and the court upon its own motion could, at any stage of the proceedings, have dismissed the supplemental bill. On the whole, while perhaps not conclusive, the case must, I think, be considered as strongly fortifying the position which the government here maintains.

In harmony with the views hereinbefore expressed, it is held that complainant is entitled to a decree.

HOME MIXTURE GUANO CO. v. OCEAN ACCIDENT & GUARANTEE CORPORATION, LIMITED, OF LONDON, ENGLAND.

(Circuit Court, N. D. Georgia. February 18, 1910.)

1. INSURANCE (§ 435*)—EMPLOYER'S INDEMNITY POLICY—CONSTRUCTION—"CONSTRUCTION, DEMOLITION, OR EXTRAORDINARY REPAIRS"—"ORDINARY REPAIRS."

A large part of plaintiff's factory having been destroyed, it was engaged in rebuilding the same, and, in connection therewith, was rebuilding an acid chamber, required to be lined with lead. In the course of this work, one of plaintiff's employes, while engaged in unrolling the lead, fell from a scaffold and received injuries for which he recovered damages from plaintiff. *Held*, that such work was not "ordinary repairs," but "construction, demolition, or extraordinary repairs," within the exception of an employer's liability policy excepting injuries to persons occurring in the construction, demolition, or in making extraordinary repairs to structures, buildings, or plants.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 435.*]

For other definitions, see Words and Phrases, vol. 6, p. 5049; vol. 8, p. 7740.]

2. INSURANCE (§ 146*)—INDEMNITY POLICY—CONSTRUCTION.

An employer's liability policy, and the exceptions therein contained, must be construed most strongly against the insurer.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 295; Dec. Dig. § 146.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. INSURANCE (§ 154*)—RIDERS—PRIOR ACCIDENTS.

That the insurer placed a rider on plaintiff's liability policy providing that the policy should not cover any operations in connection with the relining, repairing, or constructing of acid vaults, except on written notification to and written acceptance thereof by the insurer, did not warrant a conclusion that the parties construed the policy to cover a prior accident to one of plaintiff's employes while engaged in relining an acid chamber in the course of extraordinary repairs expressly excepted from the policy.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 154.*]

Action by the Home Mixture Guano Company against the Ocean Accident & Guarantee Corporation, Limited, of London, England. On demurrer to declaration. Sustained.

S. B. Hatcher and T. T. Miller, for plaintiff.
Rosser & Brandon, for defendant.

NEWMAN, District Judge. The present hearing in this case is on a demurrer to the declaration. The suit is on a policy of insurance issued by the defendant company, to the plaintiff company, in which the former agrees to indemnify the latter during a period of 12 calendar months, from February 9, 1906, to February 9, 1907, against loss of common-law or statutory liability, for damage on account of bodily injuries, fatal or nonfatal, accidentally suffered while this policy is in force, by any employé or employes of the guano company, while on duty at the place, and in the occupations, and within the factories, shop, or yard of the guano company. The policy contains certain provisions as to payments for injuries to employes, and certain limitations on the same, and then provides that the liability in no case shall exceed \$5,000. The policy further provides that, in case of suit brought against the assured to enforce a claim for damages covered by the policy, the assured shall immediately forward to the American head office of the indemnity company every summons or other process, as soon as the same shall have been served on him, and the corporation (the indemnity company) will, at its own costs, defend such suit in the name and on behalf of the assured, or settle the same. Then follows this allegation:

"Petitioner avers that in the early part of the year 1906 a fire burned and destroyed a portion of its manufacturing plant, being the acid chamber thereof, and, in order to manufacture fertilizers, it was necessary to rebuild said acid chambers. It says that it contracted with an independent contractor and builder for the construction of the wooden building, in which the acid chamber was to be built; and, when this building was constructed, petitioner, with its employes, whose compensation is regularly included in the estimated pay roll, began the work of unrolling lead for lining the acid chamber, being an ordinary repair, necessary in connection with the work of manufacturing fertilizers. The burning of lead being also let out by contract to an independent contractor, and the only part of said work undertaken by plaintiff was the unrolling of the lead, which was an ordinary repair and in terms of said policy. That among said employes, engaged in unrolling said lead to cover the acid chamber was J. L. Womack, whose name was on the pay roll of assured, engaged in the operation of manufacturing fertilizers, and within the terms of the policy.

"Petitioner avers that defendant was advised of the character of the work it was doing, as will appear by letter received by it from defendant, under

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

date of July 21, 1906, and the petitioners reply thereto, under date of July 24, 1906, copies of such letters attached. And that said defendant raised no objection thereto, at the time, nor did it intimate until September 6, 1906, that the work in which plaintiff's employes were engaged was not within the terms of said policy; and not until after said J. L. Womack and other employes had been injured by the fall of the scaffolding used in unrolling lead to cover the acid chamber. Copy of the letter of September 6, 1906, attached. Petitioner avers that on the 6th day of August, 1906, said J. L. Womack, an employe of petitioner, was engaged at work upon a scaffold, in unrolling lead, necessary for the lining of its acid chamber, when said scaffold broke, causing said Womack to fall to the floor, and he was accidentally injured thereby, from which he lost a leg, and the other leg was badly injured, and his back was injured, being permanently injured."

It is then averred that, in compliance with the conditions of said policy, plaintiff gave immediate written notice of said accident to the defendant, and that on the 8th day of November, 1906, rendered a hospital bill and doctor's bill for services and attention to said J. L. Womack, caused by his injuries. It is then alleged that in July, 1907, Womack brought suit in the city court of Columbus for the injuries sustained by the falling scaffold, as stated, and that plaintiff mailed to the indemnity company a copy of the subpoenas served upon them, and that the indemnity company refused to settle the damage, and failed and refused to engage counsel to represent plaintiff in the action.

The suit was tried in January, 1910, and resulted in a verdict for \$5,000, and \$50 costs of court, which execution issued against the guano company, which they fully paid and settled on the 18th day of January, 1909.

Plaintiff then alleges that it is entitled to recover from the indemnity company \$10,000, or other large sum, also \$1,000 attorney's fees, for defending the suit brought by J. L. Womack, and also \$100 for medical and surgical attention to Womack on account of his injuries.

There is in the policy of insurance, as shown by the declaration, the following provision:

"This policy does not cover loss from liability for injuries to, or caused wholly, or in part by: * * * (e) Any person connected with the making of additions to, or alterations in, any structure, building or plant, or in connection with the construction, demolition, or extraordinary repairs thereof; but ordinary repairs when made on the premises mentioned in said schedule by employes whose compensation is regularly included in the estimated pay roll, are permitted."

Paragraph 13 of what is called "the schedule" contains this provision:

"The employes whose compensation is included in the foregoing list, are not employed in the making of alterations in, or additions to, structures, buildings or plants, nor in connection with the construction, demolition, or extraordinary repairs thereof."

There is a demurrer to the declaration on the ground that there is no cause of action set out in this declaration. The declaration also is specially demurred to upon several grounds.

The precise question for determination here is whether J. L. Womack, the person injured at the time he was so injured, was engaged in work which is covered by the policy of indemnity which was issued to the plaintiff by the defendant company. The declaration says, as will be seen above:

"That in the early part of the year 1906 a fire burned and destroyed a portion of its manufacturing plant, being the acid chamber thereof, and, in order to manufacture fertilizers, it was necessary to rebuild said acid chamber."

It was then alleged that after the wooden building was erected it became necessary to line the same with the lead to prepare it as an acid chamber, and Womack, who was on the pay roll, as a regular employé of the guano company, was engaged in unrolling the lead to be used in lining the chamber.

Was this work such that, injury occurring, the indemnity company would be liable to the plaintiff, in view of the exceptions contained in the policy, which have been quoted above, and the provision of paragraph 13 of the schedule?

The argument here is that although the building containing the acid chamber was destroyed by fire, and the same had been rebuilt, and was being relined, inasmuch as relining would be an ordinary repair, and it was being done by regular employés of the guano company, it does not come within the exception stated in the policy.

Persons engaged in connection with "construction, demolition, or extraordinary repairs" are not covered. Persons engaged in "ordinary repairs," when made on the premises mentioned in the schedule, by employés whose compensation is regularly included in the company's pay roll, are covered. It is contended here, and the contention is unquestionably sound, that this policy should be construed most strongly against the indemnity company, and the exceptions in the policy construed as against the company; but, construing the policy in this way, can it be said to cover the person injured in the work in which Womack was engaged, at the time he was injured, although he was on the regular pay roll of the company? For some reason best known to the indemnity company, it saw fit to make an exception in its policy as to employés engaged in "construction, demolition, or extraordinary repairs," and the guano company assented to this in the schedule.

While it is true that the indemnity company would probably have been liable had Womack been simply engaged as an employé of the company, and on its pay roll, in assisting in relining the acid chamber, that being all, yet, in view of the fact that the building in which the acid chamber was contained was completely destroyed, and was being rebuilt, is there any such liability?

It is perfectly clear from the petition, and from the letters of the plaintiff company attached to the petition, that a large part of its manufacturing plant was destroyed, and that it was engaged in rebuilding the same. That portion of the plant, undoubtedly, in which the acid chamber was placed, was being rebuilt. Therefore the contention is that what Womack was doing at the time of his injuries was not repair work at all, but was extraordinary construction work. If the building and the acid chamber were destroyed, and the whole were being rebuilt, it could hardly be called repairing the acid chamber.

It is urged for the plaintiff that a case is made which should go to a jury to determine whether or not this was ordinary repair work. If there was any doubt about the proper construction of this contract, or if any questions of fact were involved, this would be true. But

there is no difficulty from the terms of this policy and from the facts stated in the declaration and exhibits as to what was being done, and in applying the same to the facts stated. If it was construction work, or extraordinary repairs in which J. L. Womack was assisting, his injuries are not covered by the policy. If ordinary repairs, it is covered by the policy. To say that where a large part of a manufacturing plant is burned, and is being rebuilt, and an entirely new acid chamber put in, is ordinary repair work, is not possible, giving the most extreme construction to this policy against the indemnity company and in favor of the guano company.

In the case of *Wheeler v. Fidelity & Casualty Company*, 129 Ga. 240, 58 S. E. 710, Judge Cobb, speaking for the Supreme Court of Georgia, says this:

"While we recognize the rule that a policy of insurance must be construed most strongly against the insurer, still the words of the policy must be given the meaning which they ordinarily bear; and, where it is manifest that it was the intention of the insurer that liability should attach only in given circumstances, the law will uphold the contract according to its true intent and import. We do not think there is any ambiguity whatever in the clause of the policy providing for indemnity resulting from death or disability of the beneficiary. Nor do we think that there is any stipulation in the policy which can be properly held to vary or alter the plain and evident meaning of the terms in this clause. The writing being unambiguous, parol evidence as to what was said by the parties at the time it was executed will not be admitted to vary or alter the terms of the writing. The petition set forth no cause of action, and was properly dismissed on demurrer."

Other authorities might be quoted to the same effect, but it is unnecessary.

It is said that the parties themselves construed this policy, and extended it, to cover an accident of this sort. The two letters which are attached to the policy, it is said, show this. One is from the indemnity company to the guano company, dated July 21, 1906, and the reply of the guano company to the indemnity company, dated July 24, 1906. This was with reference to accidents which had occurred prior thereto, to Henry Cheney and Doc. Williams. The first letter is as follows:

"July 21st, 1906.

"Home Mixture Guano Company, Columbus, Georgia—Gentlemen: * * * We have to-day received notice of accident to above employes (Cheney and Williams). From the particulars given in your report there does not appear to be any liability attaching to you for the occurrence of these accidents. We note that the injured employes were engaged in rebuilding acid chambers. Kindly let us know the nature and extent of any alterations and repairs that you are now engaged in at your plant. Are you doing anything except relining acid chambers? We wish that you would caution your superintendent in regard to using extra precaution against accidents while carrying on this work. It has been our experience for the last two or three years that in almost every instance where fertilizer plants have undertaken to reline their acid chambers, that a number of serious and fatal accidents have resulted, principally from the giving way of springing scaffold necessarily used in this kind of work. We recall one instance where a new manilla rope one and one-half inch in diameter broke, precipitating three men to the bottom of the acid chamber with serious results. We hope that you will give the necessary attention to this matter and see that any ropes used are carefully tested and not allowed to come into contact with acid.

"Yours truly, The Ocean Accident and Guarantee Cor. Ltd.,

"[Signed] C. B. Atkins, Dept. of Claims."

The reply of the guano company is as follows:

"Replying to your favor of the 21st, we are rebuilding our acid chambers from the burner rooms back, and our superintendent, who is a very reliable and careful man, is using all diligence and care to eliminate any chance of accident. Our tackle consisting of blocks, pulleys, etc., is in first-class shape, and our cables and ropes are brand new, and we trust to complete the work without having any serious accident."

Subsequently, on September 6, 1906, C. B. Atkins, representative of the indemnity company, wrote the guano company with reference to the accident of August 6th, in which Womack and others were injured, that upon investigation the indemnity company found that this accident occurred while Womack was engaged in the construction of a large new building, including acid chambers, acid towers, etc., and then proceeds to state that this accident does not come under the terms of the policy which has been referred to above.

The claim is, however, that the letters of July 21, and July 24, 1906, show that the parties construed this contract as applying to the character of the work in which Womack was engaged. This claim does not seem sound. On the contrary, it appears in the letter of C. B. Atkins, dated July 21, 1906, that he asks to know the nature and character of the repairs, and whether they were doing anything except to reline the acid chamber. Assuming the information of the indemnity company to be such as indicated by the letter to Atkins, he knew nothing of the character of the work being done. It could hardly be said that any statements made by him and any requests as to care in doing work connected with lining the acid chamber could be taken as an admission of liability, unless he knew what the real facts were at the time he wrote. These letters do not appear to strengthen the plaintiff's case in any way whatever.

It is next urged that a rider which was placed on the policy in October, 1906, indicated that work such as Womack was doing at the time of his injury was covered by this policy. The rider is as follows:

"It is understood and agreed that the undermentioned policy subject in all respects to its conditions, agreements and limitations, does not cover any operations in connection with the relining, repairing or construction of acid vats, except upon written notification to, and written acceptance thereof by the corporation."

It is impossible to see how this rider can in any way affect this contract as applied to the accident to J. L. Womack in August. It seems that the indemnity company, for reasons satisfactory, desired to relieve itself from all possible liability from accidents occurring in the relining or construction of acid vats. It would seem that the purpose of placing this rider on the policy was to prevent all possible doubt on the question of liability thereafter. This is the most that it seems can be said about this rider.

The meaning of this policy seems to be quite plain, and even the most strained construction could not make it cover the accident to J. L. Womack, under the circumstances surrounding its occurrence, and in view of what was being done at the guano company's plant, at the time of his injury.

The demurrer to the declaration must be sustained.

In re MILLER PURE RYE DISTILLING CO.

(District Court, E. D. Pennsylvania. February 10, 1910.)

No. 3,021.

BANKRUPTCY (§ 140*)—PROPERTY PASSING TO TRUSTEE—PLEDGE OF DISTILLER'S BONDED WAREHOUSE CERTIFICATES.

A distilling company's warehouse certificates, calling for whisky stored in its bonded warehouse, which in practical effect under the internal revenue laws is in the custody of the United States as bailee, represent the property itself, and their transfer to a purchaser or pledgee operates as a delivery of the whisky called for thereby subject to the payment of the tax, and, when made in good faith more than four months prior to the company's bankruptcy, such a pledge is good as against its trustee and general creditors, and the whisky does not pass to the trustee.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 140.*]

In the matter of Miller Pure Rye Distilling Company, bankrupt.
On certificate of referee. Order reversed.

Snyder & Zieber, for claimant.
Joseph Hill Brinton, for trustee.

J. B. McPHERSON, District Judge. This dispute presents an important and interesting question: What effect should be given to the pledge of a storage receipt covering packages of whisky in a distiller's bonded warehouse? The creditors' petition was filed on February 3, 1908, and if the whisky was property which the bankrupt could have transferred by any means before that date, or which might have been levied upon and sold under judicial process against the company, the trustee afterwards acquired the title that might thus have been transferred, or been levied upon and sold at judicial sale. If the pledge of the receipts pledged the whisky, the trustee's title is subordinate; otherwise, the adjudication gave him the complete ownership. The relevant facts are as follows:

On August 27, 1907, the Penn National Bank of Reading, Pa., lent \$2,500 to the bankrupt, a corporation then engaged in distilling whisky at Ryeland or Womelsdorf; both names being used in the evidence. The company secured the loan by giving its note at four months, and also by pledging as collateral three warehouse receipts and certain gauger's certificates covering 200 barrels of whisky in the company's bonded warehouse. The note contains the usual collateral provisions. It states, *inter alia*, that the company has deposited with the bank as collateral security 200 barrels of whisky in the bonded warehouse at Womelsdorf as per warehouse receipts and gauger's certificates accompanying the note; and in the event of default at maturity authorizes the holder to sell, transfer, and deliver the whole or any part of the whisky without any previous demand, advertisement, or notice, either at public or private sale, with the right on his part to buy the property free of all trusts and claims. A copy of one of the receipts, duly indorsed by the company, is as follows:

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

No. 5,454.

First District of Pennsylvania.

25 Bbls.

United States Internal Revenue Distillery Bonded Warehouse of Miller Pure Rye Distilling Company.

Ryeland, Berks Co., Pa., August 26, 1907.

Received on storage from ourselves twenty-five (25) barrels of Miller Pure Rye Whisky Distilled, marked and numbered as per record attached, subject to our order and risk of loss or damage by fire, the elements, leakage, evaporation or accident. Deliverable only upon surrender of this certificate, payment of tax and other charges due thereon, and storage at the rate of five cents per barrel per month, from August 26th, 1907. Inspection Spring 1907. Stored in Warehouse No. 2. Miller Pure Rye Distilling Co.

Serial Nos. of Packages 7964/7988.

S. V. Nagle, President.

Special Notice.—Particular care should be taken of this certificate as the whisky cannot be delivered without its surrender.

The gauger's certificates accompanied the receipts, and are dated between April 23 and June 7, 1907. The note was not paid at maturity, and on February 5, 1908, the bank, after advertisement and notice to the company or its representative, sold the receipts at public sale and bought them in for \$200. Thereafter the bank offered to pay all taxes and charges, and asked the referee for an order, directing the trustee to take whatever steps might be required under the internal revenue laws to bring about the physical delivery of the whisky to the bank. In reply the trustee denied that the bank had become the owner, averred that no delivery had ever been made, and asserted that the whisky was under the company's exclusive control and direction when the receipts were executed and pledged. Numerous other claims of a similar kind were presented to the referee, and much testimony was taken. By agreement all the evidence applies to all the claims, and I understand also that they will all be disposed of by the decision in the case now under discussion. The referee refused the order, holding that the trustee as the representative of the general creditors could successfully attack the pledge of the receipts; the ground of the decision being that the whisky itself had not been validly pledged, because it had not been delivered either actually or constructively. The company continued therefore to be the owner, and the trustee succeeded to its title.

As already stated, the bank bought in the receipts on February 5th, and thus became their formal owner; but the sale was held two days after the petition in bankruptcy was filed and can have no effect upon the pending question. If the bankrupt could have transferred the whisky on February 3d, or if a creditor could then have sold it under judicial process, the title passed to the trustee when the adjudication was afterwards entered. For present purposes the sale on February 5th is not material. If the pledge of the receipts bound the property, the bank's petition should have been allowed; if failure to deliver the whisky made the pledge invalid, the subsequent sale could not give it life. What effect, then, did the issue and pledge of the receipts have upon the rights of general creditors? There is no doubt that the pledge was for value and was without fraud in fact, and that it was made more than four months before the petition in bankruptcy was filed. But these considerations are not decisive; if the pledge was fraudulent in law because the whisky was not delivered, either actually

or constructively, the bank acquired no rights against general creditors, and has no valid claim upon the property.

Save in one respect, the case cannot be distinguished, I think, from *In re Millbourne Mills Co.* (C. C. A.) 172 Fed. 177; and, unless the distinction justifies the application of a different rule, the order of the referee was right. In my opinion, however, a material difference between that case and this is to be found in the fact that the pledged property here was stored in a bonded warehouse established and maintained under the laws of the United States. It is true that the whisky did not cease to belong to the company, simply because it was stored in the warehouse. It was the product of the bankrupt's skill, labor, and capital, and in no sense belonged to the government. The stringent regulations of the federal law concerning the custody of distilled spirits are intended to protect the government's right to the tax. They have no other ultimate purpose; but I think it cannot be denied that these regulations interfere so seriously with the owner's right to deal freely with the spirits that property in such a situation should not be treated as grain and flour, for example, are treated in the warehouse of a milling company. In the case of a milling company, nothing except the convenience or the desire of the parties prevents the company from delivering possession of the grain or flour to the pledgee; and therefore, if they choose to make a contract of pledge without actual or constructive delivery of the property, they must abide the consequences. But delivery of spirits in a bonded warehouse cannot be offered by a pledgor nor accepted by the pledgee. The spirits must remain where they are until the tax is paid and the government formally permits the removal. The peculiar situation in which the federal law has placed this kind of property will appear more fully in a moment; but I may anticipate the reference to the statutes in order to say at once that in my opinion the rule now applicable is not the general rule that is so fully discussed in *Re Millbourne Mills Co.* (C. C. A.) 172 Fed. 177, but the well-known exception that seems to have been announced for the first time in *Pennsylvania in Linton v. Butz*, 7 Pa. 89, 47 Am. Dec. 501. In that case a machine was sold while it was in the hands of a third person as bailee, and the vendee did not disturb the possession. It was afterwards levied on and sold as the property of the vendor; but the vendee recovered its value in an action of trespass against the execution creditor, the court saying:

" * * * (To) constitute a valid assignment of personal property against an execution, there must be a delivery accompanied and followed by a continuing possession in the assignee. And where the possession does not follow as well as accompany a transfer, it is a fraud in law, without regard to the intent of the parties. It is not sufficient that the assignor gives to the assignee a delivery which may be symbolical or constructive, or a temporary delivery, and then takes the articles back into his own possession, and keeps and uses them as before. The case in hand differs in two particulars from the cases cited. Here, at the sale, the articles sold was not in the possession of the vendor, but in the hands of another, as bailee; and the vendor did not take it again into his own possession. Hence the property being in the hands of the bailee, the only possession was given of which it was susceptible. This is all that is required. Thus nothing is more common than a transfer by a principal of goods in the hands of a factor, and no one doubts it is a valid transfer, subject only to any lien which the factor may possess. So a transfer of goods at

sea, which are in the possession of the master of a ship, is deemed a valid transfer, and if he refuse to deliver them, upon due demand and refusal, the vendee may maintain suit against him for the recovery of them or their value. In a case of bailment the property passes when the sale is completed, and no formal delivery is necessary."

Other decisions recognizing *Linton v. Butz* are *Worman v. Kramer*, 73 Pa. 385, *Woods v. Hull*, *81 Pa. (32 Smith) 453, *Stephens v. Gifford*, 137 Pa. 232, 20 Atl. 542, 21 Am. St. Rep. 868, and *Caulfield v. Van Brunt*, 173 Pa. 433, 34 Atl. 230. It is true that the government was not a formal and technical bailee of the whisky, but its possession and control were of such a character as not to be distinguishable in effect from possession and control under a bailment. Whisky in a bonded warehouse is in a peculiar situation. Usually, the title is in the distiller, and it is also true that for certain purposes he may be said to have some degree of possession, custody, or control. At all events, he comes within the terms of a statute which subjects spirits to forfeiture if they be found in "the possession or custody or within the control of any person or persons for the purpose of being sold or removed by such person or persons in fraud of the internal revenue laws, or with design to avoid the payment of such taxes." *United States v. 36 Barrels of High Wines*, Fed. Cas. No. 16,468, 7 Blatchf. 459. But the subject must now be approached from a different point of view. How are the general creditors of a distiller affected by the situation and surroundings of spirits belonging to him and stored in his bonded warehouse? Does the distiller appear to be the owner? Has he such apparent possession as indicates the power to dispose of the property freely? Does he obtain a false credit by seeming to have the sole right to sell or pledge? As creditors are bound to take notice of the federal statutes governing a bonded warehouse, let us look at the provisions that are now relevant.

A distiller is required to provide at his own expense a warehouse in which nothing but spirits may be stored. The warehouse must have no doors or windows leading into the distillery or into any other room or building, and must be under the direction and control of the collector of the district, and in immediate charge of a storekeeper who is assigned to this duty by the Commissioner of Internal Revenue. In this warehouse the spirits may remain for eight years, but they may be withdrawn at any time during that period. 2 U. S. Comp. St. 1901, p. 2122. If the commissioner thinks the warehouse unsafe or unfit for use, he may require the distiller to provide another and to remove the spirits at his own expense. *Id.* 2123. The warehouse is theoretically in the joint custody of the storekeeper and the proprietor, but in fact the control of the storekeeper is complete and practically exclusive. The lock is put on by the government, and the key is in the storekeeper's possession. The warehouse must not be unlocked or opened or remain open except in the presence of the storekeeper or his lawfully designated representative, and no articles may be received or taken out except by the collector's order addressed to the storekeeper. *Id.* 2124. Any revenue officer at any hour of the day or night may enter the building to examine, gauge, measure, and take account of the spirits. Heavy penalties are denounced if his attempt to enter is obstructed by

the distiller. Id. 2125. Immediately upon distillation, the spirits must be placed in the warehouse. Careful regulations provide what kind of packages may be used, and regulate their brands and stamps. Id. 2130, 2132. A formal entry that the spirits have been deposited in the warehouse must be made with the collector, the storekeeper, and the commissioner, and a bond for the payment of the tax must accompany the entry. Id. 2133. Immediately after the tax has been paid, the spirits must be removed under penalty of forfeiture. Id. 2132. This removal is carefully guarded, and can only take place on the collector's order. Id. 2135, 2136. There are heavy penalties for removing spirits from the warehouse except as provided by law, and these penalties may be inflicted although no intent to defraud may exist. Id. 2136.

There are other provisions applicable to a distiller's warehouse, but these will suffice, I think, to show that in no proper sense can a distiller be said to "make a warehouse of himself as to his own goods"—to use the language of the Millbourne Mills Case. He has no choice in the matter; he must provide the place of storage, must surrender control to the government's officers, and must forego the right even to enter his own building except by permission and in the presence of the storekeeper. Moreover, he may not keep the spirits in the warehouse as long as he pleases. He must give bond for the payment of the tax; but even after the tax is paid he does not thereby regain control over the spirits, so that he may keep them where they are, for as soon as the tax is paid, whether by the distiller himself or by the purchaser, they must be removed from the warehouse or be subject to forfeiture. To treat property stored under these restrictions as if it were freely at the disposal of the owner is, I think, out of the question. If the owner of flour or grain chooses to sell or pledge it, no external power prevents him from making delivery; and if delivery, either actual or constructive, is not made, the public may well conclude that the ownership still accompanies the possession. But here is a species of property over which the legal owner has almost no control. As soon as he makes it, he must put it into a warehouse in the charge of a government officer. After that time he cannot even see it except by permission, and apparently he cannot mark the packages except as the law prescribes. He is liable for the tax upon it; but he cannot go on storing it after he pays the tax, but must remove it without delay. The public, therefore, who only see the outside of a bonded warehouse, but are nevertheless chargeable with knowledge of the federal statutes, cannot be misled by the continued presence of the spirits. The government's complete control is well known, and the fact that the spirits remain in the warehouse is equally consistent with the distiller's title as owner, or with the title of a buyer or pledgee. Neither buyer nor pledgee can take delivery without paying the tax, and neither is bound to make payment until actual removal is desired. At no time can it be said that the spirits are in the exclusive possession of the bankrupt. Every step even of the manufacturing process is carefully supervised by the government, and the bankrupt is never able to deliver possession of the product to a third person without violating the law. Id. 2120, 2121.

To the public, therefore, including its general creditors, a distilling company is never able to assume such appearance of prosperity as the possession of personal property ordinarily gives. Indeed, the public are excluded from the warehouse, and the quantity of spirits that are stored therein can only be a matter of conjecture. But even if the quantity should be actually known there would be little advantage in such knowledge, for the government's hand is upon it all, whether the packages are many or few. It is so completely in the government's actual control and possession that it cannot be levied upon by judicial process in the hands of a sheriff. This was decided in *McCullough v. Large* (C. C.) 20 Fed. 309, by Mr. Justice Bradley and Judge Acheson, who held that whisky deposited in a bonded warehouse of the United States, and held therein for internal revenue taxes due the government, is virtually in the possession of the United States, and that a sheriff has no right to enter the warehouse and levy upon the whisky as the property of the defendant, even though the sheriff may offer to pay the tax.

But how then is this property to be dealt in? Is the owner to be debarred from deriving any benefit from it unless he can find a buyer or creditor who is ready to take immediate possession? It is well known that spirits would lose much of their value, if they could only be sold under such a restriction, and it is therefore not surprising to find that the natural expedient has been adopted of substituting warehouse certificates or storage receipts in place of the whisky itself. As the government is in effect a bailee, the situation is practically the same as in the case of ordinary articles deposited in a storage warehouse of the usual character. In such event the storage receipts may be freely sold or pledged, and there seems to be no good reason why similar receipts for bonded spirits should not have the same position in the markets of the country. In fact, they do have this position now, unless the courts shall refuse to recognize it; for it is the unbroken custom of the trade—the evidence leaves no doubt upon this point—to treat storage receipts for spirits as completely equivalent to the spirits themselves, and to sell or pledge them freely and without question.

In the present case there are many claimants against the spirits in the bankrupt's warehouse; some putting the claim upon a pledge, most of them upon a sale, and the transactions extending over the period from March, 1903, to the end of 1907. They would be greatly astonished, I think, to be advised that transactions three or four years old, carried out according to a well-known and universally established custom, were voidable at the option of the trustee in bankruptcy because the property sold or pledged had not been physically delivered when the sale or pledge took place. And the soundness of the reason supporting such a result would be more difficult to appreciate, if such claimants were also told that their receipts were not valid because the spirits had been placed in the distiller's own warehouse, but would have been valid if the spirits had been placed in a general bonded warehouse, although in all other respects there would have been no difference between the two places of deposit. General warehouses not connected with a distillery may be established and spirits may be stored

therein. 2 U. S. Comp. St. 1901, p. 2143 et seq. The regulations and restrictions of the internal revenue laws apply to these places of storage just as they apply to a distiller's own warehouse; but in the case of a general bonded warehouse there can be no doubt that the proprietor is a bailee, and that physical delivery of property in his warehouse is not necessary in order to validate a sale or a pledge. It would be difficult, I think, to justify the conclusion that delivery of storage receipts would deliver the spirits in the one case, but would not deliver them in the other, since the conditions are essentially the same in both, and give equally effective, or ineffective, notice to the public.

It is, of course, true that unless a buyer or pledgee of storage receipts takes certain precautions—for example, gives notice to the government officials, assuming such notice to be sufficient—he may be defrauded by a second sale or a second pledge of the same property. This happened in *Miller v. Browarsky*, 130 Pa. 372, 18 Atl. 643. But the possibility of such a fraud has no bearing upon the question now under consideration. There is no dispute at present between two persons, both of whom are innocent purchasers or pledgees; the question now being this: Whether any innocent purchaser or pledgee of a bonded warehouse receipt can get a good title to the whisky without taking actual possession.

The decision of the referee is therefore reversed, and he is directed to make an appropriate order under which the bank may be put into possession of the whisky in dispute.

YOUNG et al. v. UNITED STATES.

(Circuit Court, W. D. Oklahoma. January 10, 1910.)

No. 243.

(*Syllabus by the Court.*)

1. INDIANS (§ 27*)—INDIAN ALLOTMENTS—JURISDICTION OF TERRITORIAL COURTS.

The district courts of the territory of Oklahoma had jurisdiction of suits brought therein by persons of Indian blood or descent to establish their rights to allotments, pursuant to Act Cong. Aug. 15, 1894, c. 290, 28 Stat. 305, and Act Cong. Feb. 6, 1901, c. 217, 31 Stat. 760.

[Ed. Note.—For other cases, see *Indians*, Dec. Dig. § 27.*]

2. ACTION (§ 42*)—SEPARATE ALLOTMENTS—ACTION TO ESTABLISH—PROCEDURE—TERRITORIAL CODE.

Where several claimants of allotments sued jointly to establish their rights to separate allotments in a district court of the territory of Oklahoma, a demurrer to their petition was properly sustained by said district court, where one of the grounds of the demurrer was a misjoinder of causes of action.

[Ed. Note.—For other cases, see *Action*, Dec. Dig. § 42.*]

3. COURTS (§ 431*)—PROCEDURE—IN CIRCUIT COURT AFTER ADMISSION OF STATE.

Where an appeal was taken from a judgment of dismissal in such case to the Supreme Court of the territory, and the appeal, being undetermined on the admission of the state, was thereafter transferred to a federal Circuit Court, which by the enabling act (Act June 14, 1906, § 16, c. 3335, 34

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Stat. 276, amended by Act March 4, 1907, c. 2911, 34 Stat. 1286) was vested with the powers of such Supreme Court, the judgment should be affirmed by the Circuit Court, if it should have been affirmed by the Supreme Court, under the territorial Code of Procedure.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 431.*]

4. COURTS (§ 431*)—PROCEDURE IN FEDERAL COURT—DISMISSAL—JUDGMENT.

Where in such a case the federal Circuit Court affirms a judgment of the territorial district court, and the original petition is multifarious, as tested by the rules of equity pleading which obtain in the federal courts, the judgment of dismissal should be without prejudice to the prosecution of future separate suits by the parties plaintiff in the case.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 431.*]

Appeal from the District Court of Canadian County, Territory of Oklahoma.

Action by Rebecca Young and others against the United States. Judgment for defendant, and plaintiffs bring error. Affirmed.

Blake, Blake & Low and F. E. Riddle, for plaintiffs in error.

John Embry, U. S. Atty., and John W. Scothorn, Asst. U. S. Atty.

COTTERAL, District Judge. This case was commenced in the district court of Canadian county, in the territory of Oklahoma, by several plaintiffs, who by their joint petition against the United States as sole defendant sought to establish their alleged rights as Caddo Indians to allotments of land in the reservation of the Wichita and affiliated bands of Indians, in the territory, as provided by the treaty with them, which was ratified by Act Cong. March 2, 1895, c. 188, 28 Stat. 895. The plaintiffs brought the suit jointly, some of them for themselves and their children and others for themselves alone, as follows: Rebecca Young, for herself and two minor children; Matilda Fullbright, daughter of Rebecca Young, for herself and six minor children; Joe Stevenson, son of Rebecca Young, for himself and four minor children; Mary Chambers, daughter of Rebecca Young, for herself and minor son; Rosa Figures, daughter of Rebecca Young, for herself and two minor children; Mandie Harmon, daughter of Rebecca Young, for herself and four minor children; George, Robert, and Edward Stevenson, sons of Rebecca Young, for themselves. It is alleged that Rebecca Young was born in the Caddo Tribe in Louisiana, and is a half blood Caddo Indian, and that each of her said children is a quarter blood, and each of their children a one-eighth blood Caddo Indian. It is also alleged that selections of land were made by or for each of these claimants, adults and minors, as and for their allotments, descriptions of the several tracts, according to government survey, being set out; and the relief demanded is that each of them be declared entitled to the allotment thus selected and described.

The record shows that the probate judge of Canadian county, in the absence of the district judge, enjoined the register and receiver of the United States Land Office at El Reno from receiving homestead applications for these lands, and that this order was later modified by the district court so that these land officers were enjoined from permitting filings for the lands "unless the party making such filing be advised

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Index

of the pendency of the action and a receipt given to the entryman, reciting that said filing is made subject to the rights of the plaintiff herein, as the same may be determined by the court or on appeal." A demurrer to the petition was filed and sustained. Afterward, upon leave given, an amended petition was filed, to which also a demurrer was interposed and sustained. The record, however, fails to show upon what ground or grounds of this demurrer the ruling was made. The plaintiffs again asked leave to amend their petition, but the application was refused. Thereupon the action was dismissed, with costs, and the injunction dissolved. From the judgment thus rendered the plaintiffs perfected an appeal to the Supreme Court of the territory. The appeal, being there undetermined on the admission of the state, was transferred to this court, pursuant to section 16 of the statehood enabling act, approved June 14, 1906 (chapter 3335, 34 Stat. 276), and amended by Act March 4, 1907, c. 2911, 34 Stat. 1286. By the terms of that section this court is invested with the powers of the territorial Supreme Court. Three of the grounds set forth in the latter demurrer appear to be relied upon by the defense and have been argued on this appeal, as follows: (1) Want of jurisdiction of the court over the subject-matter of the action; (2) misjoinder of causes of action; (3) failure to state facts sufficient to constitute a cause of action.

The objection made to the jurisdiction of the territorial district court will be first considered. The suit was brought by the plaintiffs upon the authority of Act Cong. Aug. 15, 1894, c. 290, 28 Stat. 305, and Amendment Feb. 6, 1901, c. 217, 31 Stat. 760, which authorize suits in the Circuit Courts of the United States to determine the rights of allotment claimants of Indian blood or descent before the government has parted with the title to the lands claimed. The defense insists that the jurisdiction conferred by this legislation was not given to the territorial courts for the reason that they were limited by the organic act of the territory of May 2, 1890, to the jurisdiction then existing in the federal courts. The organic act (section 9) provides that the Supreme and district courts of the territory "shall possess chancery as well as common-law jurisdiction, and authority for redress of all wrongs committed against the Constitution or laws of the United States or of the territory affecting persons or property," and, further, that:

"Each of said district courts shall have and exercise, exclusive of any court heretofore established, the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the Circuit and District Courts of the United States."

The general chancery and common-law jurisdiction thus referred to does not affect the question for the reason that no court, state or federal, ever had any jurisdiction to investigate or determine these cases of contested allotments, in the absence of the special legislation contained in the act of 1894, and the amendment thereto. *Hy-yu-tu-milkin v. Smith*, 194 U. S. 413, 24 Sup. Ct. 676, 48 L. Ed. 1039; *McKay v. Kalyton*, 204 U. S. 458, 27 Sup. Ct. 346, 51 L. Ed. 566; *Sloan v. U. S.* (C. C.) 118 Fed. 283. Hence the real inquiry is whether the other provision of the organic act above quoted vested in the territorial

courts the jurisdiction thereafter given to the federal Circuit Courts in these allotment cases.

In the view of this court, the argument that Congress intended to limit the federal jurisdiction of the territorial courts to its scope as it existed on May 2, 1890, when the organic act was adopted, cannot be accepted. It overlooks the general principle that statutes should be so interpreted and construed as to give effect to the intention of the lawmaking power. It seems quite plain that it was the purpose of Congress to give to the inhabitants of the territory the same right of litigation as might be accorded from time to time to litigants in the federal courts in the states. There was every reason why this should be done, and particularly in favor of persons of Indian blood or descent, who were well known to be so numerous in the territory and who were naturally and necessarily bound to remain therein. The language used in the organic act does not exclude this reasonable interpretation which it ought to receive under the conditions existing and to continue in the territory. It is to be noted that the reference to "cases" is to those "arising," meaning, of course, those to arise in the future. And the expression "as is vested in the Circuit and District Courts" likewise means at the time when they might arise in the future. The present tense employed in defining the jurisdiction plainly refers to future conditions and the jurisdiction then to exist whether at such time it should be enlarged or diminished by Congress. The territorial district court therefore had jurisdiction of the suit.

The ground of demurrer based on a misjoinder of causes of action necessitates a consideration of the procedure applicable to the case. This court in determining this appeal, as already stated, is vested with the powers of the territorial Supreme Court, which, in a case involving procedure, was governed by the Civil Code of Procedure of the territory. It was long ago settled that the territorial courts are not federal courts, and that the procedure obtaining in them is that prescribed by the territorial Legislature. *Clinton v. Englebrecht*, 13 Wall. 434, 20 L. Ed. 659; *Hornbuckle v. Toombs*, 18 Wall. 648, 21 L. Ed. 966; *Good v. Martin*, 95 U. S. 90, 24 L. Ed. 341; *Reynolds v. U. S.*, 98 U. S. 145, 25 L. Ed. 244; *Thiede v. U. S.*, 159 U. S. 510, 16 Sup. Ct. 62, 40 L. Ed. 237; *Welty v. U. S.*, 14 Okl. 7, 76 Pac. 121. In the Code of the territory the following provisions are found:

"All persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs, except as otherwise provided in this article." *Wilson's St. 1903*, § 4233; *Snyder's Comp. Laws 1909*, § 5567.

"Of the parties to the action those who are united in interest must be joined as plaintiffs or defendants," etc. *Wilson's St. 1903*, § 4235; *Snyder's Comp. Laws 1909*, § 5569.

These sections have been frequently construed by the Supreme Court of the territory of Oklahoma and of the state of Kansas, whence they were taken. According to the holdings of both courts, the petition of the plaintiffs in this suit, tested by the foregoing limitations, includes causes of action which are improperly joined. It is true that one averment common to all of the plaintiffs is that pertaining to the Indian blood of Rebecca Young, but they have no unity of interest in the lands involved, and the demand for relief is separate and distinct on the part

of each plaintiff as to a particular tract claimed. The joinder of such claims was clearly not permissible under the territorial Code. *Jeffers v. Forbes*, 28 Kan. 174; *Hurd v. Simpson*, 47 Kan. 372, 27 Pac. 961; *Weber v. Dillon*, 7 Okl. 569, 54 Pac. 894. In the case of *Jeffers v. Forbes*, supra, the following is quoted from *Tate v. Railroad Co.*, 10 Ind. 174, 71 Am. Dec. 309:

"Two or more persons, having separate causes of action against the same defendant, though arising out of the same transaction, cannot unite; nor can several plaintiffs in one complaint demand several distinct matters of relief; nor can they enforce joint and separate demands against the same defendants."

Another provision of the territorial Code is contained in section 4296, *Wilson's St.* 1903, and *Snyder's Comp. Laws* 1909, § 5632, and is as follows:

"When a demurrer is sustained on the ground of misjoinder of several causes of action, the court, on motion of the plaintiff, shall allow him, with or without costs, in its discretion, to file several petitions, each including such of said causes of action as might have been joined, and an action shall be docketed for each of said petitions, and the same shall be proceeded in without further service."

It has been the practice under this statute on appeal, where a misjoinder of causes of action appeared in the pleading, to remand the case with directions to permit the plaintiffs to file separate petitions and proceed thereon. See cases last cited. However, the territorial courts have ceased to exist, and, in view of that fact, the question is presented as to the proper disposition of the case by this court. The enabling act provides:

"Cases transferred from appellate courts shall go to the Circuit Courts of the United States in such state, which courts, for the purpose of hearing such cases, are hereby vested with all the powers of such territorial appellate courts. If the Circuit Court shall affirm the judgment, it shall, if the case be one then originally cognizable in the district court, remand it to that court for carrying into effect the judgment of the trial court; but if the case be one then originally cognizable in the Circuit Court, it shall carry into effect the judgment of the trial court. If the Circuit Court shall reverse the judgment, it shall, if the case be one then originally cognizable in the district court, remand the case to that court for a new trial; but if the case be one then originally cognizable in the Circuit Court, it shall set the case down for a new trial therein."

The judgment of the territorial district court must be affirmed. In such a case this court is authorized to "carry into effect the judgment of the trial court." That judgment dismissed the case, with costs against the plaintiffs. But this court is also vested with the powers of the territorial Supreme Court, which, as stated, included the authority to permit a further prosecution of these suits agreeably to the procedure applicable thereto. However, the same could be carried on only in this court, in the exercise of its equity jurisdiction, because suits to establish allotments are equitable in character, and since the admission of the state the federal Circuit Courts alone therein can take cognizance of them. Reading the provisions of the enabling act together, it would seem that, in the interest of justice, this court might retain the case, if, embracing the various causes of action which have been joined, it can be proceeded with in this court.

It is to be determined, then, whether the petition now before the court is multifarious, under the rules which obtain in equity, in a Circuit Court of the United States.

It may be premised that there is not any positive or universal rule as to what constitutes multifariousness, and that it must often be determined by the nature of the case in which objection is made on this ground. *Shields v. Thomas*, 18 How. 253, 15 L. Ed. 368; *Brown v. Guarantee Trust Co.*, 128 U. S. 410, 9 Sup. Ct. 127, 32 L. Ed. 468; *Harrison v. Perea*, 168 U. S. 319, 18 Sup. Ct. 129, 42 L. Ed. 478.

In Story's Equity Pleading, § 271, the text reads:

"By multifariousness in a bill is meant the improperly joining in one bill distinct and independent matters, and thereby confounding them, as, for example, the uniting, in one bill of several matters, perfectly distinct and unconnected, against one defendant, or the demand of several matters of a distinct and independent nature against several defendants in the same bill."

And in section 539 of the same work it is said:

"All that can be done in each particular case as it arises, is to consider, whether it comes nearer to the class of decisions where the objection is held to be fatal, or to the other class, where it is held not to be fatal. And in new cases, it is to be presumed that the court will be governed by those analogies, which seem best founded in general convenience, and will best promote the due administration of justice, without multiplying unnecessary litigation on the one hand, or drawing suitors into needless and oppressive expenses on the other."

For the plaintiffs the principal contention is that they have a common interest, and that a common question is involved, to be determined by the same legal rule, and upon similar facts, wherefore they seek to justify the course which was adopted of uniting these various claims in one suit. Various authorities are cited which are supposed to sustain their position. But it is believed that the holdings relied upon are predicated on different facts to an extent that they cannot be considered as decisive of the question here involved. They cite Story's Eq. Pl. § 285, where it is said:

"Another exception to the general doctrine respecting multifariousness and misjoinder, which has already been alluded to, is where the parties (either plaintiffs or defendants) have one common interest touching the matter of the bill, although they claim under distinct titles, and have independent interests. The cases respecting rights of common, where all the commoners may join, or one may sue or be sued for all; of parishioners to establish a general modus; or of a parson to establish a general right of tithes against parishioners; and others of a like nature, already stated under another head, fully exemplify the doctrine, for in all of them there is a common interest centering in the point in issue in the cause."

The text well illustrates the difference between cases in which parties have been authorized to sue jointly and the case at bar. Here there is no "common interest touching the matter of the bill," each of the plaintiffs seeking distinctive relief; in fact, a separate decree as to his right and title to specific real property, which is quite dissimilar to the claim of commoners, parishioners, and like persons, with a common interest at stake. Referring to the joinder and confounding of distinct and independent matters, Mr. Justice Story further says, in section 271:

"In the former case the defendant would be compellable to unite in his answer and defense different matters wholly unconnected with each other, and thus the proofs applicable to each would be apt to be confounded with each other, and great delays would be occasioned by waiting for the proofs respecting one of the matters, when the others might be fully ripe for hearing. Indeed, courts of equity in cases of this sort are anxious to preserve some analogy to the comparative simplicity of proceedings at the common law, and thus to prevent confusion in their own pleadings, as well as in their own decrees."

And in section 533:

"The result of the principles to be extracted from the cases on this subject seems to be that, where there is a common liability and a common interest, a common liability in the defendants and a common interest in the plaintiffs, different claims to property, at least if the subjects are such as may without inconvenience be joined, may be united in one and the same suit."

In 1 Daniell's Chancery Pl. & Pr. pp. 344-346, it is said:

"It thus appears that a plaintiff cannot join in his bill, even against the same defendant, matters of different natures, although arising out of the same transaction. * * * As a bill by the same plaintiff against the same defendant for different matters would be considered multifarious, so, a fortiori, would a bill by several plaintiffs, demanding distinct matters, against the same defendants. Thus, if an estate is sold in lots to different purchasers, the purchasers cannot join in exhibiting one bill against the vendor for a specific performance; for each party's case would be distinct, and there must be a distinct bill upon each contract."

The foregoing principles may be properly applied to this case. It will not be necessary to examine the various authorities cited in behalf of the plaintiffs. The facts there involved are essentially different. In this case, for various reasons, the bill is multifarious, both as to subject-matters and as to parties. No one of them is interested in the success of the other. They sue jointly to establish their rights to individual allotments. The burden is on each of them to show membership in the Wichita or an affiliated band of Indians, and, furthermore, a right to a specific tract selected, agreeably to a treaty and an act of Congress. A right to an allotment is called for and as well a right to a tract claimed. The right of all may have origin in Rebecca Young, but that does not make out the right asserted. Other requirements condition the right to the allotment. Some of the plaintiffs may succeed and others fail. The investigation of each claim in various ways must necessarily take a separate course both as to the right to an allotment and the land claimed. The practice of prosecuting separate suits was adopted in *Sloan v. United States* (C. C.) 118 Fed. 283. That course is believed to be imperatively demanded of these plaintiffs, no adequate grounds appearing for the joint investigation and trial of the divergent issues which must arise upon their several demands for relief.

The conclusion thus reached renders unnecessary a consideration of the sufficiency of the averments of the petition to warrant a decree in favor of any of the plaintiffs. The merits of the claims of these parties may be decided when and if they are appropriately presented in separate bills, as they are lawfully entitled so to do.

The judgment of the District Court of Canadian county, of the territory of Oklahoma, dismissing the action, will be affirmed, with costs

on appeal, but, in order that the plaintiffs may not be denied a right to prosecute their claims, it will be adjudged that the dismissal of the action be without prejudice to future prosecution of separate suits by the parties plaintiff in this case.

BEARDSLEY v. HOWARD & BULLOUGH AMERICAN MACH. CO., Limited.

(Circuit Court, D. Rhode Island. February 18, 1910.)

No. 2,882.

1. MASTER AND SERVANT (§ 264*)—INJURIES TO SERVANT—ACTION—VARIANCE.

In an action for injuries to a servant, where the negligence charged is the failure to provide plaintiff with flanges to use in connection with an emery wheel, evidence of the use of collars on each side of the wheel of about one-third of the diameter of the wheel was not such a variance as to render the evidence inadmissible.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 861-876; Dec. Dig. § 264.*]

2. WORDS AND PHRASES—"COLLAR."

A "collar," in mechanics, is a ring or a round flange upon or against an object.

3. WORDS AND PHRASES—"FLANGE."

A "flange" is defined as a projecting flat rim, collar, or rib used to strengthen an object, to guide it, to keep it in place, etc.

4. NEW TRIAL (§ 97*)—GROUNDS—SURPRISE—DILIGENCE.

In an action for injuries caused by the breaking of an emery wheel from failure to furnish plaintiff with flanges to strengthen it, surprise at the trial at the submission of the issue whether flanges furnished were of sufficient size, instead of the issue raised by the pleadings whether any flanges were furnished, is not ground for a new trial, where no continuance was requested.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 195-198; Dec. Dig. § 97.*]

5. MASTER AND SERVANT (§ 265*)—INJURIES TO SERVANT—ACTIONS—BURDEN OF PROOF.

In an action for injuries caused by the breaking of an emery wheel, the negligence alleged being the failure to furnish plaintiff with flanges, the burden is on plaintiff to show not only that defendant furnished improper appliances, but that the injury resulted from the particular defects pointed out.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877-906; Dec. Dig. § 265.*]

6. MASTER AND SERVANT (§ 276*)—INJURIES TO SERVANT—ACTION—SUFFICIENCY OF EVIDENCE.

In an action for injuries to a servant by the breaking of an emery wheel, resulting from failure to furnish plaintiff with flanges to use in connection with the wheel, the plaintiff must show not merely that the injury might have resulted from the defect named, but that it did, in fact, so result.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 950-976; Dec. Dig. § 276.*]

7. MASTER AND SERVANT (§ 276*)—INJURIES TO SERVANT—ACTIONS—SUFFICIENCY OF EVIDENCE.

In an action for injuries to a servant from the breaking of an emery wheel, evidence held insufficient to show that the accident resulted from

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the negligence alleged, viz., failure to furnish plaintiff with flanges for the wheel.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 276.*]

Action by Ernest J. Beardsley against the Howard & Bullough American Machine Company, Limited. Judgment for plaintiff, and defendant petitions for a new trial. Granted.

A. B. Crafts and M. L. Lizotte, for plaintiff.

Vincent, Boss & Barnfield, for defendant.

BROWN, District Judge. This is an action for personal injuries received by the plaintiff June 3, 1908, from the bursting of an emery wheel during the employment of the plaintiff as a polisher in the defendant's factory.

The declaration alleged that the emery wheel was—

"run and used without flanges attached thereto on the sides thereof, and that the running of said emery wheel as aforesaid, without flanges attached thereto as aforesaid, was very dangerous and improper, and unsafe, and rendered said emery wheel liable and apt to break and burst," etc.

The negligence charged is the failure—

"to provide the plaintiff with flanges to use in connection with emery wheels, or to inform the plaintiff that said flanges were necessary, or advisable in connection with said wheels."

"The plaintiff alleges that on a certain day while he was cleaning or dressing said wheel, revolving as aforesaid, in the exercise of all reasonable care and caution, and wholly ignorant of the danger to which he was exposed as aforesaid, the said wheel, by reason of its revolving rapidly as aforesaid without flanges to keep it steady and prevent its bursting as aforesaid, suddenly broke and burst into divers flying pieces," etc.

Upon the trial the plaintiff departed from the allegations of the declaration, testifying that the wheel broke before he had started to clean it; that he had set the wheel up in the usual manner, and had been working on it for an hour and a half, when he went to get a dressing tool, and had just seated himself preparatory to dressing the wheel when the wheel burst; that he was not then touching the wheel, either for work or for dressing.

The plaintiff testified that on the day of the accident he set up the wheel with the same implements that he had safely used for 14 months for similar wheels; that he first put upon the shaft a collar $2\frac{1}{2}$ inches in diameter and about 1 inch long, then the wheel, which was about $4\frac{3}{4}$ or 5 inches in diameter and 4 inches across its grinding face, and next a second collar $2\frac{1}{4}$ inches in diameter and 3 inches long; the whole being secured by a nut.

At the trial the defendant contended that the allegation that no flanges had been provided was disproved by plaintiff's own testimony to the effect that flanges of $2\frac{1}{4}$ and $2\frac{1}{2}$ inches in diameter had been supplied and used, and objected to evidence tending to charge the defendant with negligence on the ground that the flanges were of insufficient size. This objection was overruled, and exception duly taken.

While I am of the opinion that there was not such a variance as to render the evidence inadmissible (Baltimore & Potomac R. Co. v.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Cumberland, 176 U. S. 232, 20 Sup. Ct. 380, 44 L. Ed. 447; Grayson v. Lynch, 163 U. S. 468-476, 16 Sup. Ct. 1064, 41 L. Ed. 230), there is ground for thinking that the jury may have been misled by the arguments of counsel and by the testimony of the plaintiff and of experts as to flanges.

Thus, the plaintiff testified that he was provided with no flanges, and expert witnesses testified that an emery wheel would not be properly set up unless it had flanges.

It was contended at the trial that the collars used were not flanges, and counsel for the plaintiff still insists upon the distinction between collars and flanges, and asserts that "a flange is a flat circle something like a plate; average three-fourths inch thick," etc.

It is apparent, however, from the plaintiff's testimony, that whether proper appliances for setting up the wheels were furnished was merely a question of abutting surfaces, and that the distinction between "collars" and "flanges" was largely verbal and tended to confusion. A "collar" is a "ring or round flange upon or against an object." See Knight's Mechanical Dictionary. A "flange" is defined in the New English Dictionary:

"(2) A projecting flat rim, collar or rib used to strengthen an object, to guide it, to keep it in place, etc."

In support of the petition for a new trial, the defendant insists that there was a substantial difference between the issue raised by the pleadings, i. e., whether it had furnished flanges for the lateral support of the wheel, and the issue submitted to the jury, as to whether the flanges furnished were of sufficient size; and contends that it was prejudiced through having to meet on the trial a new issue not made by the pleadings. As no continuance was requested on this ground, the defendant cannot now claim surprise as a ground for a new trial; yet the defendant's argument on this point is not without force when we consider the defendant's further point that there is no testimony showing that the wheel actually became broken on account of insufficiency in the size of the flanges.

Assuming—what, in view of the indefiniteness of the expert testimony, is by no means clear—that there was evidence sufficiently specific and definite to show that the flanges used were less than one-third of the diameter of the wheel, or less than would conform to expert opinion or standards, we are still met by the fact that no witness in the case, expert or other, has given an opinion or reason for believing that this alleged departure from expert standards was in fact the cause of the breaking of the wheel.

If the defendant is to be charged with negligence because appliances which the plaintiff had operated safely for 14 months are subject to expert criticism and fall below expert standards, it can only be made liable upon supplemental proof showing that the wheel broke because of some effect upon it resulting from the size of the flanges actually provided, and which would not have resulted from the use of such flanges as the experts say should have been provided.

There are few machines which cannot be made the subject of expert criticism, and the mere fact that the defendant's flanges were some-

what smaller than the standards set by experts is not in itself a sufficient ground of liability.

There is no evidence from which an inference is warranted that there was any actual connection between the bursting of the wheel and the fact that the flanges were, in the opinion of experts, somewhat too small. There is no testimony from any witness to the effect that the breaking of the emery wheel was in fact due to any deficiency in the size of the collars or flanges, or that the wheel itself exhibited any evidence that it had been weakened by the use of collars or flanges of insufficient size. There was merely testimony that in the opinion of witnesses the wheel was not properly set up because the collars were of insufficient size, and that it was possible that the tightening of the nut during the work should exert an undue pressure upon the wheel.

Under decisions of the Supreme Court, the burden was upon the plaintiff to show not only that the defendant furnished improper appliances, but that the injury resulted by reason of the particular defects pointed out and insisted upon by the plaintiff. See *Looney v. Metropolitan Railroad Company*, 200 U. S. 480-486, 26 Sup. Ct. 303, 50 L. Ed. 564; *Texas & Pacific Railway Company v. Barrett*, 166 U. S. 617-619, 17 Sup. Ct. 707, 41 L. Ed. 1136.

The plaintiff did not ask either of his three experts to give an opinion as to the actual cause of the breaking of this particular wheel, or to examine the wheel and to point out to the jury any feature of the broken wheel that would indicate the cause of the breaking. Defendant's counsel, however, upon cross-examination of plaintiff's expert Leaver, asked:

"Q. Well now, what do you say was the cause of the breaking of this wheel, there being no force exerted upon it at the time?

"A. I should think that it was cracked when the man was using it, grinding with it, and when he went around in back of it it was working away from the collars all the time, and when he got around in back it parted.

"Q. That is to say, you think he bore hard enough on it to crack it?

"A. It must have been something like that."

He also testified that a wheel with proper flanges might be broken:

"A. A man might be grinding something on it, and touched it too hard. It would not take a very sharp rap to break an emery wheel."

"Q. And the durability of these wheels depends largely on the carefulness of the man who works on them?

"A. Yes, sir.

"Q. It is competent or possible for a man, by bearing down too hard, to break any of them, is it not?

"A. Not alone by bearing on too hard, but an unsteady pressure."

Plaintiff's expert Richmond, manufacturer of the wheel, was asked:

"Q. If a wheel like this one, having been worn down as this one has, was properly put up on a spindle, in a proper frame, would it burst?

"A. It might be broken from a half a dozen causes. It would not burst of its own accord.

"Q. If there was a strain upon these washers, bringing it together that way, a heavy strain, and these collars being there without any washers—without any flanges—then what do you say as to whether or not it would have a tendency to break?

"A. It would have a tendency; yes, sir."

Mr. Richmond also testified that it would be possible for anybody who was using a wheel of this size to put pressure enough on it to break it.

Upon the question of the existence of a flaw in the material of the wheel the evidence was conflicting, and upon this petition for a new trial it may be assumed that the evidence was insufficient to convince the jury, and that a concealed flaw was the cause of breakage. The pieces of the wheel were produced in court; but the exhibit itself is not of such a character as to enable a jury, without the aid of expert testimony, to determine therefrom the cause of breakage.

Reviewing then the evidence as to the cause of breakage, we find that the plaintiff, an experienced man, tested the wheel by looking it all over and rapping it, and found it all right; that he set it up with the same appliances that he had used for 14 months and in the same way; that he then used the wheel for about an hour and a half, polishing stay brackets, until the wheel needed cleaning off; that he then "set the rest on the back of the wheel to clean the wheel off"; that he then got the dresser and was going to touch the wheel with it, when he was knocked unconscious; that the wheel flew off at a time when there was no pressure being exerted upon it.

In the opinion of the plaintiff's experts the wheel must have been cracked during the previous grinding before the plaintiff went for his dressing tool.

It seems an unavoidable conclusion from the testimony for the plaintiff that the wheel was cracked while under pressure, either from the work of grinding, or from the work of cleaning or dressing the wheel, as is alleged in the declaration. The burden was upon the plaintiff to show something more than a possibility that there was an undue lateral pressure resulting from insufficient flanges.

Accepting the testimony of the plaintiff that the break did not happen while he was cleaning the wheel, there is no evidence which will support a verdict to the effect that the wheel first became cracked during the short time that it was running without pressure upon it. Accepting the conclusion of plaintiff's experts that it must have become cracked during its use in grinding, it is impossible to say, upon the present record, that the plaintiff has shown that the supposed insufficiency of the flanges was the actual cause, or even a contributing cause, of the breaking of the wheel. It was left as a mere matter of conjecture as to what caused the wheel to crack.

Upon the question of the sufficiency of the proofs to show the liability of the defendant, the case comes within the rule stated in *Patton v. Texas & Pacific Railway Co.*, 179 U. S. 658-663, 21 Sup. Ct. 275, 277, 45 L. Ed. 361:

"It is not sufficient for the employé to show that the employer may have been guilty of negligence; the evidence must point to the fact that he has.

"And when the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes, and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employé is unable to adduce sufficient evidence to show negligence on the part of the employer, it

is only one of the many cases in which the plaintiff fails in his testimony, and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof."

The defendant also urges that the damages are excessive, and asks for a new trial upon this ground independently of the question of liability. I am of the opinion that the amount of damages is so much larger than the testimony warrants as to justify the setting aside of the verdict on this point alone; but, as a new trial must be granted for the reason that the testimony is insufficient to show liability, it is unnecessary to consider to what extent the damages are excessive.

The petition for a new trial is granted.

In re HOLLAND.

(District Court, E. D. New York. February 11, 1910.)

BANKRUPTCY (§ 288*)—CONCEALMENT OF ASSETS—CONTEMPT.

Where a bankrupt disposed of considerable property, and with the proceeds paid certain debts and turned over the balance to his son, who, on an order of the bankruptcy court to turn over the money unaccounted for to the trustee, claiming that he was unable to comply with the order, testified that he had paid board to his mother, and that he was gambling on horse races or interested in bookmaking individually and as a partner with another, but his testimony as to when and where there were race meets at which they could carry on the business of bookmaking was inconsistent with the dates when the money came into his hands, and where the son made no claim of title, the son will be committed until he has purged himself of contempt or is released by further order.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 288.*]

In the matter of Kolman Holland, bankrupt. Contempt proceedings against Harry Holland for failure to comply with order of court to turn over funds to trustee.

Brewster & Farries, for trustee.

Law & Holtzmann, for Harry Holland.

CHATFIELD, District Judge. The bankrupt secured certain moneys and paid off therewith some antecedent debts, from the sale of a milk business and mortgages placed upon his real estate, between the 26th day of July and the 10th day of August, 1909. He also received in cash, over and above these debts, the sum of \$2,603 during the same period. This amount of money was actually in the possession of his son, Harry Holland, as agent for the bankrupt.

Upon reference to a special commissioner it was found that certain further expenditures and payment of indebtedness, amounting to \$1,295.66, by the bankrupt and by his son, Harry Holland, were proven; but the balance, \$1,307.34, was not satisfactorily accounted for.

The son is shown to have had in his hands all of the money received from his father's property, and whatever was not expended by him, or returned to the father and paid out by the father, is, so far as the bankrupt is concerned, still in the hands of the son or chargeable against him as a debt of the estate.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Upon an application to direct the bankrupt and his son to turn over the money unaccounted for, as reported by the special commissioner, this court decided that, inasmuch as the testimony made out an apparent case of embezzlement or fraud on the part of the son as against the father (for the money which had been neither returned to the father nor expended on his behalf), no order could be made directing the father to pay this balance to the receiver or trustee in bankruptcy, as it was not shown that there was anything in his possession or control. Especially was this so as Harry Holland, the son, was a party to the motion, and had submitted himself to the jurisdiction of this court, admitting his liability for whatever balance of his father's property might be due from him, and making no claim of title in himself with respect thereto.

Considerable testimony has been taken, which Harry Holland, the son, contends establishes his inability to comply with the order of the court, and on which he asks to be relieved from any punishment, at least for apparent contempt of the order under which he was directed to pay over to the bankrupt estate the amounts for which he had failed to account, or which he admitted his indebtedness for to the estate.

It is apparent that Harry Holland is now working on a small salary, and has no property, disclosed by the examination, which could be applied to this purpose. His explanation of what had been done with the money in question is confined to a statement that he paid board to his mother (which she has not substantiated), and that he was gambling upon the horse races or interested in the occupation of bookmaking, both individually and as a partner with one Rogoff.

His testimony and that of Rogoff, as to when there were race meets at which they could carry on the business of bookmaking, is to a great extent inconsistent with the dates when this money came into the hands of Harry Holland. The transactions on the part of both the bankrupt and his son are extremely peculiar, and do not impress one with the idea that they were attempting to be honest with their creditors. But the father has evaded responsibility by accusing his son of what is substantially a crime, and the son does not deny the transaction, but merely pleads acquiescence or condonation on the part of his father.

It is apparent that a trustee in bankruptcy could, under these circumstances, obtain a judgment against Harry Holland, and the order directing him to turn over the property belonging to his father's estate was no more than the estate was entitled to from both the father and the son.

But the son, Harry Holland, contends that he should not be imprisoned for contempt of this court's order, inasmuch as he has shown (according to the arguments presented in his behalf) inability to obey the order, coupled with no disrespect or willful disobedience thereof; and he also suggests that, under the charge of contempt, he should not be punished for acts which, even if wrong in themselves, were committed before the order in question was made, and which were not in any way anticipatory thereof.

The creditors have called the attention of the court to Matter of Friedman (D. C.) 18 Am. Bankr. Rep. 712, 153 Fed. 939, in which the

bankrupt and his wife and a third party were each ordered summarily to turn over certain amounts traced into their hands, and for which they did not furnish a satisfactory explanation. This case was affirmed by the Circuit Court of Appeals. 161 Fed. 260, 88 C. C. A. 306.

In *Matter of Frankfort* (D. C.) 15 Am. Bankr. Rep. 210,¹ decided in this district, the bankrupt was imprisoned upon a writ of ne exeat, in default of bail pending the payment by him of a sum of money which it was claimed had been stolen from his wife under circumstances from which the court found that the money was still in her possession or control.

In *Matter of Weinreb*, 16 Am. Bankr. Rep. 702, 146 Fed. 243, 76 C. C. A. 609, the bankrupts were directed to pay over to the trustee money which they claimed to have expended in ways that the court was satisfied were false; and in general the decisions in these cases are based upon the reasoning in the *Friedman Case*, supra, in which the court said:

"But if property which had once been in the possession of the bankrupt is found in the possession of any person, and such person is, in the opinion of the court, very clearly but a cover or receptacle for that property which as between the bankrupt and such other person is still the property of the bankrupt," a summary order is proper.

Again:

"And if, according to the evidence, it be the property of the bankrupt, the bankruptcy court should order its restoration to the representative of the creditors and enforce that order by the most drastic means. If this be not done, creditors in most cases are utterly without remedy, for a plenary suit against persons who are in truth but receivers of stolen goods (or money) is but an expensive illusion.

"A person who has no money should not be punished for contempt in failing to turn over money. But the very point of this proceeding is that it is the opinion of the court that the persons proceeded against have the money and do not tell the truth when they assert their inability to pay."

And further:

"If any person into whose possession money is traced can avoid the legitimate consequences of the possession of that money by swearing that he no longer has it, or never had it, the administration of justice would become a farce."

There can be no doubt as to the conclusions of the court in these cases that fraud or perjury will prevent the creditors in bankruptcy proceedings from obtaining the property which should be applied to the payment of their debts, and certain drastic methods are the only means applicable to such a situation. But the more serious question is whether the contempt of court has been willful, and whether there is ability to repay, because, in the absence of either of these elements, an order directing punishment for contempt, by compelling the payment of indebtedness through the compulsion of imprisonment (it being apparent that, if the person in contempt is unable to pay, the money to release him must be raised by other people), would be perilously close to imprisonment for debt or crime, and no authority for that method of collection can be found under the laws of the United States.

The situation is much similar to that existing in proceedings supplementary to execution upon a judgment in a court of law, where authority is given by statute to impose a fine equal to the amount of the execution, with costs, and to imprison the party in contempt until the fine is paid. Such a penalty has never been held imprisonment for debt, and is especially applicable where the party alleged to have property of the judgment debtor hides behind an unbelievable story as to the circumstances under which he and the judgment debtor created the relations that existed between them for the palpable purpose of defrauding the debtor's creditors. So in the case at bar, the story told by the bankrupt as to the purposes for which he borrowed the money in question, and by Harry Holland as to his reasons for taking the balance of these loans and sales out of the funds of his father's business, and using them to a large extent to gamble at the race track, is worthy of no belief whatever. If the bankrupt intrusted his son with what he could save from the wreck of his business, and the son paid back to the bankrupt one-third, which with several hundred more was used preferentially to pay debts and for ordinary household expenditures, and then lost the balance by gambling at the race track, both the son and the father have shown such lack of moral capacity and disregard of creditors' rights that their statements should not be given any credence whatever. The testimony, however, as to the expenditures at the race track, is unsatisfactory, except to the extent of suggesting that such a man would probably have no compunction about gambling in one form or another, and the story bears no indications of truth beyond that point.

Under the demands of the creditors and the orders of the court, neither the bankrupt nor his son have endeavored to restore or secure anything for the remaining creditors of the estate; and the so-called "bookmaker," who testified that Harry Holland had advanced money to him for the purpose of making books, but who could not give any satisfactory statement of how much he had received in that way, nor when it had been received, does not seem to object to being shown to have received money apparently stolen from other people.

Under such circumstances, the respondent, Harry Holland, should be punished for his defiance and disregard of the order of the court, by which he was directed to restore the property which he admitted should be paid by him to the estate, and which this court is satisfied he either had within his control, or could, in part at least, reobtain if he had made honest efforts so to do.

He will be committed until he has purged himself of contempt or is released by further order.

In re BAILEY.

Ex parte PARIAN PAINT CO.

Ex parte PERKINS MFG. CO.

(District Court, D. South Carolina. February 4, 1910.)

1. BANKRUPTCY (§ 140*)—PROPERTY PASSING TO TRUSTEE—GOODS HELD ON CONSIGNMENT.

Under Civ. Code S. C. 1902, § 2855, which provides that every agreement of purchase or bailment of personal property, whereby the vendor or bailor shall reserve to himself any interest in the same, shall be void "as to subsequent creditors or purchasers for a valuable consideration without notice," unless in writing and recorded as required of mortgages, as construed by the Supreme Court of the state, an agreement of consignment under which goods were delivered to a bankrupt to be sold and accounted for as agent, otherwise valid, is not void as against the bankrupt's trustee, or general creditors, because not recorded.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 225; Dec. Dig. § 140.*]

2. BANKRUPTCY (§ 140*)—PROPERTY PASSING TO TRUSTEE—GOODS HELD ON CONSIGNMENT.

Where goods were in fact shipped to and held by a bankrupt under a valid consignment contract, to be sold as agent, and not otherwise, the fact that he subsequently gave notes for their price for the accommodation of the payee, which were not enforced, but renewed when due, he being called on only to account for the goods sold, is not conclusive that the contract was changed into a sale.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 225; Dec. Dig. § 140.*]

In the matter of G. W. Bailey, bankrupt. On review of two orders of referee. Affirmed as to one, and reversed as to the other.

Geo. T. Magill, for Parian Paint Company.

Grier & Park, for Perkins Mfg. Company.

Richardson & Cunningham, for bankrupt.

BRAWLEY, District Judge. These claims were heard together, upon a petition to review the report of the referee.

1. The Parian Paint Company, under an agreement in writing dated April 2, 1907, agreed to furnish to the bankrupt, who was doing business under the name of the Bailey Builders' Supply Company, paints and painters' supplies, upon receipt of orders, the same to be sent on consignment; Bailey agreeing to keep an itemized statement of all paints and supplies sold by him, and to pay for the same when sold, at the end of every 60 days, and to return to the Parian Paint Company, when called upon, all paints and supplies which he had on hand. Bailey filed his voluntary petition in bankruptcy in the autumn of 1909, and thereafter the Parian Paint Company filed its petition for the return to it of certain paints and painters' supplies, which were readily identified. The referee in bankruptcy, to whom the petition was referred, found as a matter of fact that the paints and painters' supplies were furnished under a contract of consignment, that the same was not recorded, and that the claims represented by the cred-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

itors who have filed this petition for review have not been reduced to liens, and were simple contract claims, all of which had been incurred by the bankrupt subsequent to the date of the contract of consignment. He thereupon made an order directing the trustee to turn over to the petitioners all of the goods and merchandise in his possession belonging to the Parian Paint Company, and that all accounts that said company could trace in the hands of the purchasers should also be turned over to it. The petition for review impeaches the correctness of this decision, and in the argument the sections of the Civil Code of South Carolina which are supposed to have a bearing upon the question have been cited.

Section 2655 is as follows:

"Every agreement between the vendor and the vendee, bailor or bailee, of personal property, whereby the vendor or bailor shall reserve to himself any interest in the same shall be null and void as to subsequent creditors or purchasers for valuable consideration without notice, unless the same be reduced to writing, and recorded in the manner now provided by law for the recording of mortgages."

Section 2456 of the Code provides that:

"All deeds of conveyance of lands, tenements or hereditaments," etc., "and generally all instruments in writing now required by law to be recorded," etc., "shall be valid so as to affect from the time of such delivery or execution the rights of subsequent creditors (whether lien creditors or simple contract creditors) or purchasers for valuable consideration without notice, only when recorded within forty days from the time of such delivery or execution, in the office of register of mesne conveyances," etc., "where the property affected thereby is situated."

These sections have been frequently interpreted by the Supreme Court of South Carolina. The latest pertinent case is *Armour & Co. v. Ross*, 78 S. C. 294, 58 S. E. 941, 1135. This was an action to recover a quantity of bacon and lard consigned by plaintiffs to one Butler as their agent, and by him turned over to Ross & Turner, who claimed to be purchasers for valuable consideration without notice. The lower court held that the agreement between the plaintiffs and Butler was null and void as to subsequent creditors and purchasers for valuable consideration without notice, as it was not recorded within the time required by section 2655; but the Supreme Court reversed this decision, on the ground that this section of the Code had no application to simple or unsecured creditors, but applied only to those whose claims had been reduced to judgment, or to those holding other liens on the property before receiving notice of the unrecorded instrument, and that the amendment to section 2456, above cited (by inserting the words "whether simple contract creditors or lien creditors"), was not applicable, as that section and section 2655 are separate and distinct.

The precise question involved in this petition for review was settled by the Court of Appeals of this Circuit in *Fridmore v. Puffer Mfg. Co.*, 163 Fed. 496, 90 C. C. A. 42. That was a case in bankruptcy, where petitioners sought to recover from the trustees certain property consigned to the bankrupt under a contract similar to that in this case, and the District Court held that it was governed by the case of *York Mfg. Co. v. Cassell*, 201 U. S. 352, 26 Sup. Ct. 481, 50 L. Ed.

782, which held that the "trustee takes the property of the bankrupt in cases unaffected by fraud in the same plight and condition that the bankrupt himself held it, subject to all the equities impressed upon it in the hands of the bankrupt." The Court of Appeals affirmed this judgment. It was contended there, as here, that the contracts in question were of a character such as are required to be recorded under section 2456, Code of Laws of South Carolina, and that subsequent creditors of the bankrupt, who had no notice of the secret agreement between the claimant and the bankrupt, had rights superior to those of the claimant. The Court of Appeals in its opinion says:

"We have carefully considered the contention of counsel representing the trustee, in which it is insisted that the statute of South Carolina (Civ. Code, § 2456), which relates to secret liens, applies, and are of opinion that under the circumstances in this case the decisions relied upon to sustain such contention do not apply to the case at bar."

The judgment of the referee is in accord with this opinion, and the same is in all respects affirmed.

2. The referee, upon hearing the petition of the Perkins Manufacturing Company of like character with that just disposed of, held "that the Perkins Manufacturing Company and the bankrupt did enter into a contract some time during the month of February, 1908, which was a consignment contract"; but inasmuch as the general manager of the Perkins Manufacturing Company, subsequent to the contract, took notes from the Bailey Builders' Supply Company, he decided that said notes were taken practically to close the said account, and the contract of consignment was changed thereby, and his decision was therefore against the petitioner's claim. It appears from the testimony that the bankrupt in February, 1908, entered into an arrangement with the Perkins Manufacturing Company, of Augusta, Ga., by which the latter company was to consign certain doors, sashes, blinds, and other lumber to Bailey, who was to sell the same as their agent, and to account to them from time to time for the proceeds of sale, and upon his return to his home at Greenwood Bailey sent them an agreement substantially similar to that which he had with the Parian Paint Company, but this agreement was not signed by either party. The referee holds, and the testimony corroborates his finding, that the goods were forwarded under a consignment contract; both parties understanding that Bailey was to acquire no interest whatever in the goods, that he was to take and handle them for the Perkins Manufacturing Company, and such profit as he was able to make on the sale of the goods over and above the price at which they were billed to him was to be his commission.

It appears that before the agreement was made something was said about the Perkins Company taking notes, and that the attorney for the Perkins Company advised them against taking notes for the supplies furnished, but some time after the goods were shipped Toale, representing the Perkins Manufacturing Company, came to Greenwood and asked Bailey to sign notes representing the value of the goods shipped. These notes matured in 30, 60, and 90 days. The testimony of Perkins is that the notes were taken for two reasons:

First, "for our accommodation"; second, "to keep the records of the shipments clear." These notes were discounted by the Perkins Manufacturing Company in Augusta, and were renewed whenever they fell due; but the understanding between Bailey and the Perkins Manufacturing Company was that Bailey should be required to pay thereon only what moneys he derived from the sale of the goods. All the parties to the transaction say, and all of the testimony shows, that the goods were shipped upon a consignment contract, and that the notes were not given or accepted in payment therefor. After the notes were given the Perkins Manufacturing Company went to Bailey's place of business and took stock of the goods in his hands. This act is consistent with the theory of the petitioner that Bailey was its agent, and is not consistent with the theory that Bailey, by giving the notes, became the purchaser.

The advice of the attorneys for Perkins & Co., given, it appears, before the agreement was actually reached, was that if they took notes in payment they could not hold Bailey as simply an agent; but all the parties agree, and the referee finds, that the actual agreement between the parties was a consignment contract. All the parties to the transaction agree that the giving and taking of the notes was not intended to change the character of the relations between the parties, that they were not given or accepted in payment for the goods shipped, and there is no testimony whatever in contradiction. There was no attempt to enforce the payment of the notes as they fell due, and Bailey was not called upon to pay the same, or any part thereof, until after he had actually sold the goods. Bailey was conducting a small business at Greenwood, in this state, and there is nothing in the testimony that warrants the assumption that the Perkins Manufacturing Company would have furnished as much as \$2,800 worth of builders' supplies solely upon his personal credit; and as the testimony is clear that the goods were furnished upon a consignment contract, under which Bailey was given a price list and was to be called upon to pay only when the goods were sold, taking as his commission the difference between the price list and the price at which he actually sold the goods, and that it was not the intention of either of the parties that the notes were given or accepted in payment for the goods, and that after the giving of the notes an account was taken of the stock on hand from time to time, showing that the parties did not consider that the original contract of consignment was to be modified by the giving of the notes, I am of opinion that it would be going too far to hold that the mere taking of notes, in the circumstances stated, changed the relation of parties from bailor and bailee to that of creditor and debtor, when both parties agree in their testimony that such was not their intention.

It is therefore ordered and adjudged that the decision of the referee on that point be reversed, and the case is remanded, with directions to enter an order as upon a consignment contract, similar to that entered in the case of the Parian Paint Company.

BAKER WHITELEY COAL CO. v. BALTIMORE & O. R. CO.

(Circuit Court, D. Maryland. February 9, 1910.)

MONOPOLIES (§ 16*)—VALIDITY—GRANT OF EXCLUSIVE PRIVILEGE TO DOCK VESSELS AT WHARF.

A contract made by a railroad company, which was a large carrier of coal to the seacoast at Baltimore, and which had there built a private pier for exclusive use in loading coal from its cars upon vessels for water transportation, by which it gave to a tug owner the exclusive right to dock and undock vessels at such pier, in consideration of which the tug owner agreed to keep one or more tugs on hand at the pier at all times to perform such service as required and to render assistance in case of fire, is not unlawful as against other tug owners, it being shown that it facilitated the use of the pier by itself and shippers, and did not add to the charges of the latter or their consignees.

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 16.*]

In Equity. Suit by the Baker Whiteley Coal Company against the Baltimore & Ohio Railroad Company. Decree for defendant.

Robert H. Smith, John C. Rose, and J. Craig McLanahan, for complainant.

Herbert R. Preston and R. Marsden Smith, for defendant.

Before GOFF, Circuit Judge, and MORRIS, District Judge.

MORRIS, District Judge. This is a bill in equity filed by the Baker Whiteley Coal Company, a corporation of West Virginia, against the Baltimore & Ohio Railroad Company, a corporation of Maryland, praying an injunction restraining the railroad company from putting into effect a rule made by it by which after June 15, 1908, the docking and undocking of all classes of vessels at the railroad company's coal pier at Curtis Bay should be done exclusively by the tugs of Capt. R. M. Spedden. On the case made by the bill and affidavits, a preliminary restraining order was granted, and now, after answer filed and testimony duly taken, the case comes on for final hearing.

The Curtis Bay coal pier of the Baltimore & Ohio Railroad Company was, about 1901, built out from land of which the railroad company is the riparian owner on the navigable waters of the Patapsco river adjacent to the harbor of Baltimore. The object of its construction by the railroad company was to facilitate in the most convenient manner the loading of coal-carrying ships with the coal brought to the pier by the railroad company. There is room for from two to four ships on each side of the pier, but it is not used for any other purpose. The complainant is the owner of tugs, having a large business in towing vessels and in docking them at the coal pier. The business of the complainant is injuriously affected by the enforcement of the order complained of for the reason that the complainant makes annual contracts with vessels coming up the Chesapeake Bay and using the coal pier by which it contracts for an agreed price to meet the vessels and do all their towing, including the service of docking and undocking at the coal pier. This towing business of the complainant is large, and the part of its charges for the work of docking and undocking

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

steamers at the coal pier amounts to as much as \$7,000 a year. The immediate occasion of the filing of the bill as stated in the complaint was that the Norwegian steamship Horda, in respect to which the complainant had a towing contract, had arrived in the harbor of Baltimore intending to load with coal at the coal pier, and had been towed alongside the pier by one of complainant's tugs for the purpose of being docked at the coal pier, but those in charge of the pier had refused to let the steamship come to the pier in tow of complainant's tug, and had denied to the complainant the opportunity of completing the towage service it had contracted to perform, and refused to allow the steamship to be docked except by Spedden's tug.

The answer of the railroad company alleges that the coal pier at Curtis Bay, with its large number of shifting tracks and its branch road connecting it with the railroad company's main line, was constructed for the purpose of receiving, assorting, and classifying coal cars with the least delay possible; that its operation is complex as compared with an ordinary pier, and requires for successful operation that, in assorting and arranging coal cars and sending them to the pier and in unloading the coal into vessels, every kind of delay and confusion should be avoided; that it is true that in the past vessels have employed any tugs they might choose to dock and undock them at the pier, but it was found that this practice caused delay and confusion and materially limited the capacity of the pier resulting in delay to the shippers of coal; that as a means of remedying these evils, the railroad company determined to so arrange that there should always be tugs in readiness at or about the pier for the special purpose of promptly docking and undocking vessels as soon as they were ready; that for this reason they had contracted with R. M. Spedden to keep during 12 hours of the day a tug of sufficient capacity at the coal pier, and to charge vessels for the service not exceeding the rate established by the Tow Boat Owners' Association for docking and one-half the rate for undocking. The contract also required said Spedden to keep at the pier day and night and Sundays a tug and sufficient crew for fire protection, and to perform all the service to the satisfaction of the railroad. It was made a condition of the contract that, in consideration of the fact that Spedden should keep tugs always on hand for the prompt handling of vessels, the railroad company would enforce a rule that all docking and undocking at the pier should be done exclusively by said Spedden's tugs. There does not appear to be any material dispute as to the facts except that the complainant contends that the claim that there exists any necessity or reasonable ground for such a rule is not well founded. We think the proof does lead to the conclusion that by the enforcement of the rule established by the railroad company as the owner of the pier its business will be facilitated, and the dispatch of vessels insured, by having at all times a tug at the pier ready to dock and undock vessels, and that other incidental advantages accrue from having at all times a steam tug there ready to extinguish fires, and to clear the pier of ice and move vessels as required. It does not appear that the cost to vessel owners of docking and undocking has been increased by the new arrangement. The

only parties who can be said to have a right to come to the pier are those for whom coal has been transported by the railroad, and who, as consignees or shippers, have a right to require it to be delivered to the vessels they send to the pier for it. They are not complaining or seeking redress, but a tug boat owner on his own behalf.

It is to be borne in mind at the threshold that under the Maryland law this pier is the private property of the railroad company (Maryland Code, art. 98, § 21), and in *Weems Steamboat Company v. People's Company*, 214 U. S. 345, 29 Sup. Ct. 661, 53 L. Ed. 1024, it was decided that a private wharf is not held by the owner subject to public use, and that a third person has no right to demand its use even on tendering compensation therefor. This ruling followed the court's previous decision in *Louisville & Nashville Railway Company v. West Coast Naval Stores Company*, 198 U. S. 483, 25 Sup. Ct. 745, 49 L. Ed. 1135. In the case last cited, the Supreme Court held that the fact that a wharf was built by a railroad company, and was intended for terminal purposes at a seaport, did not make it a public wharf in the sense that any one having goods to be transported by water could ship them over the railroad and use the wharf for any vessel he might select to load them for the water transportation. The rulings in these two cases would appear to sustain the contention that the pier in this case is so far under the control and regulation of the railroad company that it can determine for itself how it shall be used, and that if it sees fit to make a not unreasonable regulation determining what tugs shall be permitted to dock and undock coal vessels there, it is within its right as owner.

The testimony tends to prove, and we think does fairly establish, that the railroad company can only get the tug service most beneficial to itself and most convenient and effective to the shippers of coal by making an exclusive contract with some one to furnish the tugs and, incidentally, to have a proper tug always on hand to avoid delays and to render assistance in case of fire or other emergency. The ruling of the Supreme Court in *Chicago, St. Louis & New Orleans Railroad Company v. Pullman Car Company*, 139 U. S. 79-90, 11 Sup. Ct. 490, 35 L. Ed. 97, with regard to an exclusive contract of the railroad company with the Pullman Car Company would seem to be applicable in principle. It is contended that as the Curtis Bay pier is a facility offered for the use of all shippers of coal over the Baltimore & Ohio Railroad who desire to have it further transported by water, and as they have a right to send the vessels selected by them to the pier and to have the coal loaded on board, that this right implies and includes the right to use any proper and suitable tug to put the vessels in place. But we think that the docking and undocking of the vessel is a mere incident of the business, and is a matter which the owner of the pier may within reasonable limits control to subserve its own convenience and that of its shippers.

The case of *Donovan v. Pennsylvania Company*, 199 U. S. 279, 26 Sup. Ct. 91, 50 L. Ed. 192, was a case which received most learned consideration by the Supreme Court. In that case the Pennsylvania Railroad Company, being the owner of a passenger station and depot build-

ings in Chicago, made an exclusive arrangement with the Parmalee Transfer Company to supply all vehicles required by passengers. This arrangement deprived the hackmen of the city of the privilege they had theretofore enjoyed of entering the station to solicit employment from arriving passengers. It was held by the Supreme Court that the railroad was required under all circumstances to do what was reasonably necessary and suitable for the accommodation of passengers and shippers, but was under no obligation to refrain from using its property to the best advantage of the public and itself, and that it was not bound to so use its property that others having no business with it might make a profit to themselves. It was urged that the hackmen were themselves carriers of passengers, and were entitled to pursue their business at any place open to another carrier engaged in the same kind of business. The court denied this contention, and held that the railroad company was not bound to accord this particular privilege to the defendants simply because it had accorded a like privilege to the Parmalee Transfer Company, for it had no contractual relations with the defendants, and owed them, as hackmen, no duty to aid them in their special calling.

In the present case, although it might seem that as to arriving vessels which have been towed in by the complainant's tugs and were going direct to the coal pier it might be contended that the tug had a right to continue the towing service and take the vessel to the pier, it is a fact that this situation does not often occur, for, as a rule, the vessel that expects to load coal goes first to the coal pier anchorage, and lies there until a place is ready for her at the pier, when she is docked by a tug which does that special service. For this service of docking and undocking the rule put in force by the railroad company results in no increase of expense to the vessel.

We think the order heretofore entered restraining the Baltimore & Ohio Railroad Company from preventing the tugs of the Baker Whiteley Coal Company from docking and undocking vessels at the railroad company's coal pier at Curtis Bay should be rescinded and the bill of complaint dismissed, and it is so ordered.

UNITED STATES v. AMMERMAN.

(District Court, W. D. Arkansas, Ft. Smith Division. February 3, 1910.)

No. 653.

1. PERJURY (§ 25*)—REQUISITES OF INDICTMENT—MATERIALITY OF TESTIMONY.

In a prosecution for perjury, it must be alleged in the indictment that the matter sworn to was material, or the facts set forth as falsely or corruptly sworn to must be sufficient in themselves to show such materiality.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 82-89; Dec. Dig. § 25.*]

2. PERJURY (§ 25*)—INDICTMENT—CONSTRUCTION—"DURING."

In an indictment for perjury alleging that on the trial of a criminal case it was a material inquiry whether the defendants were in a certain

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

town "during the day and night of December 28th, and early in the morning of December 29th," the word "during" means at any time during the day or night of the 28th and the morning of the 29th.

[Ed. Note.—For other cases, see Perjury, Dec. Dig. § 25.*

For other definitions, see Words and Phrases, vol. 3, p. 2278.]

8. PERJURY (§ 25*)—INDICTMENT—SUFFICIENCY.

An indictment for perjury alleged that on the trial of a criminal case it was a material inquiry whether the defendants were in a certain town during the day and night of the 28th and early in the morning of the 29th of a certain month; that the defendant willfully, corruptly, and contrary to his oath, testified on said trial that two of the defendants were in another state up to 8 or 9 o'clock on the morning of the 28th. *Held*, that such allegations were sufficient to show that the testimony given by defendant on such trial was material to the issues, and that it was not necessary to show that such testimony, if true, would exclude the guilt of the defendants on trial.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 82-89; Dec. Dig. § 25.*]

Criminal prosecution by the United States against Lon Ammerman. On motion in arrest of judgment. Overruled.

John I. Worthington, U. S. Dist. Atty.

Ira D. Oglesby and Troy Pace, for defendant.

ROGERS, District Judge. On the motion in arrest of judgment the argument, clear and cogent as it was, in the opinion of the court proceeded on a mistaken theory, and is misleading. It is a sound principle of law that, in a prosecution for perjury, "it must be alleged in the indictment that the matter sworn to was material or the facts set forth as falsely and corruptly sworn to sufficient in themselves to show such materiality." It is the application of that principle which is involved here. It is not alleged in the indictment that the matters sworn to are material, and that alternative of the principle may be considered eliminated.

The question then remains: Are the facts set forth in the indictment as falsely and corruptly sworn to sufficient in themselves to show such materiality? Pretermitted any notice of formal matters, the indictment charges that on the trial of Bell, Patterson, and Thompson it became and was a material inquiry whether said Bell, Patterson, and Thompson "were in the town of Huntington, in Sebastian county, state of Arkansas, during the day and night of December 28, and early in the morning of December 29, 1908." The word "during" used in the indictment means "in the life of: in the time of: in the course of" those days. Century Dictionary. "During coverture" means "while the marriage lasts." *State v. Fry*, 4 Mo. 159. "During such trial" includes all the proceedings from the impaneling of the jury to the receiving and according of the verdict. *Maurer v. People*, 43 N. Y. 3. It was material, then, within the terms used in this indictment, to know whether Bell, Patterson, and Thompson were in Huntington, Ark., at any time during December 28th, and that night, and the morning of December 29, 1908. It is not alleged that it was material to know whether Bell, Patterson, and Thompson were in Huntington at

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

any particular hour of the day, night, and morning named, but either during the day, night, and morning named, either during the course of the day, night, and morning named. Having so alleged, the indictment then alleges that the defendant willfully, corruptly, and contrary to his oath testified in substance and to the effect following; that is to say:

"That he knew said defendants James C. Bell and John Patterson, and that they, the said James C. Bell and John Patterson, came to his hotel, the Buffalo Hotel, in Sapulpa, Okl., about December 23, 1908, and that they, the said James C. Bell and John Patterson, remained at his said hotel every night continually until December 28, 1908; that said James C. Bell and John Patterson ate breakfast at the Buffalo Hotel in Sapulpa, Okl., on the morning of December 28, 1908; that James C. Bell and John Patterson left said Buffalo Hotel in Sapulpa, Okl., about 8 or 9 o'clock a. m. on December 28, 1908."

Having alleged that the evidence set out was willfully and corruptly false and contrary to defendant's said oath, the indictment then alleges specifically that each and every of said statements made by him was false at the time he made them, and that he did not believe them to be true, and then closes with the ordinary formal allegation of the crime of perjury thus committed. It is therefore alleged in the indictment what was a material inquiry, what the defendant testified to, and that it was corruptly and willfully false. But it is said that it does not appear from the indictment how the willful and corrupt testimony was material, because it does not appear on what day the robbery was alleged to have been committed, for which Bell, Patterson, and Thompson were on trial at the time the false testimony was given, and, as the court cannot see with its judicial eye how it was material, that the indictment is insufficient. In *Markham v. United States*, 160 U. S. 325, 16 Sup. Ct. 291, 40 L. Ed. 441, the court said:

"In *King v. Dowlin*, above cited, Lord Kenyon said that it had always been adjudged to be sufficient in an indictment for perjury to allege generally that the particular question became a material question. So in *Commonwealth v. Pollard*, 12 Metc. [Mass.] 225, 229, which was a prosecution for perjury, it was said that it must be alleged in the indictment that the matter sworn to was material, or the facts set forth as falsely and corruptly sworn to should be sufficient in themselves to show such materiality."

So it therefore appears that, if "the facts set forth as falsely and corruptly sworn to should be sufficient in themselves to show such materiality," the indictment is good. So, here, it is not necessary to show how the false testimony was material. It is enough if it appears upon the face of the indictment that it was material to the matter under inquiry.

But it is argued that all the defendant's testimony set out in this indictment might be true, and still Bell, Patterson, and Thompson could be guilty of the robbery, and therefore it does not appear that the defendant's alleged false evidence was material. This argument assumes that to make defendant guilty the false testimony must have been such as, if true, to preclude the guilt of Bell, Patterson, and Thompson, and that it must be so made to appear in the indictment. The argument is ingenious, but fallacious and unsound. It is misleading, in this: that the question is not whether defendant's testimony, if

true, precluded the guilt of Bell, Patterson, and Thompson, but whether it had any bearing on the issues involved in their trial—whether it was material to the issues. In 2 Archbold on Criminal Practice and Pleading, p. 1727, the author says:

"The statement alleged to be false must be material to the subject then under consideration, otherwise it does not amount to the offense of perjury; but, if it tend, even circumstantially, to the proof of the issue, it will be material."

Can it be fairly said that the testimony of the defendant which accounted for the whereabouts of Bell, Patterson, and Thompson during the night of December 28 and the morning of December 29, 1908, as being in the town of Sapulpa, in the state of Oklahoma, is not material to an indictment which alleges that it was a material inquiry in the trial of said Bell, Patterson, and Thompson to know whether they were in the town of Huntington, in Sebastian county, in the state of Arkansas, during the 28th day of December, and the night thereof and the morning of the 29th of December, 1908? Can it be said that, if they were in Sapulpa at half past 8 or 9 o'clock on December 28, 1908, it throws no light upon the question as to whether they were in the town of Huntington, Ark., during the course of the same day and of that night, and the early morning? It seems to me the question answers itself. This indictment may not be as artistically drawn as it might be, but I think it good, either on demurrer or on motion in arrest of judgment. Section 1025, Rev. St. (U. S. Comp. St. 1901, p. 720), provides that:

"No indictment found and presented by a grand jury in any District or Circuit Court or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection of matter or form only, which shall not tend to the prejudice of the defendant."

It cannot be possible that the defendant in this case has been misled or prejudiced by any defect of form or substance in this indictment, and, unless he has, there is nothing of which he can complain.

The motion in arrest of judgment is overruled.

CONOVER v. PENNSYLVANIA R. CO.

(Circuit Court, S. D. New York. March 2, 1910.)

DEATH (§ 31*)—ACTION FOR WRONGFUL DEATH—PERSON ENTITLED TO SUE UNDER PENNSYLVANIA STATUTE.

Under Laws Pa. 1855 (P. L. 309), giving an action for wrongful death to the "husband, widow, children or parents of the deceased," and providing that the sum recovered shall go to them in the proportion they would take his or her personal estate in case of intestacy, as construed by the Supreme Court of the state, the widow of the person killed, if living, is the person in whom the right of action is vested, and she has authority to settle an action so brought by her, since she holds the amount recovered or received as trustee for all the persons interested therein.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 35, 42; Dec. Dig. § 31.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Action by Ella K. Conover against the Pennsylvania Railroad Company. On motion of Theophile Sirois, guardian ad litem, to vacate order of discontinuance made on settlement. Overruled.

Joseph D. Conover was killed in an accident on the defendant's railroad, at Clover Creek Junction, Pa. Ella K. Conover, widow of Joseph D. Conover, brought an action as administratrix in the Supreme Court of New York County. On motion by the defendant the case was removed to this court. The defendant then demurred on the ground that plaintiff was without capacity to sue, she having sued as administratrix, and thereafter the complaint was amended allowing the plaintiff to sue as widow, for the loss of her husband, pursuant to the statute of the state of Pennsylvania giving her the right to sue, as widow, for the pecuniary damages sustained in the loss of her husband. The action was settled between the widow and the defendant company, the latter paying her \$7,500, and an order of discontinuance entered on January 22, 1908.

Now Theophile Sirois, recently appointed guardian ad litem of the two children of Joseph D. Conover, applies for an order vacating the order of discontinuance. It is not disputed that the settlement was made without consulting the children who are lunatics.

The Pennsylvania statute relating to damages for injuries producing death, and now in force, was passed in 1855 (Laws Pa. 1855, No. 323, p. 309) and is as follows:

"That the persons entitled to recover damages for any injury causing death shall be the husband, widow, children or parents of the deceased and no other relative; and the sum recovered shall go to them in the proportion they would take his or her personal estate in case of intestacy and that without liability to creditors.

"That the declaration shall state who are the parties entitled in such action; the action shall be brought within one year after the death and not thereafter."

Edw. J. Shumway, for petitioner.

Robinson, Biddle & Benedict, for defendant.

HAND, District Judge (after stating the facts as above). It is quite clear under the law of Pennsylvania that the widow alone is the person in whom the right of action is vested. *Huntingdon & Broad Top R. R. Co. v. Decker*, 84 Pa. 419; *Marsh v. Pennsylvania R. R. Co.*, 204 Pa. 229, 53 Atl. 1001; *Haughey v. Pittsburg Ry. Co.*, 210 Pa. 367, 59 Atl. 1110. All the proceeds she holds in trust for herself and her children; but there is no provision anywhere in the statute by which the interest of the children may be apportioned in the action, and the proceeds are to be turned over to her for her distribution. I think that payment to her or settlement with her was an effective bar, just as it is in the case of any other trustee, and that the person who deals with her need not follow the application of the proceeds. The moving party entirely misconceives the effect of the citation from *Perry on Trusts*, § 796, in which the rule is laid down that a payment to a trustee under a power of sale of real property is not sufficient where the power of sale is to pay a particular debt or particular legacies. In those cases the courts construe the powers as to be exercised for a particular purpose which is not fulfilled unless the money is applied as the testator directs. It is hardly necessary to cite authorities for the proposition that in general a trustee, who is not merely a naked trustee of the legal title, has complete rights to settle controversies, and that third persons need not concern themselves with the application of the proceeds which he makes. The distinction in the case of dry trusts

arises from the fact that the cestui que trust in such cases is complete owner in equity, and the dry trustee has nothing but a bare legal title.

I have been somewhat troubled with *Southern Pacific Railroad Co. v. Tomlinson*, 163 U. S. 369, 16 Sup. Ct. 1171, 41 L. Ed. 193, which held that under the Arizona statute the widow had no right after verdict to reduce the recovery of the children and parents of the deceased; but there are several considerations which in my judgment entirely distinguish that case. In the first place, they were all parties to the record, a procedure which was permitted by the statute. The widow was therefore in the position of trying to compromise the interests of other parties to the record than herself. In addition, as permitted by the statute, the jury had assessed separately the recoveries of each of the parties plaintiff, and it is obvious that the widow, being only one of the parties plaintiff, had no right to interfere with the rights of any others than herself. In view of the fact that the Pennsylvania courts do not admit the children as parties plaintiff at all, that case has no bearing upon the Pennsylvania statute. It is true that in *Styles v. Pennsylvania Steel Co.*, 7 Del. Co. R. (Pa.) 456, the contrary rule was laid down, and it was there held that the widow had no right to discontinue the suit. It is on this case that the applicant chiefly relies. But the case was decided by a single judge in a court of inferior jurisdiction, and I do not feel it is an authoritative declaration of the statute. *Freund v. Yaegerman* (C. C.) 27 Fed. 248. Nor does it seem to me to be in accordance with the fact that children will not be permitted to be parties plaintiff.

Precisely the opposite result was reached under a similar statute in *Natchez Cotton-Mills v. Mullins*, 67 Miss. 672, 7 South. 542. The law in Tennessee, where the children likewise share with the widow (*Collins v. East Tennessee, Virginia & Georgia Railroad Co.*, 9 Heisk. 841), seems to be the same way (*Greenlee v. R. R. Co.*, 73 Tenn. 418; *Holder v. Railroad*, 92 Tenn. 142, 20 S. W. 537, 36 Am. St. Rep. 77; *Stephens v. Railroad*, 78 Tenn. [10 Lea] 448). Of course, those cases in which the right of action is vested in an administrator or executor are not in point.

I can find no case in which the rule is as the applicant says, except the case which he cites and cases in which the children are parties to the record. The construction he desires is an extremely harsh and inequitable one, for it offends against the general rule that one may always safely deal in the compromise of litigation with the parties to the suit. There can be no good reason for excluding the names of the children from the process as parties, if they are to be regarded as still parties to any settlement. If the applicant be right, it must follow that after judgment the judgment debtor may not pay the widow safely, but must insure the distribution to the children. In a case where their shares are not fixed by verdict, as in Arizona, this would be unusual and somewhat burdensome. If it appeared from the record that the widow was what the Pennsylvania decisions call a plaintiff "for use," I might think otherwise; but there is no reason to think that she is.

Motion denied.

SWEETLAND et al. v. TRANSBERG et al.

(Circuit Court, E. D. Washington, S. D. January 21, 1910.)

No. 260.

DESCENT AND DISTRIBUTION (§ 52*)—ORDER OF SUCCESSION—WASHINGTON STATUTE.

Ballinger's Ann. Codes & St. Wash. § 4620, subds. 2, 4 (Pierce's Code, § 2702), relating to the distribution of property of intestates, provide: "(2) If the decedent leaves no issue, the estate goes in equal shares to the surviving husband or wife, and to the decedent's father and mother, if both survive. If there be no father nor mother, then one-half goes in equal shares to the brothers and sisters of the decedent, and to the children of any deceased brothers or sisters, by right of representation. * * * (4) If the decedent leaves a surviving husband or wife and no issue, and no father nor mother, nor brother nor sister, the whole estate goes to the surviving husband or wife." *Held*, that the second clause of subdivision 2 applies only to cases where there is a surviving brother or sister and children of a deceased brother or sister, and that where there is neither brother nor sister surviving, and the case comes within the terms of subdivision 4, that governs, to the exclusion of children of a deceased brother or sister.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 160; Dec. Dig. § 52.*]

In Equity. Suit by W. M. Sweetland, B. J. Sweetland, husband of said W. M. Sweetland, and Grover T. Lemon, a minor, by W. M. Lemon, guardian of his estate, against Christine Transberg and others. On demurrer to bill. Sustained.

N. E. Conklin, for complainants.

T. P. Gose and C. C. Gose, for defendants.

WHITSON, District Judge. This is a suit to establish the heirship of complainants as children of the deceased sisters of Hans Transberg, who, it is alleged, died intestate in this district leaving a widow, but neither father, mother, brother, nor sister, surviving.

In the absence of state construction, the demurrer to the amended bill of complaint calls for an interpretation of subdivisions 2 and 4 of section 4620 of Ballinger's Code (Pierce's Code, § 2702), which read as follows:

(2) "If the decedent leaves no issue, the estate goes in equal shares to the surviving husband or wife, and to the decedent's father and mother, if both survive. If there be no father nor mother, then one-half goes in equal shares to the brothers and sisters of the decedent, and to the children of any deceased brothers or sisters, by right of representation. If decedent leaves no issue, nor husband nor wife, the estate must go to his father and mother."

(4) "If the decedent leaves a surviving husband or wife and no issue, and no father nor mother, nor brother nor sister, the whole estate goes to the surviving husband or wife."

Complainants claim under the second clause of subdivision 2, while, as to the present issue, counsel for defendants rest their case upon the theory that the widow, to whom the property of deceased was distributed by the probate court, was entitled under subdivision 4 to take as the sole heir of deceased.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Several familiar rules of statutory construction are to be observed.

Where the parts of a statute so conflict as to be irreconcilable, a prior must give way to a later provision as being the final expression of the legislative will.

An act, if possible, should receive that construction which will give effect to every clause and section.

While the legislative intent controls, that intent is to be drawn from the statute itself, and it is only where the meaning is ambiguous that there is room for construction at all.

With these rules in mind, we proceed to an examination of the respective claims of the parties. While the clauses in subdivision 2 as divided by periods form distinct sentences, it is manifest that the text was illy punctuated.

The statute of California, from which the act under consideration appears to have been taken (Deering's Civ. Code Cal. 1903, § 1386, subd. 2), divides subdivision 2, which is practically identical in phraseology with subdivision 2 of the statute of this state, into but two sentences. Under the rule that the legislative intent must be discovered if possible, it would seem to be sufficiently clear that the second sentence or clause of this subdivision should be construed in connection with the first. In other words, while the second clause makes provision only for one half of the estate, the provision of the first that the other half goes to the surviving husband or wife should be read into the second.

Thus aiding the statute, it is pertinent to inquire of results.

The complainants must rest upon one of two propositions: Either the subdivisions must be reconciled, or subdivision 4 must be disregarded altogether. But the latter presents nothing to construe. It is unambiguous. If complainants may take under subdivision 2, then the rule that a later conflicting provision nullifies that which goes before will have to be ignored. From that standpoint, subdivision 4 would be superfluous. The court is not at liberty to violate so cardinal a rule of construction. It would involve also substituting that which does at least need aid to make it understood, for language entirely certain in meaning.

Thus far the discussion has proceeded upon the assumption that the two provisions affect the same matter and cannot stand together; and it has been seen that if they cannot be reconciled the complainants must fail. If they can be harmonized, it is perfectly clear that it must be done by construing subdivision 2, which is obscure, and not by abrogating subdivision 4, the terms of which are too plain to be construed. It has been suggested that section 4620 was probably taken from California. A perusal of the statute of that state is confirmatory of this conclusion. But, however, that may be, the California Supreme Court, considering identical provisions, clearly expressed a view contrary to the contention of complainants' counsel.

In *Ingram's Estate v. Clough*, 78 Cal. 586, 21 Pac. 435, 12 Am. St. Rep. 80, that court concluded that the second subdivision was meant to apply only to cases where there is a surviving brother or sister and children of a deceased brother or sister. The reason for the use of the

word "and," instead of "or," relied upon here as having the same meaning, will thus be seen. This harmonizes the statute and gives effect to the whole. The decision above referred to no doubt led to the amendatory act of the Legislature of California in 1905, which must have been adopted to meet the holding of the Supreme Court. The argument, therefore, by complainants' counsel, that the legislative interpretation ought to be adopted, results in favor of the defendants, for if the construction relied upon is sound there was no need of an amendment.

It cannot escape attention that the right to take by representation is specifically provided for in subdivisions 1, 2, 3, 6, and 7 of the above-noted section, but is omitted in subdivision 4. This emphasizes the views already expressed, and it negatives inadvertence on the part of the Legislature in framing the statute, if such an element could become the subject of consideration. From whatever standpoint the matter be regarded, there is no ground upon which the complainants may stand as heirs of the deceased.

This conclusion renders it unnecessary to discuss section 4638 (section 2716, Pierce's Code).

Demurrer sustained.

In re EVANS LUMBER CO.

(District Court. N. D. Georgia. February 11, 1910.)

No. 2,531.

1. BANKRUPTCY (§ 166*)—CHattel MORTGAGES—VALIDITY.

When intervenor began to sell lumber to the bankrupt, he required the personal indorsement of E. for \$1,000, which was about the amount for which he expected to give the bankrupt credit. Within four months prior to the bankrupt's adjudication, intervenor, at E.'s request, gave up such personal indorsement and took a mortgage on the bankrupt's machinery and a transfer of certain of its bills receivable. The mortgage was not recorded immediately, but without any arrangement between intervenor and the bankrupt to keep it from the record. *Held*, that the mortgage was valid as between the parties and as to the bankrupt's trustee; intervenor having no reasonable cause to believe the bankrupt to be insolvent when he took it.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 250, 251; Dec. Dig. § 166.*]

2. BANKRUPTCY (§ 474*)—LIENS—CARING FOR PROPERTY—CONTRIBUTION BY LIENOR.

Where intervenor had a valid chattel mortgage lien on certain of the bankrupt's machinery and a transfer of certain of its bills receivable to secure an indebtedness of \$930.45, and was entitled to be paid from the proceeds of a sale of the machinery \$380, he was properly charged \$75 as a contribution toward the expense of caring for the property pending bankruptcy and before sale.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 474.*]

In the matter of the Evans Lumber Company, bankrupt. Intervention of H. T. Reynolds to recover certain mortgaged personalty. Decree for intervenor.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The question made by the petition for review on the findings of the referee on claim of H. T. Reynolds as to his right to priority to mortgage on certain machinery and transfer to him as collateral three accounts.

Arthur Heyman, for intervener.
Hudson Moore, for creditors.

NEWMAN, District Judge. The report of the referee is as follows:

"A claim was filed on October 28, 1909, in Re Evans Lumber Company, bankrupt, by one H. T. Reynolds. The petition sets out that the said Evans Lumber Company is indebted to the said Reynolds in the sum of \$930.45, less certain credits, and that said indebtedness to said Reynolds is secured by a mortgage on certain machinery, as set out in the petition. Petitioner claims that the mortgage created a lien in his favor, and that he was entitled to be paid the proceeds of said machinery, which is shown in the petition for confirmation of sale filed November 10, 1909, to be the sum of \$380.

"In addition to this, there were three accounts transferred to petitioner to secure said mortgage, the proceeds of which are also claimed in the petition.

"The petition further shows (and it is borne out by the evidence) that Reynolds at first had received a note for \$1,000 indorsed by James Evans individually, and that at the request of the said Evans this security was given up, and, it having been made to appear to the said Reynolds that the affairs of the Evans Lumber Company were in good condition, he surrendered the note to the said Evans, and took the mortgage, which is attached to the petition.

"The evidence shows that this mortgage was kept from the record, but the testimony shows that the said Reynolds did not keep the mortgage from record by any agreement with the said Evans, but retained the right to record his mortgage when he saw proper.

"The answer was filed by the attorneys representing the trustee on November 1, 1909. This answer denies that the intervener, Reynolds, was ignorant of the true condition of the affairs of the said Evans Lumber Company, and alleges that he should have known of the true condition of the said Evans Lumber Company; that the giving of the mortgage did not create a lien until the same was recorded; and it appears that the same was not recorded until the intervener had knowledge of the insolvent condition of the said bankrupt, Evans Lumber Company.

"Trustee's attorneys, further answering, say that the mortgage and transfer of said accounts was within four months prior to the adjudication of the Evans Lumber Company as a bankrupt; that the said mortgage was given to secure a pre-existing indebtedness, and was given and taken under such conditions and circumstances as of necessity put said Reynolds upon notice as to the true financial condition of the said Evans Lumber Company.

"The brief of intervener's counsel is very full, and meets with the approval of the referee. Under the law of Georgia (Code, § 2727), it is not necessary to record the mortgage as between the parties. The law is very full as to the trustee taking the place of the bankrupt concern. There have been no intervening liens filed in this case, and, as between the parties, it appears to the referee that the mortgage given in lieu of certain security to Reynolds, and accepted by him in good faith, as the evidence shows, should be held good. From the evidence the only point in this case is whether or not Reynolds, from his associations and dealings with the Evans Lumber Company, was put on notice, or had reasonable cause, to believe any bankrupt conditions existing at the time that he took the mortgage.

"It appears to the referee that this question has been fully decided in the case of Coder v. Arts, 152 Fed. 943 [82 C. O. A. 91, 15 L. R. A. (N. S.) 372], and Coder v. McPherson, 152 Fed. 951 [82 C. O. A. 99], and quoted by the referee in a former decision, which has just passed under the review of the judge of the District Court in the case of M. C. Vandiver.

"The evidence is convincing to the referee that Reynolds was not aware of the bankrupt condition of the affairs of the Evans Lumber Company at the time that he agreed with Evans to surrender the personal note of Evans, and accept a mortgage on certain machinery, as specified in his petition, which machinery now stands for \$380, as sold by the trustee."

It appears from the opinion of the referee and the evidence in the record that the Evans Lumber Company was engaged in the lumber business, and at the time H. T. Reynolds began to sell them lumber and required the personal indorsement of James Evans, individually, for \$1,000, which was about the amount he expected to give the bankrupt credit.

It further appears from the record in this case that, within four months prior to the adjudication of the Evans Lumber Company, H. T. Reynolds, at the request of Evans, gave up the personal indorsement and took the mortgage and transferred notes.

The only question in the case, and the one to determine, is whether or not Reynolds, at the time he took this security, had reasonable cause to believe the Evans Lumber Company to be insolvent. The referee says:

"The evidence is convincing that Reynolds was not aware of the bankrupt condition of the affairs of the Evans Lumber Company at the time that he agreed with Evans to surrender the personal note of Evans, and accept a mortgage on certain machinery as specified in his petition, which machinery now stands for \$380, as sold by the trustee."

I think the evidence sustains the referee in this conclusion.

The referee further held that Reynolds should pay \$75 toward the expenses of looking after and caring for the property in which he was interested when the bankruptcy was pending and before the sale.

I am not prepared to say that this amount is unreasonable. It is perfectly clear that he should pay his proportion of the rent and other expenses incident to the care of the property on which he had a mortgage. The referee finds that \$75 is "the lowest possible figure" at which the expense can be figured.

The action of the referee is approved.

In re SIMS.

Ex parte BATJER & CO.

(District Court, S. D. New York. February 21, 1910.)

1. BANKRUPTCY (§ 391*)—PROCEEDINGS IN STATE COURT—VACATION OF STAY.

A stay of proceedings against a bankrupt in the state court will be vacated, so as to permit creditors to move the state court to punish the bankrupt for contempt committed prior to the filing of the bankruptcy petition.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 649-654; Dec. Dig. § 391.*]

2. BANKRUPTCY (§ 391*)—PROCEEDINGS IN STATE COURT—STAY—EXECUTION AGAINST SALARY.

Where, prior to bankruptcy, judgment creditors of the bankrupt had secured an execution entitling them to collect from the bankrupt's employ-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ers 10 per cent. of his salary, as authorized by Code Civ. Proc. N. Y. § 1391, a stay granted in bankruptcy proceedings would be vacated, so as to permit the creditors to proceed in the state court to collect any part of the salary falling due prior to the filing of the bankruptcy petition, regarding the same as apportioned for the month in which the petition was filed, but not to permit the collection of any part of the salary earned after the filing of the petition, to permit which would be in conflict with the purpose of a discharge.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 649-654; Dec. Dig. § 391.*]

In the matter of bankruptcy proceedings against one Sims. Application for vacation of a stay of proceedings in the state court by Batjer & Co. Granted in part.

This is an application to vacate the usual stay against the bankrupt's creditors. The bankrupt was adjudicated upon his own petition, filed on December 20, 1909. More than 11 years previous to this the creditors had obtained a judgment against him in the state court on October 12, 1898, for \$723.40. On October 7, 1908, the creditors obtained an execution under section 1391 of the New York state Code, by virtue of which they were entitled to collect from the bankrupt's employers 10 per cent. of his salary till the judgment was paid. The employers paid to the creditors \$30.76. The sheriff under the levy collected and now retains in his hands \$139.42, and these two sums represent the percentage due under the execution for a period of 22 weeks, since when nothing has been paid. On December 4, 1909, the bankrupt was served with an order from the state court directing him to appear for examination on the return day mentioned therein, which was December 14, 1909. Upon that day he defaulted.

Joseph P. Williams, for creditors.
Harry R. Kohn, for bankrupt.

HAND, District Judge (after stating the facts as above). The stay will, of course, be vacated, so as to permit the creditors to move the state court to punish the bankrupt for any contempt committed prior to December 20, 1909. In addition, the stay will be vacated so as to permit the creditors to proceed in the state court to collect any part of the bankrupt's salary which fell due prior to December 20, 1909. In re Driggs (D. C.) 171 Fed. 897; Ex parte Raymond (D. C.) 171 Fed. 897. For this purpose his salary for December may be regarded as apportioned. While in the case at bar, the levy is not against exempt property, it was more than four months old when the petition was filed, and under the New York Code the execution operates as "a continuing levy" till the judgment is paid. Of course, I have no power to direct the sheriff to pay the creditors. For any relief they must go to the courts in which they initiated their proceedings. All I can do is to relieve them from any stay of this court.

The remaining question is as to proceeding under the levy to recover 10 per cent. of that portion of his salary which the bankrupt has earned and shall earn after petition filed. In Re Driggs, Ex parte Raymond, supra, I said that there was no difference between exempt wages and wages earned after petition filed. The case involved only exempt wages, and the statement was clearly obiter. It was inadvertent, and I think it is wrong. In cases of garnishment, where the obligation garnished is unconditional and due in installments, it may

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes

be that installments which fall due after petition filed will be covered by the lien. Even if the obligation be conditional, the same thing may be true, if the condition does not involve the performance of services by the bankrupt or his transfer of property. In this case, however, all the salary which the creditors can get after December 20, 1909, will be part of what the bankrupt has earned and will earn after petition filed. The situation is wholly unlike the case of a merely future obligation, or of a conditional obligation when performance does not depend upon the bankrupt.

Should I allow the creditors to levy on wages in fact earned in the future, they would recover upon a past debt from property earned subsequently. This contradicts the whole purpose of a discharge, and I cannot permit it, without violating the act. It is not enough that in form the levy may be upon a single chose in action, consisting of the contract of employment. I concede that this is so; but the obligation is quite valueless till the bankrupt performs the condition of service to his employer. Therefore, for the purposes of this act, I shall decide that the wages which arise from services rendered after petition filed are covered by the discharge, and that the stay should continue as to that.

Hence the order must be limited to so much of the salary as represents services rendered prior to December 20, 1909.

In re ALFRED KESSLER & CO.

Ex parte HEINE & CO.

(District Court, S. D. New York. February 25, 1910.)

BANKRUPTCY (§ 340*)—CLAIMS—FORM—PROOF.

Claimant, a bank, sent to the bankrupt's receiver an account showing the general balance of its claim against the bankrupt in the form of a bank account, shortly following the filing of the petition. An attorney representing claimant testified that, a very few days thereafter, he had a conversation with the receiver, who was afterwards trustee, and was informed that the receiver had received the claim, and that "it was all right." The receiver testified that, while he would not contradict such testimony, he had no recollection of the interview, and no sworn claim in proper form was ever filed within the time prescribed. *Held*, that such evidence was insufficient to establish an agreement between the creditor and the trustee as to the sufficiency of the claim, and that the claimant was, therefore, not entitled to amend.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 340.*]

In the matter of the bankruptcy proceedings of Alfred Kessler & Co. On petition of Heine & Co. to review a referee's order declining to allow petitioner to amend its proof of claim. Affirmed.

See 174 Fed. 906.

This is a petition to review the order of the referee in bankruptcy declining to allow the petitioner to amend its proof of claim so as to conform with the statute. The bankrupts made an assignment for the benefit of creditors on October 30, 1907, and thereafter the assignee for the benefit of creditors sent a notice to all creditors that they should submit to him their claims in

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

writing. The petitioner filed a signed copy of the account stated between the bankrupt and themselves, which set forth in full detail all the items of the account, and stated the general balance. The account was in the usual form of a bank account; the petitioners being themselves French bankers. Accompanying the account was a letter to the assignee of which the following is a copy:

"Paris, November 12, 1907.

"William Williams, Esq., 85 Wall Street, New York—Dear Sir: Re Kessler & Co. We are in receipt of your circular of October 31st, contents of which have had our attention, and, referring to the letter we addressed on the 6th inst. to Messrs. Kessler & Co., we beg to hand you herewith extract of account of the said firm, made up the 7th of November, and showing a debit balance of \$27,159.47. We authorize by this mail Messrs. Heidebach, Ickelheimer & Co. of your city to represent us in this matter, which we mention for your government, and, awaiting your communication, we remain, dear sir,

"Yours faithfully,

Heine & Co."

On the 8th of November, 1907, a petition in bankruptcy was filed against the bankrupts, and Lawrence E. Sexton was appointed receiver, and subsequently and on November 22, 1907, they were adjudicated bankrupts, and on or about December 30, 1907, the receiver was appointed trustee. Some two months before November 22, 1906, the trustee sent out a notice to all creditors telling them the date at which the time would expire to prove claims. This was in the nature of a warning. The petitioner filed no other papers than those which they filed with the assignee, but the assignee upon the qualification of the receiver turned over to the receiver all the papers of the bankrupts and all papers which he had received during his own incumbency, and among these papers were the letter and account sent by the petitioner to the assignee.

Some time a very few days after November 8, 1907, Mr. Delos McCurdy, who at that time was attorney for the New York correspondent of the petitioner, had an interview with the trustee, who was then receiver. Mr. McCurdy says that at the first interview he asked the receiver if he had received from the assignee a claim of the petitioner against the bankrupt estate; that the receiver told him to come in a day or two afterwards; that he did come a day or two afterwards and again asked the receiver if the claim was received from the assignee, and the receiver said it was. Mr. McCurdy asked him if it was all right, and he said it was. The receiver, who was sworn, says that he will not contradict the statement of Mr. McCurdy, but he has no recollection of the interview.

After the expiration of the year the petitioner filed an amendment to his claim which complied with the statute and the question before the referee was as to whether the amendment should be allowed. The referee has decided against the amendment.

Wallace MacFarlane, for the trustee.

Thomas & Oppenheimer, for Heine & Co.

HAND, District Judge (after stating the facts as above). There are two points upon both of which the petitioner must succeed in order to succeed upon the appeal. He must first show that a proof of claim need not contain in writing any indication that it is a claim against the bankrupt estate; and, second, if he succeeds upon that point, he must show that the conversation between the trustee, then the receiver, and Mr. McCurdy estopped the trustee from denying that some sort of claim had been filed.

I do not think it is necessary to make any decision upon the first point, although I can see many evils which would arise from permitting oral testimony to show that some of the papers, which came into the hands of the trustee, he agreed to treat as proofs of claim. When

the Congress says that the proof of claim must be in writing, it must mean that there are certain essential elements without which it is no "claim" at all. I should think that one of those elements must be some indication in the writing that the "claim" is a demand against the bankrupt estate. No case goes so far as to remove that essential. However, I make no decision upon that question because it is not necessary.

The most that the petitioner can claim is that because of the conversation between the trustee, then receiver, and Mr. McCurdy, the trustee consented that the petitioner's statement and letter, which he had received with the other papers from the assignee, should stand in the place of a proof of claim. If any paper is to be treated as a proof of claim which the parties agree on, I am certainly of opinion that the oral testimony on which the parties rely must be clear and explicit. The trustee has no recollection of the conversation; but, assuming that Mr. McCurdy's recollection is accurate, it by no means goes far enough to show that the trustee consented to accept the papers in lieu of a formal proof of claim. He was asked whether he had received them from the assignee, and he said that he had, and that they were all right. At the time when this conversation took place, no trustee had been appointed, and no adjudication had taken place. No proof of claim could have been filed. It is inconceivable to my mind that either party to the conversation could have intended that the papers referred to should stand in lieu of a proof of claim. The receiver did not know that he would be elected trustee; he did not know that there would be an adjudication. It would have been rash and improper for him to have agreed, on behalf of the future trustee and in the event of a future adjudication, that any existing papers should have stood in place of a proof of claim. I do not even mean to decide that such an agreement would have bound the estate, though the receiver was subsequently made trustee; but I do mean to decide that it would be most unreasonable to construe the language used as intended by the parties to constitute so certain an agreement as must exist, if this paper is by estoppel to be construed as a proof of claim.

Therefore, the proof falls short, in my opinion, of an agreement that the papers should stand as a proof of claim. Assuming all that Mr. McCurdy says to be true, it would be an extreme thing to infer from it any intention to do more than ascertain whether the petitioner's account was in the receiver's hand. But at the least the petitioner must go further and show that at some time the creditor agreed with the trustee that the paper, which did not purport to be a claim against the estate, should be treated as such. Otherwise it would be enough to show that the bankrupt's books contained the claim in full to dispense with any proof of claim. I am assuming for the sake of argument that it would be enough even if the creditor should agree with the trustee that the account in the ledger should stand for a claim. The petitioner cannot ask more than that, and he fails even to establish that.

Order affirmed; petition denied.

In re T. M. LESHER & SON.

(District Court, E. D. Pennsylvania. February 25, 1910.)

No. 1,445.

1. BANKRUPTCY (§ 342½*)—PROCEEDINGS BEFORE REFEREE—REVIEW BY COURT—TIME FOR PETITION.

Under General Order in Bankruptcy No. 27 (89 Fed. xi, 32 C. C. A. xxvii), providing that, when a creditor shall desire a review by the judge of any order by the referee, he shall file with the referee his petition therefor, and the referee shall certify to the judge the question presented and a summary of the evidence, and a rule of court that, unless the petition be afterwards allowed by a judge of the District Court, a review of any order of a referee must be asked by a petition to him before the expiration of the tenth day after the order, where the referee on November 18th disallowed a claim, and subsequently the petitioner asked and obtained permission to take testimony in support of the claim, and on February 9th the referee declined to change his former order, and the record of the proceeding was transcribed and filed on February 17th, a petition for review presented to the District Court on February 21st was not in time; the proceedings, subsequent to the original order, being without any effect whatever.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 530; Dec. Dig. § 342½.*]

Appeal and review in bankruptcy cases, see note to In re Eggert, 43 C. C. A. 9.]

2. BANKRUPTCY (§ 326*)—ADMINISTRATION OF ESTATE—OFFSET.

Under Bankr. Act July 1, 1898, c. 541, § 68a, 30 Stat. 544 (U. S. Comp. St. 1901, p. 3450), providing that, in all cases of mutual debts or credits between the estate of a bankrupt and a creditor, the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid, a claim from promissory notes of a partner cannot be set off against a judgment on behalf of the firm; the debts not being in the same right.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 514; Dec. Dig. § 326.*]

3. BANKRUPTCY (§ 326*)—ADMINISTRATION OF ESTATE—OFFSET.

Under Bankr. Act July 1, 1898, c. 541, § 68a, 30 Stat. 544 (U. S. Comp. St. 1901, p. 3450), providing that, in all cases of mutual debts or credits between the estate of a bankrupt and a creditor, the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid, a creditor is entitled to prove only the balance in his favor; and, where the bankrupt's claim exceeds his, his remedy is in the court in which the claim against him is sought to be enforced.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 514; Dec. Dig. § 326.*]

In the matter of the bankruptcy of T. M. Leshner & Son. On petition to direct referee to certify question for review. Refused.

Edward J. & James W. Fox, for petitioner.

Frank Reeder, for bankrupt.

J. B. McPHERSON, District Judge. On November 18, 1909, the referee rejected a claim that had been offered by the present petitioner, Andrew Radel, against the bankrupt estate. In order to obtain a review of the referee's action, the petitioner should have asked for a

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

certificate within 10 days, in conformity with the practice established for this district in December, 1904, by the following rule of court:

"Unless the petition be afterwards allowed by a judge of the District Court for cause shown after notice to opposing interests, a review of any action or order of a referee must be asked for by petition presented to him before the expiration of the tenth day after such action is taken or order is made, with this exception, namely, a review of the admission or rejection of evidence, if such admission or rejection has been duly objected to at the time, may be asked for within ten days after the referee has filed his decision in the proceeding wherein the evidence was offered. Referees are instructed to disregard petitions for review when presented after the expiration of the period named, unless accompanied by an order of allowance from a judge of the District Court. Prompt notice of filing of decisions upon any subject shall be given by the referee to counsel interested."

The effect of this rule, taken in connection with General Order 27 (89 Fed. xi, 32 C. C. A. xxvii), was considered in *Re Greek Manufacturing Co.* (D. C.) 21 Am. Bankr. Rep. 111, 164 Fed. 211, and the court decided that under the rule and the General Order a decision of a referee may only be reviewed by petition, and that such petition must be presented within the period specified by the rule, or afterwards only upon special allowance by one of the judges; otherwise, the referee's order (unless, perhaps, when it is obviously beyond his jurisdiction) is no longer subject to review after the 10 days have expired. And it was also decided that an order once entered is not subject to be reviewed or altered by the referee himself.

Within 10 days from November 18th, therefore, the petitioner should have asked the referee to certify his order of rejection for review. Instead of taking this course, however, the petitioner asked and obtained permission to take testimony in support of the claim. After the witnesses had been heard, the referee on February 9, 1910, declined to change the order of November 18th. The petitioner then goes on to say:

"The record of which proceeding was transcribed and filed on the 17th day of February, 1910."

This apparently means filed before the referee himself, for no such paper is on file in the District Court. But, whatever it means, its probable object is to furnish a plausible foundation for the argument that the petition now under consideration is in time, because it was presented to the District Court on February 21st. But the date from which the period of 10 days referred to in the rule should be counted is not February 17th, but November 18th, when the referee rejected the claim. The subsequent proceedings before him were without warrant, and should be wholly disregarded. Following *In re Greek Manufacturing Co.*, therefore, the petition must be refused, unless it shows sufficient cause to move the discretion of the court under the first clause of the rule.

Upon this point it is only necessary to say that I find nothing in the averments of the petition that calls for the special allowance of a certificate of review. The adjudication was entered in September, 1902, and the claim was not presented until November, 1909, more than seven years afterward. Unless it is saved by some other provision of the act, it is expressly denied allowance by section 57n (Act July 1,

1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3444]). The claim has not been in litigation, and the only ground upon which it can possibly stand is the provision of section 68a:

"In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor, the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid."

Assuming the claim to be "provable," and not to be barred either by the statute of limitations or by section 57n—*Railway Co. v. Graham* (C. C. A.) 145 Fed. 809, 76 C. C. A. 385—the further objection still remains that a situation of "mutual debts or mutual credits" was not presented when the petition in bankruptcy was filed. The claim is based on two promissory notes of T. M. Leshner as an individual, but these are to be set off against a judgment that was recovered against the petitioner on behalf of the firm of T. M. Leshner & Son by the trustee in bankruptcy in a suit for unliquidated damages *ex contractu*. Section 68a does not apply to such a case, the debts not being in the same right. *Collier* (7th Ed.) p. 796; *Loveland* (3d Ed.) p. 375; *Brandenburg* (3d Ed.) pp. 724, 725; *Gray v. Rollo*, 85 U. S. 629, 21 L. Ed. 927.

And this also may perhaps be said: Section 68a seems to contemplate that, if a creditor's debt against the bankrupt is greater than the bankrupt's debt against him, he shall only prove for the balance. But here (assuming the debts to be in the same right) the petitioner is seeking to prove his whole debt, and not merely the balance—if in fact the balance is in his favor. If, however, a creditor's debt against the bankrupt is less than the bankrupt's debt against him, the time for a set-off would seem to be when the creditor is sued, and the place the forum in which the suit is brought. If, therefore, the petitioner has any equitable ground on which to ask for a set-off against the trustee, his remedy would seem to be in the court which rendered and controls the judgment.

I can see no good reason for interfering with the ordinary operation of the rule already quoted.

The petition is refused.

In re A. P. WILSON & CO.

(District Court, E. D. Pennsylvania. February 12, 1910.)

No. 3,180.

BANKRUPTCY (§ 140*)—TITLE TO PROPERTY—LIENS.

Where parties who contracted to furnish and set tile for buildings in the course of erection assigned their contracts to a trust company as security for money borrowed, but did not attempt in any way to pledge the tile, the trust company is not entitled, as against the trustee in bankruptcy of the contractors, to the proceeds of sale of the tile which had been delivered at the buildings.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 140.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep.'s Indexes

In the matter of the bankruptcy of A. P. Wilson & Co. Proceeding to review order of referee. Affirmed.

Arthur G. Dickson, for Aldine Trust Co.

John J. Foulkrod, Jr., for trustee.

J. B. McPHERSON, District Judge. The bankrupts had agreed as subcontractors to furnish and set tile for three buildings in course of erection. For one of these buildings the arrangement was rather loose, but for present purposes it may be treated as a contract, and not as a mere understanding. In order to carry out their agreements, the bankrupts had delivered some tile at each of the buildings, and these articles were on the respective premises when the creditors' petition was filed. The tile was turned into cash by agreement, and the money is in the hands of the Aldine Trust Company awaiting the decision of the controversy between that company and the trustee.

The trust company's claim is based upon several agreements with the bankrupts, which need not be set out in detail. Their effect is to assign to the trust company the bankrupts' interest in the three subcontracts as collateral security for money borrowed, and the trust company's right to the proceeds of the tile depends upon the nature of the company's right in the tile itself. It is not contended that the assignments attempted to pledge the physical property or to deal with it directly in any other way. As the brief of counsel for the trust company states, "the trust company does not claim, and never did claim, a possessory lien on the tile by virtue of a delivery to it." The assignments merely transfer the bankrupts' interest in the subcontracts, and, of course, could only be of any value to the trust company if the bankrupts should complete these contracts and earn the right to be paid for the work. No one could be sure that the contracts would ever be carried out, or that anything at all would be due the bankrupts thereon. The owners of the buildings might abandon the operations, or might for good cause refuse to permit the bankrupts to do the work, or the bankrupts might themselves abandon the contracts and otherwise dispose of the tile, or they might do the work so badly that the damages thereby occasioned might fully offset their claim to the contract price. These and other contingencies might so affect the bankrupts' interest in the subcontracts that the assignments would find nothing valuable to operate upon, and the trust company would be obliged to look to its legal remedies for such satisfaction as might be attainable. The point to be insisted upon I think is that the trust company concededly had no claim against the tile itself. The assignments gave it none; the tile was not in its possession; there was no agreement to deliver the property to it by way of pledge or for any other purpose; and therefore the possession taken by the trust company after the bankruptcy had no legal justification. The tile belonged to the bankrupts when the assignments were made. Either then or soon thereafter it was delivered at the incomplete buildings in order that it might be set in place; but the trust company had nothing to do with the buildings, either as owner or as contractor, and delivery upon these premises was in no sense delivery to the trust company. Indeed, no

such thought was in the mind of any person connected either with the building operations or with the loans.

The case of Duplan Silk Co. v. Spencer (C. C. A., Third Circuit) 115 Fed. 689, 53 C. C. A. 321, is essentially different. There a contractor agreed to build a mill for the silk company, and delivered material upon the premises for that purpose. The company advanced him money on the credit of the material, and upon his default took possession of it under a provision of the contract that authorized such action. The contractor went into bankruptcy, and his trustee claimed the material, because, *inter alia*, possession had not been delivered to the company. But the Court of Appeals held—to quote from the syllabus—that:

“A provision of a building contract that the owner may in case of default by the contractor proceed to finish the building himself, and to that end may use materials brought by the contractor on the ground for the purposes of the building—being accountable to the contractor for any excess of the unpaid contract price over the cost of completion—is not one for a forfeiture, which must be strictly construed against the owner, since it does not involve the taking of any property of the contractor by way of penalty or punishment, but is in the interest of both parties, and is to be fairly construed to effect its purpose.”

And that:

“Under such a provision, materials brought by the contractor upon the owner's premises, and appropriated to the building contracted for, are to be considered as so far delivered into the possession of the owner as to make them a security for advances made by him on the contract, and to vest in him a qualified right of property in the same, consistent with the right of the owner to use them in the fulfillment of his contract.”

There seem to be vital differences between that case and this. There the material was delivered on the premises and put into the possession of the owner of the building, who had a right to have the material used in the construction. Here the trust company had no interest in the building, and did not receive possession of the material. There the contract empowered the owner to take and use the material in certain contingencies. Here there is no such authority, for the only agreement with the bankrupts deals with a wholly different subject, namely, the money to which they may be entitled when or if they complete their contract.

Neither does *Hurley v. Railway Co.*, 213 U. S. 126, 29 Sup. Ct. 466, 53 L. Ed. 729, seem to be in point. A coal company agreed to furnish daily supplies of coal to a railway company. The coal company became embarrassed financially, whereupon the railway company came to its relief by advancing money, but with the understanding that the loan should be repaid by the subsequent delivery of coal. Afterwards the coal company went into bankruptcy. The District Court held that the arrangement was a separate and independent contract, and furnished no ground for a lien upon the property for its repayment. But the Court of Appeals and the Supreme Court held otherwise; the Supreme Court saying (page 134 of 213 U. S., page 469 of 29 Sup. Ct. [53 L. Ed. 729]):

“Equity looks at the substance, and not at the form. That the coal for which this money was advanced was not yet mined, but remained in the ground to be mined and delivered from day to day as required, does not change the trans-

action into one of an ordinary independent loan on the credit of the coal company or upon express mortgage security. It implies a purpose that the coal as mined should be delivered, and is from an equitable standpoint to be considered as a pledge of the unmined coal to the extent of the advancement. The equitable rights of the parties were not changed by the commencement of bankruptcy proceedings. All obligations of a legal and equitable nature remained undisturbed thereby. If there had been no bankruptcy proceedings, the coal as mined was, according to the understanding of the parties, to be delivered as already paid for by the advancement."

In other words, the parties intended to make, and did make, an equitable pledge of the coal, and the pledge was not only good between themselves, but was good also against the trustee in bankruptcy. Here, however, there was neither pledge nor intent to pledge. The only agreements between the bankrupts and the trust company related to a different subject, namely, the contingent proceeds of the subcontracts.

I think it is clear that the trust company had only an indirect interest in the tile, and that the trustee has the superior right to the fund.

The order of the referee is affirmed.

IN RE KITTLER.

(District Court, M. D. Pennsylvania. February 17, 1910.)

BANKRUPTCY (§ 32*)—AMENDMENT OF SCHEDULES—TIME OF APPLICATION.

An application of a bankrupt, nearly a year after adjudication of bankruptcy, to amend his schedules to bring in an omitted creditor, will be refused.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 31-33; Dec. Dig. § 32.*]

In the matter of an application of Joseph Kittler, bankrupt, to amend schedules by inserting the name of a creditor. Refused.

J. A. Mulhern, for bankrupt.

ARCHBALD, District Judge. The bankrupt was adjudicated March 5, 1909, on petition duly filed. And he now, within a few days of the end of the year, asks to amend his schedules so as to bring in an omitted creditor. In my judgment it is altogether too late. While the year is not yet up, it is so nearly at an end that this ought not to be allowed to be done. While it is not too late for the creditor to prove his claim, and while there may be no visible assets upon which to come in, it has been deferred so long that he has been deprived of participation in the administration of the affairs of the estate, which is equally important. *Birkett v. Columbia Bank*, 195 U. S. 345, 25 Sup. Ct. 38, 49 L. Ed. 231.

Application refused.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In re HELLER.

(District Court, E. D. New York. January 31, 1910.)

BANKRUPTCY (§ 317*) — LIABILITIES OF ESTATE — CHARGES IN PRIOR JUDICIAL PROCEEDINGS.

Where a sheriff levied an attachment a few days before a petition in bankruptcy was filed, the suit having been brought by the same creditors who subsequently petitioned in bankruptcy, and the attachment proceedings preserved the property for the benefit of the creditors, such portion of the expenses of attachment as was for the benefit of the estate should be paid therefrom.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 331; Dec. Dig. § 317.*]

In the matter of the estate of Isaac Heller, a bankrupt. Proceeding for the allowance of certain fees to a sheriff, who had attached the property of the bankrupt. Fees allowed.

Robert M. Johnston, for sheriff.

N. Raymond Heater, for trustee.

CHATFIELD, District Judge. The sheriff received \$50 indemnity before levying under an attachment issued December 22, 1908, in a suit brought by the same creditors who subsequently petitioned in bankruptcy. The sheriff's levy was made upon the 23d of December, and upon the 29th of December, which was the very day when the petition in bankruptcy was filed, the sheriff, for some reason or other, moved the property a considerable distance to the storage warehouse. The attachment is stated to have been vacated upon a motion argued the 31st day of December, on the ground that "the affidavit of the cause of action was not sufficient to show a cause of action," whatever that may mean.

Under the decisions, the sheriff must look to the indemnity deposited with him, or to the persons applying to him, for his poundage, fees, and expenses. *Lawlor v. Magnolia Metal Co.*, 2 App. Div. 552, 38 N. Y. Supp. 36. But inasmuch as the attachment proceedings preserved the property for the benefit of the creditors, and the creditors obtained the property from the storage warehouse, such portion of the expenses as was for the benefit of the estate should be paid. It is too late now to question the necessity or propriety of the expenses as a whole, and the trustee has presented nothing to reduce the amount of the various charges. The bill of the storage warehouse will be paid, to the extent of \$46; the items of a truck, in addition to the charge for cartage, and for labor at the store, not being considered.

The item for keepers' fees between December 24th and December 29th will be allowed at the rate of \$6 per day, or \$30 in all. The acts of the attaching creditor being the same as the acts of the petitioning creditor, the question of his responsibility to the sheriff for these expenditures need not be considered now.

The above allowances should be paid by the trustee out of the estate.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

DOWNS v. WALL et al.

(Circuit Court of Appeals, Fifth Circuit. March 15, 1910.)

No. 1,953.

1. ADMIRALTY (§ 60*)—PROCEEDINGS—LIBEL—SUFFICIENCY.

Where a libel in admiralty sets out a charter party, upon which it seeks recovery, signed by the respondent corporation, the presumption is that the signature is for a purpose, and, since the corporation cannot be a witness, the libel is sufficient to show a cause of action against it either as principal or surety.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 482-496; Dec. Dig. § 60.*]

2. ADMIRALTY (§ 60*)—PLEADING—LIBEL—SUFFICIENCY.

Notwithstanding Civ. Code La., art. 2278, providing that parol evidence shall not be received to prove any promise to pay the debt of a third person, and article 3039 providing that suretyship cannot be presumed, but should be expressed and restrained within the limits intended by the contract, and Rev. St. U. S. § 858 (U. S. Comp. St. 1901, p. 659), providing that witnesses shall not be incompetent for certain causes, but that in other respects their competency is determined by the law of the state, a libel in admiralty setting out a charter party made in Louisiana, and signed by an individual, whom the libel alleged to be a surety on the contract, is sufficient as against him, since the libelants are not called on to prove the allegations until the issues are made up; and even under the Louisiana law suretyship may be proved as against the face of a written instrument.

[Ed. Note.—For other cases, see Admiralty, Dec. Dig. § 60.*]

3. ADMIRALTY (§ 73*)—EVIDENCE—PAROL EVIDENCE.

The district court of the United States sitting in admiralty administers the highest equity, and when a contract is involved which, on its face, is ambiguous and needs explanation, the rules of evidence governing the court are fully adequate.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 563-579; Dec. Dig. § 73.*]

4. COURTS (§ 349*)—FEDERAL COURTS—CONFORMITY TO STATE PRACTICE—EVIDENCE AND WITNESSES.

Rev. St. U. S. § 858 (U. S. Comp. St. 1901, p. 659), providing that witnesses are not incompetent for certain causes, and that in other respects their competency is governed by state law, relates only to the competency of the witnesses, and not to the admissibility of evidence.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 925; Dec. Dig. § 349.*]

Federal courts following state practice as to rules of evidence, see *O'Connell v. Reed*, 5 C. C. A. 594.]

5. ADMIRALTY (§ 32*)—JURISDICTION—DISTRICT IN WHICH SUIT MUST BE BROUGHT.

In a suit in admiralty, where two or more defendants are citizens of different districts of the state of Louisiana, the suit may be brought in either district, under Act March 3, 1881, c. 144, § 2, 21 Stat. 507 (U. S. Comp. St. 1901, p. 364).

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. § 306; Dec. Dig. § 32.*]

Appeal from the District Court of the United States for the Eastern District of Louisiana.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
178 F.—42

Libel by Wiley Downs against S. E. Wall and others. From a decree sustaining exceptions to the libel and dismissing it, libelant appeals. Reversed and remanded, with instructions to overrule exceptions.

Wiley Downs propounded his libel against S. E. Wall of West Monroe, La., and the Lambou, Noel Lumber & Manufacturing Company of the city of New Orleans, and against Victor Lambou, also of the city of New Orleans, to recover rent and damages on a maritime contract, as follows:

"Agreement between S. E. Wall of West Monroe, La., party of the first part, and Wiley Downs of the city of New Orleans, La., party of the second part, whereby the party of the first part agrees to charter from the party of the second part the steamboat Jno. C. Fears at a monthly rental of \$100, payable in advance. The said boat to be delivered by party of the second part in the harbor of New Orleans in good condition, and to be returned to him in harbor of New Orleans by the party of the first part after the termination of the agreement in the like good condition in which it is received, free from all defects and claims of any description whatsoever. Any damages caused to and material missing resulting from the use of the boat by the party of the first part to be thoroughly repaired and replaced, and the boat handed over in an acceptable condition to the party of the second part.

"New Orleans, La., Jan. 20th, 1907.

"The said Wiley Downs further agrees to sell the said steamboat Jno. C. Fears for the sum of twenty-five hundred less the amount that has been paid on the charter price.

[Signed] S. E. Wall.

"Lambou, Noel L. & Mfg. Co.

"Victor Lambou, Manager."

Respondents, having been duly served, filed exceptions as follows: S. E. Wall, appearing by protest and solely for the purpose of exception, says that he was, at the time the libel was filed and at all times since, a resident of the Western district of Louisiana, and that monition was served on him in said Western district of Louisiana and out of the jurisdiction of the court; the Lambou, Noel Lumber & Manufacturing Company filed an exception to the effect that the libel disclosed no admiralty and maritime claim whereupon judgment could be founded; and Victor Lambou excepted to the libel on the ground that the allegations thereof do not disclose any maritime lien. Thereupon the libelant filed an amended and supplemental libel the second article of which is as follows:

"Second. The second article of the original libel is hereby amended to read as follows: Second. That on or about the 20th day of January, 1907, said defendant S. E. Wall of West Monroe, Louisiana, made a proposition to libelant for the charter of libelant's vessel the J. C. Fears on the terms and conditions set forth in Exhibit A, which is hereto annexed and hereby made a part hereof as if at large and in detail written herein. Thereupon your libelant expressed a willingness to agree to the terms and conditions set out in said exhibit, provided the said S. E. Wall would obtain a surety or sureties satisfactory, to libelant, for the faithful performance of the obligations on his part set out in said exhibit. And thereupon the said S. E. Wall suggested the name of Lambou, Noel Lumber Mfg. Co., and of Victor Lambou, the manager of said company, as sureties, and your libelant agreed to accept them as sureties. And thereupon the said S. E. Wall procured the signatures of Lambou, Noel Lumber Mfg. Co. and Victor Lambou to said contract as sureties on his behalf, and as such, to said contract, were accepted by libelant. And because of said suretyship, and under the terms and conditions of the said contract hereto annexed as 'Exhibit A,' the said steamboat J. C. Fears was delivered to the defendants, the said S. E. Wall, the said Lambou, Noel Lumber Mfg. Co., and the said Victor Lambou. The steamboat designated in the contract as the 'John C. Fears' was known by defendants to be one and the same boat, licensed and enrolled as the 'J. C. Fears,' delivered to said defendants; and she was the only steamboat owned by libelants, and the only one intended by the parties to said contract, and the one they contracted for."

The exceptions of the Lambou, Noel Lumber & Manufacturing Company and of Victor Lambou filed to the original libel were renewed as to the supple-

mental libel. On hearing, the exceptions of all the respondents were maintained, and the libel and amended libel were dismissed. After vainly applying for a rehearing, the libellant Willey Downs sued out this appeal.

John D. Grace, for appellant.

Charles S. Rice and Richard B. Montgomery, for appellees.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge (after stating the facts as above). As the exception of the Lambou, Noel Lumber & Manufacturing Company admits the signature of the corporation to the contract sued on, the presumption is that it was for some purpose, and, as a corporation can hardly sign as a witness, that the Lambou, Noel Lumber & Manufacturing Company signed either as principal or surety; therefore we think it clear that the libel and amended libel state a cause of action against that corporation cognizable in admiralty.

As to the exception of Victor Lambou the case cannot be quite as apparent, because he might have signed as a witness or agent of the Lambou, Noel Lumber & Manufacturing Company. The amended libel specifically charges that he signed as surety, and his contention seems to be, "You cannot prove it."

The argument as to both exceptions is that, as the contract was made in Louisiana and the court sits in Louisiana, the Louisiana Civil Code controls as to the law and evidence; citing article 2278, Civ. Code La. ("Parol evidence shall not be received: * * * 3. To prove any promise to pay the debt of a third person"), and article 3039 of the same Code ("Suretyship cannot be presumed, it ought to be expressed and is to be restrained within the limits intended by the contract"), and section 858, Rev. St. U. S. (U. S. Comp. St. 1901, p. 659).

The answer to this is that, until the issues are made up by the sworn pleas of the respondents, the libellant will not be called upon to prove the allegations of his libel; and that even under the Louisiana law, which we do not decide will control as to the admissibility of evidence in this case, "Suretyship may be proved as against the face of a written instrument." See *Roberts & Crain v. Jenkins*, 19 La. 453. This case suggests that article 347 of the Louisiana Code of Practice (and as to its prevailing authority when repugnant to or in conflict with the Civil Code, see Rev. St. La. § 514) provides for interrogatories on facts and articles, and the same is permissible in admiralty.

Further than this, we may say that the District Court of the United States, sitting in admiralty, administers the highest equity, and whenever in admiralty a contract is involved, which on its face is ambiguous and needs explanation in order to administer justice between the parties, the rules of evidence governing the court are fully adequate. The *Bark J. F. Spencer*, 3 Ben. 337, Fed. Cas. No. 7,315; *The Bark Vivid*, 4 Ben. 319, Fed. Cas. No. 16,978; also *Watts v. Camors*, 115 U. S. 353, 6 Sup. Ct. 91, 29 L. Ed. 406, and cases there cited.

Section 858 of Revised Statutes of the United States relates to the competency of witnesses, and not to the admissibility of evidence. See *Hobbs v. McLean*, 117 U. S. 579, 6 Sup. Ct. 870, 29 L. Ed. 940.

The exceptions of the Lambou, Noel Lumber & Manufacturing

Company and Victor Lambou to the libel and amended libel are not maintainable.

The exception of S. E. Wall, to the effect that he is a citizen of the Western district of Louisiana, and was served with process therein, is not good. Where two or more defendants are citizens of different districts of the state of Louisiana, the suit may be brought in either district. See section 2, Act March 3, 1881, 21 Stat. 507, c. 144 (U. S. Comp. St. 1901, p. 364).

The decree appealed from is reversed and the cause remanded, with instructions to overrule all the exceptions, and thereafter proceed according to admiralty rules and practice.

REED v. WEULE et al.

(Circuit Court of Appeals, Ninth Circuit. March 8, 1910.)

No. 1,713.

1. ADMIRALTY (§ 118*)—APPEAL—REVIEW—QUESTIONS OF FACT.

While a Circuit Court of Appeals is not limited to the review of questions of law only, in admiralty appeals, yet, where the decision involves questions of fact dependent on conflicting testimony, the finding of the district judge will not be set aside unless it is clearly against the weight of evidence.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. § 770; Dec. Dig. § 118.*]

2. ADMIRALTY (§ 10*)—JURISDICTION—NATURE OF SUBJECT-MATTER—CONTRACT.

A contract of sale of a chronometer as appertaining to a particular vessel is a maritime contract within the jurisdiction of admiralty, though at the time of sale it was on shore.

[Ed. Note.—For other cases, see Admiralty, Dec. Dig. § 10.*]

Admiralty jurisdiction as to matters of contract, see notes to *The Richard Winslow*, 18 C. C. A. 347; *Boutin v. Rudd*, 27 C. C. A. 530.]

3. CONTRACTS (§ 4*)—LIABILITIES OF PARTIES.

Where respondent, on the purchase of a ship, obtained a chronometer and retained and used it after he knew it was rented from libelants, he ratified an implied contract for the rent for the whole term of use, and, by afterwards selling it as his own, made himself liable on implied contract to the owners for the reasonable value thereof.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 4.*]

Appeal from the District Court of the United States for the Northern District of California.

Libel by Louis Weule and others, doing business under the firm name of the Louis Weule Company, against W. I. Reed. From a decree in favor of libelants, respondent appeals. Affirmed.

Frank & Mansfield, for appellant.

F. R. Wall and Henry Taylor, for appellees.

Before GILBERT and MORROW, Circuit Judges, and HUNT, District Judge.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

HUNT, District Judge. Libel by Louis Weule Company, a copartnership, makers and suppliers of nautical instruments, against W. I. Reed, late owner of the barquentine "Amelia" of Oakland, Cal., in a cause of contract civil and maritime.

Libelants allege that on July 13, 1906, at San Francisco, libelants loaned to the then owners of the Amelia a chronometer; that the owners promised to return the chronometer to libelants in good order within six months, or pay to said libelants \$100, the agreed value of the chronometer; that the said owners also agreed to pay to libelants \$1 a month as hire for the chronometer until it was returned or paid for; that on September 13, 1906, the ship was sold by her owners to W. I. Reed, respondent; but that when the sale was made the chronometer had not been paid for and no rent therefor had been paid; that, at the time of the sale of the vessel to Reed, Reed knew of the contract with libelants, and knew that the chronometer belonged to the libelants, and that neither rent nor purchase price had been paid; that, when the ship was sold to Reed, the chronometer passed into his possession and remained there until March 11, 1907, when respondent, Reed, sold and delivered the chronometer to the San Juan Fishing & Packing Company; that respondent, Reed, had the use and benefit of the chronometer from September 13, 1906, to March 11, 1907; that a reasonable value was \$36 for such use; that \$100 is the reasonable value of the chronometer; that libelants had demanded payment of the value and rent of the chronometer, but payment has been refused; that the demand for the return of the chronometer has been refused.

The prayer is for a decree for \$100, the value of the chronometer, and \$36, the value of the use thereof, together with interest and costs, and general relief.

The respondent excepted to the aforesaid libel upon the ground that no cause of action was stated against respondent, in that there was no privity of contract between libelants and respondent. Respondent also challenged the jurisdiction of the court upon the ground that the facts stated do not constitute a maritime contract. The court overruled the exceptions, and thereupon respondent answered, specifically denying that he knew of the contract set forth in the libel, or that he knew that the chronometer was the property of these libelants, or that the rent or purchase price had not been paid. Respondent admits that at the time of his purchase of the vessel the chronometer passed into his possession; but he says that, the chronometer being on board when he purchased the ship, it was left there by the former owner, and no one demanded the chronometer, and it was allowed to remain upon the ship until December, 1906, when the ship was wrecked and the chronometer was taken off and stored. Respondent alleges that afterwards the libelants made demand for the chronometer, and that he informed libelants they could go and get it. He denies that on March 11, 1907, or at any other time, he sold or delivered the chronometer to the San Juan Fishing & Packing Company, and denies that he had the use and benefit of the chronometer from September 13, 1906, to March 11, 1907, except as already set forth.

Testimony was taken, and thereafter the court filed a memorandum opinion finding that "all of the allegations" of the libel are true except

that in relation to the value of the use of the chronometer referred to in the libel during the time the chronometer was in the possession of the respondent, W. I. Reed; and as to this the court found the value of the use to be \$24. As a conclusion of law it was decreed that libelants were entitled to recover \$24 for the use of the chronometer and \$100 as the value of the chronometer. Interest and costs were allowed libelants. From the decree duly entered, respondent appealed to this court.

The case comes within the well-established rule that, while this court is not limited to the review of questions of law only, in admiralty appeals, yet, where decision involves questions of fact dependent upon conflicting testimony, the finding of the district judge will not be set aside unless it is clear that the decision is against the weight of evidence. *The Oscar B.*, 121 Fed. 978, 58 C. C. A. 316; *Paauihan Sugar Plantation Co. v. Palapala*, 127 Fed. 920, 62 C. C. A. 552; *The Edward Smith*, 135 Fed. 32, 67 C. C. A. 506.

It is to be taken that the chronometer involved was obtained from appellees by the master of the ship for use in navigation; that this appellant knew before March, 1907, when he sold the ship, that the instrument had not been purchased by him with the ship, when he became owner thereof in September, 1906, but was being used by the ship under contract of hire made by the master; and that when appellant sold the ship he intended to sell and deliver the chronometer to the purchasers. In December, 1906, the ship had been wrecked, and appellant put her in the possession and care of Hall Bros. at their shipyard at Winslow, Wash., to be held pending repair or sale. The chronometer and the ship's papers, and certain other things, were taken off the vessel by the captain and delivered to Mr. Hubbard, manager for Hall Bros. Hubbard put the chronometer in the Hall Bros.' office. Thereafter, on March 6th, this appellant wrote Hall Bros. that he expected to sell the ship, and that some canvas left in the vessel was not to be sold, but that "everything else regular will go with the vessel if sold." A few days later, at the time of the sale, appellant's son and personal agent introduced the representative of the purchaser to Mr. Hubbard and asked Mr. Hubbard to turn over all equipment that he had taken off the vessel, with the exception of some canvas and a package of clothing. Later in the day, when the sale had been effected, Mr. B. W. Reed, still acting for appellant, W. I. Reed, wrote a note to Mr. Hubbard, wherein he confirmed his previous conversation to deliver the ship to Bush & Co., "including all gear and appliances of all descriptions belonging to said boat." Upon this authority the ship and chronometer were delivered to the purchasers.

Objections to jurisdiction are not well founded, because the subject-matter of the whole contract was maritime. The chronometer being necessary to the vessel, and having been sold as appertaining to her, the fact that at the time of the sale it was on shore in the office of Hall Bros. became a mere incident and of no real importance. *Insurance Co. v. Dunham*, 78 U. S. 1, 20 L. Ed. 90; *Newberry v. The Fashion*, Fed. Cas. No. 10,143; *Benedict's Admiralty*, § 283; *Stringham v. Schloener*, Fed. Cas. No. 13,536.

As was said by Judge Benedict in the case of *The Georgia* (D. C.) 32 Fed. 637:

"Clearly, the ship cannot go to sea without a chronometer. As a matter of fact, the presence of a chronometer on board is an absolute necessity to enable the ship to perform her voyage."

It appeared in evidence that upon July 13, 1906, the master had made a written contract for one Scammon, the then owner, with these appellees, whereby he promised to return the chronometer within six months or to pay \$100, the value thereof, and also to pay \$4 per month as hire of the instrument until its return or purchase. On September 13th the master called upon appellees, and there was written on the said contract a memorandum that the ownership of the vessel had been transferred to the Rainier Lumber Company. This memorandum was subscribed by the master. The purpose of making the memorandum was to substitute the name of the corporation, which the master believed had bought the ship, for the former owner's name, and thus to make the new owner responsible to these appellees. But inasmuch as appellant was not named in this express written contract, we do not regard it as binding upon him.

We put our decision upon the ground that, although there was no express contract, the master obtained the chronometer from appellees for the benefit of the ship, and that this appellant, by retaining and using the instrument after he had knowledge that it was rented from some one else, ratified an implied contract of the master and became liable to pay the reasonable rental value for the whole term of use. No maxim is better settled in reason and law, said the Supreme Court in *Supervisors v. Schenck*, 72 U. S. 772, 18 L. Ed. 556, than, "*Omnis ratihabito retrotrahitur et mandato priori æquiparatur.*" *Fleckner v. U. S. Bank*, 21 U. S. 338, 5 L. Ed. 631; *Norton v. Shelby County*, 118 U. S. 425, 6 Sup. Ct. 1121, 30 L. Ed. 178; *Cook v. Tullis*, 85 U. S. 332, 21 L. Ed. 933; *American China Development Co. v. Boyd* (C. C.) 148 Fed. 258. And by afterwards selling the chronometer as his own, appellant also made himself liable on implied contract to pay to the owners the reasonable value thereof. *Cooley on Torts*, *110.

We do not deem it necessary to extend the opinion.

The decree is affirmed.

ATCHISON, T. & S. F. RY. CO. V. PHILLIPS.

(Circuit Court of Appeals, Ninth Circuit. February 7, 1910.)

No. 1,735.

1. COURTS (§ 280*)—FEDERAL COURTS—JURISDICTION MUST APPEAR FROM RECORD.

In the federal courts, the record must show the facts which give the court jurisdiction; otherwise, any proceedings had in the cause are void and of no force.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 816–818; Dec. Dig. § 280.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. COURTS (§ 309*)—JURISDICTION OF FEDERAL COURTS—DIVERSITY OF CITIZENSHIP—FORMAL PARTIES.

Plaintiff, as widow, brought an action in the state court to recover for the wrongful death of her husband under the California statute, by which she was the only person entitled to receive the proceeds of any recovery. Defendant removed the cause on the ground of diversity of citizenship, and afterward demurred to the complaint on the ground that it did not show that all of the heirs of deceased were parties as required by Code Civ. Proc. Cal. § 377. The demurrer was sustained, and plaintiff amended by joining the parents of deceased as defendants, on an allegation that they refused to join as plaintiffs and that they had no interest in the action. They were served with process, but made default. *Held*, that they were merely formal parties without interest, and that the fact that they were citizens of the same state as plaintiff did not defeat the jurisdiction of the court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 857; Dec. Dig. § 309.*]

Diverse citizenship as a ground of federal jurisdiction, see notes to *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullagham*, 27 C. C. A. 298.]

3. TRIAL (§ 260*)—INSTRUCTIONS—REFUSAL OF REQUESTS.

Where the legal propositions stated in a requested instruction are embraced in the charge given, the refusal of such request is not error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 651; Dec. Dig. § 260.*]

4. DEATH (§ 103*)—ACTION FOR WRONGFUL DEATH—DEFENSE OF CONTRIBUTORY NEGLIGENCE—SUFFICIENCY OF EVIDENCE.

Evidence in an action for wrongful death *held* to have justified the trial court in eliminating the question of the contributory negligence of deceased in its charge to the jury.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 141; Dec. Dig. § 103.*]

5. WORDS AND PHRASES—"INTERESTED PARTY."

A party to be "interested" in an action need not be one who may gain or lose something therein. The word has a broad meaning, and includes all those who, as parties, have some control over the action, whether they will be personally affected thereby or not. Thus an administrator, a trustee, or an executor is a real party in interest when he is bringing or defending a suit for the estate which he represents. Such a party brings or defends the suit, employs counsel, and is directly responsible for going on with the litigation.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 4, pp. 3702-3706.]

In Error to the Circuit Court of the United States for the Southern Division of the Southern District of California.

Action by Annie A. Phillips against the Atchison, Topeka & Santa Fé Railway Company and others. Judgment for plaintiff, and defendant railway company brings error. Affirmed.

E. W. Camp and A. H. Van Cott, for plaintiff in error.

J. A. Anderson, W. H. Anderson, and Joseph Scott, for defendant in error.

Before GILBERT and MORROW, Circuit Judges, and HUNT, District Judge.

HUNT, District Judge. This action was commenced in the superior court of Los Angeles county, Cal., by Annie A. Phillips, to recover dam-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ages for the death of her husband, F. C. Phillips, an employé of the defendant railway company. For convenience, the parties will be designated plaintiff and defendant, as they were in the lower court.

The complaint alleges, in substance, that the deceased was, at the time of his death, employed as a conductor on a train belonging to defendant; that while he was engaged in the work pertaining to such employment, riding in the locomotive cab, the defendant carelessly and negligently failed to furnish him with a safe place within which to work; and that on account of such negligence of the defendant an explosion of the boiler of the locomotive occurred, which inflicted injuries upon the said F. C. Phillips, from the effects of which he died.

Upon the petition of defendant, the case was removed, on account of diversity of citizenship to the United States Circuit Court for the Southern District of California. Thereafter, the defendant demurred to the complaint on the grounds that it did not state facts sufficient to constitute a cause of action, and that it was uncertain, in this, that it could not be ascertained therefrom whether or not the plaintiff is the only heir of said F. C. Phillips. The demurrer was sustained on the latter ground; and thereupon the plaintiff amended her complaint by inserting the following paragraph:

"That said F. C. Phillips was the son of the defendants, W. J. Phillips and Mrs. W. J. Phillips; that he was at the time of his death over the age of 21 years; that neither of said last-named defendants was dependent upon him for support nor received any support or assistance from him; that neither of said defendants has any claim or cause of action for damages by reason of his said death against the corporation defendant; and that said two defendants are made parties defendant herein because they do not desire and refuse to join as plaintiffs."

Upon the overruling of the defendant's demurrer to the amended complaint upon the ground that more than one year had elapsed since the cause of action set forth in said complaint had accrued, the defendant answered, denying all negligence on its part, and setting up contributory negligence, the statute of limitations, and the negligence of a fellow servant, as three distinct affirmative defenses. From a verdict and judgment of \$10,000 and costs in plaintiff's favor, the defendant prosecutes this writ of error.

The first, and much the most important specification of error is the contention that the lower court had no jurisdiction, because the facts requisite to the taking of jurisdiction do not appear on the record. The general elementary rule is that the record must show the facts upon which the jurisdiction of the United States court is based. If these facts do not appear on the record, the court is without jurisdiction, and any proceedings had in the cause are void and of no force. *Re Smith*, 94 U. S. 455, 24 L. Ed. 165; *Abercrombie v. Dupuis*, 1 Cranch, 343, 2 L. Ed. 129; *Stevens v. Nichols*, 130 U. S. 230, 9 Sup. Ct. 518, 32 L. Ed. 914; *Anderson v. Watt*, 138 U. S. 694, 11 Sup. Ct. 449, 34 L. Ed. 1078; *M. C. & L. M. R. Co. v. Swan*, 111 U. S. 379, 4 Sup. Ct. 510, 28 L. Ed. 462; *Mason v. Rollins*, 13 Wall. 602, 20 L. Ed. 527; *Robertson v. Cease*, 97 U. S. 646, 649, 24 L. Ed. 1057. The defendant's argument is that the judgment against it is of no effect because, the jurisdiction being based on diversity of citizenship, the citizenship of all the

parties does not appear of record. The citizenship of Annie A. Phillips, and of the railway company, the original parties to the suit, appear in the petition of removal, which is part of the record. However, the citizenship of W. J. Phillips and wife, who were brought in the suit by the amended complaint, is not of record. They were not parties to the suit when the petition for removal was filed, and the plaintiff failed to incorporate in her amended complaint any allegations relating to their citizenship. The Supreme Court of the United States has decided time and again that, if the jurisdiction of the court is based on the diverse citizenship of the parties, the diversity must exist between the real, substantial parties to the cause, and that the citizenship of nominal parties or parties who have no real interest in the controversy is immaterial. If the citizenship of such a party cannot affect the court's jurisdiction, it would follow that the failure to allege his citizenship can have no effect. Therefore the question to be determined is whether or not W. J. Phillips and his wife are formal parties within the meaning given to that term by the Supreme Court.

Browne v. Strobe, 5 Cranch, 303, 3 L. Ed. 108, was an action on an executor's bond brought by a British subject, in the name of the justices of the peace of the county of Stafford, Va., against a citizen of Virginia. The jurisdiction of the Circuit Court of the United States, based on diversity of citizenship, was upheld even though the parties named as plaintiffs in the record were citizens of the same state as the defendant. The court looked back of the nominal plaintiffs to the real party in interest, namely, the alien. In *McNutt v. Bland*, 2 How. 9, 11 L. Ed. 159, the court said:

"It would be a glaring defect in the jurisprudence of the United States, if aliens or citizens of other states should be deprived of the right of suit on sheriff's bonds in the federal courts sitting in Mississippi, merely because they were taken in the name of the Governor for the use of the plaintiffs in mesne or final process, who are in law and equity the beneficiary obligees. We think this defect does not exist. The Constitution extends the judicial power to controversies between citizens of different states. The eleventh section of the judiciary act gives jurisdiction to the Circuit Courts of suits between a citizen of the state where the suit is brought and a citizen of another state. In this case, there is a controversy between citizens of New York and Mississippi; there is neither between the Governor and the defendants; as the instrument of the state law to afford a remedy against the sheriff and his sureties, his name is in the bond and to the suit upon it, but in no just view of the Constitution or law can he be considered as a litigant party. Both look to things, not to names—to the actors in controversies and suits, not to the mere forms or inactive instruments used in conducting them, in virtue of some positive law."

And again, the court said:

"That where the real and only controversy is between citizens of different states, or an alien and a citizen, and the plaintiff is by some positive law compelled to use the name of a public officer who has not, or ever had, any interest in or control over it, the courts of the United States will not consider any others as parties to the suit than the persons between whom the litigation before them exists."

In *Geer v. Mathieson Alkali Works*, 190 U. S. 428, 23 Sup. Ct. 807, 47 L. Ed. 1122, the court quoted with approval the following language of Judge Blatchford, who was then a United States District Judge:

"The directors and treasurer are therefore not real parties to the suit, but merely nominal parties. No personal demand is made against any one of them, nor is any personal accounting asked from any one of them, and it is only in his relation to the company, and in the official position that he occupies toward the company, that any one of them is made a party. * * * This view is conclusive to show that the entire real controversy in both suits, so far as it is shown by the prayer of the complaints, and which is the only guide the court can have, is between the plaintiff on one side and the company, as a corporate body, on the other. The plaintiff cannot, by joining as nominal defendants with the corporation persons who are citizens of the same state with the plaintiff, deprive the corporation of any right which it would otherwise have in respect to removing the cause into this court." *Sioux City Terminal R., etc., v. Trust Co.*, 82 Fed. 124, 27 C. C. A. 73; *Foss v. First Nat. Bank (C. C.)* 3 Fed. 185; *Watson v. Bonfils*, 116 Fed. 157, 53 C. C. A. 535; *Bacon v. Rives*, 106 U. S. 99, 1 Sup. Ct. 3, 27 L. Ed. 69.

In *Wood v. Davis*, 18 How. 467, 15 L. Ed. 460, the court said:

"The ground upon which the cause was remanded is that four of the defendants were citizens of Illinois, namely, Stahl and Foster and Hooper and Campbell—the same state of which the complainant was a citizen. And this presents the question whether or not these defendants were parties in interest in the subject of the litigation, or, in other words, were proper or necessary parties in the suit. It has been repeatedly decided by this court that formal parties, or nominal parties, or parties without interest, united with the real parties to the litigation, cannot oust the federal court of jurisdiction, if the citizenship or character of the real parties be such as to confer it, within the eleventh section of the judiciary act. [*Russell v. Clark's Ex'rs*] 7 Cranch, 98 [3 L. Ed. 271]; [*Strawbridge v. Curtiss*] 3 Cranch, 267 [2 L. Ed. 435]; [*Wormley v. Wormley*] 8 Wheat. 421 [5 L. Ed. 651]; [*Browne v. Strode*] 5 Cranch, 303 [3 L. Ed. 108.]"

A careful examination of the opinions of the Supreme Court tells us that on this subject great importance attaches to the word "interest." Have the parties a real interest in the cause? It is conceded, as of course, that if they have, they are real parties, and the question of their citizenship is essential. A party to be "interested" in an action need not be one who may gain or lose something therein. The word has a broad meaning, and includes all those who as parties have some control over the action, whether they will be personally affected thereby or not. Thus, an administrator, a trustee, or an executor is a real party in interest when he is bringing or defending a suit for the estate which he represents. Such a party brings or defends the suit—employs counsel—and is directly responsible for going on with the litigation. *Chap-pedelaine v. Dechenaux*, 4 Cranch, 306, 2 L. Ed. 629; *Childress v. Emory*, 8 Wheat. 642, 5 L. Ed. 705.

Stewart v. Baltimore & Ohio R. R. Co., 168 U. S. 445, 18 Sup. Ct. 105, 42 L. Ed. 537, was a case in which the administrator was not a real party to the suit. There, however, the administrator was not acting for the estate, and standing in the shoes of the intestate, as the suit was really brought in his name for the benefit of the widow. The statute gave the widow a right to recover damages for the wrongful killing of her husband, but it said that the action must be brought through or in the name of the personal representative. The situation was the same as though the statute read that the damage must be recovered in an action in the name of the state, or the Governor or any one else. The personal representative had no control over the suit—the widow alone had, and received all the proceeds. If the administrator had been

suing on the same cause of action in favor of the estate, he would have been the real plaintiff. Under such conditions, he would have had absolute control of the suit and be responsible on his bond for any culpable negligence on his part in relation thereto. In *Stewart v. Baltimore & Ohio R. R. Co.*, supra, the court said:

"For the purposes of jurisdiction in the federal courts, regard is had to the real, rather than the nominal, party."

And the court further said that:

"This is an action for a tort, but still in such an action it is evident that the real party in interest is not the nominal plaintiff, but the party for whose benefit the recovery is sought."

The principle, that the parties whose citizenship is important are those who have a tangible interest in the controversy or exercise some control over it, is illustrated by the case of the *United States Fidelity Co. v. Kenyon*, 204 U. S. 349, 27 Sup. Ct. 381, 51 L. Ed. 516. That was an action brought in the name of the United States for the benefit of materialmen and laborers on bonds given in pursuance of certain acts of Congress. The court said:

"The United States is not here a merely nominal or formal party. It has the legal right, was a principal party to the contract, and, in view of the words of the statute, may be said to have an interest in the performance of all its provisions. It may be that the interests of the government, as involved in the construction of public works, will be subserved if contractors for such works are able to obtain materials and supplies promptly and with certainty. To that end, Congress may have deemed it important to assure those who furnished such materials and supplies that the government would exert its power directly for their protection. It may well have thought that the government was under some obligation to guard the interests of those whose labor and materials would go into a public building."

From these cases, it is seen that the Supreme Court looks to the real interest which a party has in the controversy in determining whether he is a real party or only a formal one. There may seem to be some conflicts as to what is a real interest, but, in asserting the principle itself, there is uniformity of decision. Now, have the defendants *W. J. Phillips* and wife any real interest in the cause before the court? The very allegations of the amended complaint set forth that they have no interest and were joined as defendants because they would not join as plaintiffs. Why should they join as plaintiffs? They had no claim whatever against the railway company, and to bring suit would only involve them in useless expense and worry. But, it is urged that the law of California (section 377 of the California Code of Civil Procedure) requires that all the heirs be made parties to a suit brought by any of the heirs to recover damages for the wrongful death of an ancestor. We think, though, that notwithstanding the requirement of a statute that suit shall be brought in the name of certain persons or that certain persons shall be parties thereto, it does not necessarily make such persons real parties in interest in the controversy. Even though the statute make it obligatory that certain parties shall be before the court—they may be indispensable, in that no right of action can be prosecuted without them—yet they may, at the same time, be merely nominal or formal parties. They must be brought into the

suit, yet they have no interest in or control over it. Being without actual interest, it is scarcely conceivable that their citizenship can affect the court's jurisdiction, for no controversy exists between them and any one else in the action. Here, W. J. Phillips and his wife have no interest in or control over this case. They were served with process, but made no appearance of any kind. They had nothing to gain or to lose by making an appearance, for they had no interest of any nature in the action, except, perhaps, a natural hope that their daughter-in-law might succeed therein. They were in an analogous position to that of the administrator in the case of *Stewart v. Baltimore & Ohio R. R. Co.*, *supra*.

This action should have been brought by all the heirs for the benefit of those who suffered injury, but by virtue of another statute of the state of California—section 382 of the Code of Civil Procedure—the heirs who had a cause of action could bring in the others as defendants if they refused to come in as plaintiffs. In this way, the defendants, W. J. Phillips and wife, were brought in. Their presence in the action was necessary and proper only because the real parties could not prosecute the action without them—at least if the defendant made seasonable objection. But the fact still remains that they had no interest whatever in the cause, either beneficial or detrimental, nor did or could they have had any relation, other than a nominal one, to the cause of action.

Einstein v. Georgia Southern, etc., Co. (C. C.) 120 Fed. 1008, was a case where two of three trustees brought suit against a corporation in the Circuit Court for the district of Georgia, basing the jurisdiction of the court on diversity of citizenship. The third trustee, however, being a citizen of the same state as the defendant, and refusing to join as plaintiff, was joined as a defendant. The defendant corporation demurred to the bill on the ground that the third trustee was a necessary party plaintiff, and therefore the controversy was not wholly between citizens of different states. The court held, however, that the third trustee was not a real party to the controversy, but was only made a party in order that the rights of all interested parties might be determined in one proceeding. The demurrer was overruled, the court saying:

"If the proper diversity of citizenship exists between the trustees suing and the corporation sued, the controversy is wholly between citizens of different states. The recalcitrant trustee is not technically a party to that controversy, and can only be made a party by the process of the court issued to bring him in, in order that his attitude, whatever it may be, or his rights, whatever they are, can be ascertained in one proceeding in accordance with the favorite doctrine of equity. The real controversy between the actors before the court, being one of which the court would clearly have jurisdiction had there been no refractory trustee, to hold otherwise, would be to permit his inertia or reluctance to defeat access on the part of the vigilant nonresident trustees to that court which is especially intrusted by the Constitution and laws of the United States with the preservation and protection of their trust. That he would have been an indispensable party if the suit was against the trustees, or if it had been for joint misconduct or responsibility, or brought for the diminution of the trust or for its construction, may be conceded. This suit, however, is solely for the enhancement of the trust. He can have no possible motive to resist this unless he be a faithless trustee, or denies the rights of the co-trustees, or is in collusion with the defendants. Whether one or the other

be the case, he should be sued as defendant; and there would be the proper diversity of citizenship between the parties to the controversy, and the jurisdiction should be maintained. *Hotel Co. v. Wade*, 97 U. S. 13, 24 L. Ed. 912."

In *Ban v. Columbia Southern Ry.*, 117 Fed. 21, 54 C. C. A. 407, plaintiff and another contracted as partners to do certain work as sub-contractors. By a contract between themselves, previously made and known to the principal contractor, it was agreed that the plaintiff should furnish the materials and do the work, accounting to his associate only for a share of the net profits of the contract. After the completion of the work, plaintiff brought suit in a federal court to enforce a mechanic's lien, filed in the name of the partnership, for the balance due under the contract, alleging such facts in his bill and that no net profits were earned under the contract. This court said:

"The question then arises whether or not the suit can be tried, heard, and determined without the presence of Seaman. He has no interest whatever in the suit. Mason, who sublet the contract to Ban and Seaman, knew that Seaman's interest was conditional upon profits being received. Ban was to do the work, receive and disburse the money, and, if there were any profits, Seaman was to have one-half thereof. There are no profits. Why, then, is it necessary to make Seaman a party complainant herein, when the only effect his presence would have would be to defeat the jurisdiction of the court? It affirmatively appears from the averments in the amended bill that none of the parties to the suit could possibly be injuriously or prejudicially affected by having the suit maintained by Ban, who is the real party in interest, as complainant herein. The whole subject-matter of the suit could be determined without Seaman being brought in, and settled with justice to all parties concerned, without detriment or prejudice to either. Complainant had the right to allege the facts showing the relations which Seaman had with the subject-matter of the suit, that he had no interest therein, and was not an indispensable party thereto. If brought in, he would only be a nominal party."

The case of *Delaware County v. Diebold Safe Co.*, 133 U. S. 473, 10 Sup. Ct. 399, 33 L. Ed. 674, was an action brought against one party to a contract by an assignee. The court said:

"It was further objected that the assignors were necessary parties to the suit, because they had assigned to the plaintiff part only of their original contract with the defendant; and because of the statutes of Indiana, while they require every action arising out of a contract to be prosecuted by the real party in interest, provide that 'when any action is brought by the assignee of a claim arising out of a contract, and not assigned by indorsement in writing, the assignor shall be made a defendant, to answer as to the assignment or his interest in the subject of the action.' Rev. St. Ind. 1881, §§ 251, 276. But this objection was rather to the nonjoinder of defendants than to the jurisdiction of the court, and presented no valid reason why the court should not proceed. The assignors were not parties to the suit at the time of the removal into the circuit court; and as soon as they were made parties in that court, they disclaimed all interest in the suit; and as no further proceedings were had, or relief sought or granted, against them, their presence was unnecessary."

That case resembles this in that in both the statutes prescribed that certain persons should be made parties whether they have any interest in the controversy or not. The court distinctly held that such parties who are brought into a suit by virtue of a statute and who disclaimed any interest therein were not parties whose citizenship could have any effect on the jurisdiction of the federal court. It is true that defendants *W. J. Phillips* and wife did not file a disclaimer, but when we consider that they were brought into the controversy as parties de-

fendant after the United States Court had taken jurisdiction and after it was alleged by the amended complaint that they had no interest whatever in the cause, their failure to appear and answer was an admission of the truth of the allegation relating to their lack of interest. So, without extending the discussion farther, we hold that there was jurisdiction in the circuit court, and that the case is properly before this court.

Error is assigned because the court refused to give an instruction requested by the defendant to the effect that it was not sufficient for the jury to find that the locomotive was not safe, but it must also be found that the defendant failed to use reasonable care in providing the locomotive for use of the deceased; that defendant is not an insurer of the safety of its employes, but has performed its legal duty if it exercised reasonable care to provide a safe locomotive for the use of the deceased. As the propositions included in the requested instruction were explained and embraced in the charge which the court gave, it was not necessary to repeat them in special instructions asked by either party. *Rio Grande Western Railway v. Leak*, 163 U. S. 280, 16 Sup. Ct. 1020, 41 L. Ed. 160.

Defendant asks a reversal because the court told the jury that there was no proof of contributory negligence and that they need not consider that defense. It is unnecessary to state the testimony; but, after a careful reading of it, we are satisfied that the court was justified in its ruling, for the reason that there was not enough evidence from which contributory negligence could have been reasonably inferred. Under the pleadings and instructions, whether or not the boiler of the locomotive burst because of low water, combined with a defective boiler, was immaterial so far as the deceased conductor was concerned, unless, when he was riding in the cab at the time of the explosion, he knew, or ought to have known, that there was not enough water in the boiler to make the locomotive safe to remain upon. But there was no direct or circumstantial evidence which warranted any reasonable inference that deceased knew or ought to have known of any such possible condition of the water. The fact that he had his hand on the top of the gauge cock, steadying or amusing himself just before the explosion of the boiler, was not sufficient, of itself, to prove negligence, unless there were other facts or circumstances which, when taken in connection with such conduct or position, tended to show lack of ordinary care on his part which directly contributed to his death. There were none such; hence the case became one where the court properly held, as a matter of law, that defendant had failed to sustain its allegations of contributory negligence, and properly told the jury to confine their deliberations to a consideration of the evidence in support of the issues submitted to them.

Judgment affirmed.

UNITED STATES v. JENKINS et al.

(Circuit Court of Appeals, Fourth Circuit. November 4, 1909.)

No. 887.

BAIL (§ 79*)—REMISSION OF PENALTY ON FORFEITED RECOGNIZANCE—FEDERAL STATUTE—POWER OF COURT.

An application to a federal court which has entered judgment on a forfeited recognizance in favor of the United States, for a remission of the penalty for which such judgment was rendered under Rev. St. § 1020 (U. S. Comp. St. 1901, p. 719), which gives the court power to remit the whole or any part of such penalty "when it appears to the court that there was no willful default of the party," is not a motion to vacate the judgment, and may be entertained after the term at which the judgment was entered.

[Ed. Note.—For other cases, see *Bail*, Cent. Dig. § 352; Dec. Dig. § 79.*]

McDowell, District Judge, dissenting.

In Error to the District Court of the United States for the Western District of North Carolina, at Asheville.

Application by Walter Jenkins and J. E. Shuler for the remission of the penalty of a forfeited recognizance. From a judgment granting such relief, the United States brings error. Affirmed.

At the May term, 1894, of the United States District Court, at Asheville, judgment final was entered upon a forfeited recognizance in favor of the United States and against the defendants in the sum of \$200. Execution was issued on the judgment in 1895 and returned nulla bona, and no other execution was issued until October 28, 1908, when execution was issued and placed in the hands of the United States marshal of this district for collection. The marshal was threatening to levy on and sell the lands of the defendants, when the defendants filed an affidavit in the cause, at the May term, 1908, of the District Court of the United States for the Western District of North Carolina, and entered a motion praying for an order restraining the marshal from proceeding further with the execution then in his hands and for the cancellation of said judgment.

The following are the facts upon which the court based its judgment: J. E. Shuler, who was surety for Walker Jenkins, filed an affidavit, in which he stated: "That the defendant Walker Jenkins was under bond for his personal appearance at the November term, 1894, of the United States District Court, at Asheville, and this affiant was his surety; that this affiant is advised, informed and believes that the said Walker Jenkins was sick at the November term, 1894, and unable to attend said term of the court, and that he was called out, and judgment nisi taken against the said Walker Jenkins and J. E. Shuler, his surety, in the sum of \$200; that the defendant Walker Jenkins appeared at the next term of the court, it being the May term, 1895, and was tried and found not guilty and was ordered discharged; that affiant is advised, informed, and believes that after the said defendant Walker Jenkins had been discharged and told to go home, the judgment nisi was called up, and final judgment entered on the sci. fa. against said Walker Jenkins and this affiant; that this affiant never knew that judgment had been entered against the said Walker Jenkins until a few weeks ago, when the United States deputy marshal of this district informed affiant that execution had been issued on said judgment and that he had the same in his hands for collection, and he is now threatening to collect the same."

A. E. Holton, U. S. Atty. (A. L. Coble, Asst. U. S. Atty., on the brief), for the United States.

Thomas S. Rollins (Moore & Rollins, on the brief), for defendants in error.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Before PRITCHARD, Circuit Judge, and WADDILL and McDOWELL, District Judges.

PRITCHARD, Circuit Judge (after stating the facts as above). It is contended by counsel for defendant in error that the court below had the right to set aside the judgment rendered in this case, and the brief filed by counsel is in support of such contention. In assuming this position, we think that counsel for defendant in error failed to consider the provisions of section 1020, Rev. St. (U. S. Comp. St. 1901, p. 719). The rule in the federal court is that a motion to vacate or set aside a judgment must be made before the expiration of the term at which the judgment is rendered. Even if the court below had adopted the practice of the state courts in that respect, it did not have the power to vacate the judgment, inasmuch as under the practice in the state courts of North Carolina, such motion must be made within one year from the date of the rendition of the judgment. However, we do not think that this case comes within that class of cases wherein the remedy is by motion to vacate a judgment. Section 1020, Rev. St. (Federal Statutes Annotated), to which we have referred, reads as follows:

"When any recognizance in a criminal cause, taken for, or in, or returnable to, any court of the United States, is forfeited by a breach of the condition thereof, such court may, in its discretion, remit the whole or a part of the penalty, whenever it appears to the court that there has been no willful default of the party, and that a trial can, notwithstanding, be had in the cause, and that public justice does not otherwise require the same penalty to be enforced."

Thus it will be seen that this section gives the court the power, under certain circumstances, to remit the whole or a part of the penalty for which judgment may be rendered on a forfeited recognizance. This statute was enacted on the 28th day of February, 1839, and was evidently intended as a remedy for a surety in a case where there is no willful default of the party and where a trial of the cause can be or has been had. Before the enactment of this statute, Chief Justice Marshall had this question before him in the case of *United States v. Feely*, Fed. Cas. No. 15,082, but in that case the application was before the recognizance was estreated, and was, therefore, before judgment. However, the reasoning of that distinguished jurist shows that the court has the power before, as well as after, judgment to remit a penalty based upon a forfeited recognizance.

In note 3, p. 724, *American and English Encyclopedia of Law* (2d Ed.), in referring to the foregoing case, it is said:

"In *U. S. v. Feely*, 1 Brock. 255 [Fed. Cas. No. 15,082], Chief Justice Marshall, after a full discussion of the authorities, shows that the Court of Oyer and Terminer in England had, independent of any statute, the power to refuse to estreat recognizances which it had adjudged forfeited, and might remit the same whenever the circumstances of the case in their discretion justified it. In conclusion, he says: 'The authority on which the court most relies is Mr. Blackstone. In his 4th volume, page 254, he says: "A recognizance may be discharged, either by the demise of the King, to whom the recognizance is made, or by the death of the principal party bound thereby, if not before forfeited, or by the order of the court to which such recognizance is certified by the justices (at the Quarter Sessions, Assizes, or King's Bench) if they see

sufficient cause." Upon authority, then, it appears that, entirely independent of the statute, the courts of England exercise the power which this court is now required to exercise.' This discussion of the authorities and the conclusion have been cited with approval in *State v. Clifford*, 124 Mo. 492 [28 S. W. 5]; *State v. Warren*, 17 Tex. 283. See, also, *Colt v. Eaton*, 1 Root (Conn.) 524; *Noll v. State*, 88 Neb. 587 [57 N. W. 285]; *State v. Traphagen*, 45 N. J. Law, 134."

In the case of *United States v. Duncan*, 25 Fed. Cas. No. 15,004, McCanless, District Judge, in construing section 1020, Rev. St., among other things, said:

"In the case of *Com. v. Denniston*, 9 Watts [Pa.] 142, the principle is recognized that a recognizance is a matter of record, and, when forfeited, it is in the nature of a judgment of record, and, when judgment is given, the whole is taken as one record. The right of the Governor, therefore, to remit cannot be affected by proceeding to judgment on the recognizance, as the nature of the recognizance remains the same after as before judgment. This being the case, the act of Congress affords us ample power in the exercise of a sound discretion to afford the relief prayed for. And as we are of opinion that the absence of the principal was no fault of the bail, and that he has done all in his power to repair the public injury by the surrender of the prisoner, he is entitled to the interposition of the court upon payment of the costs."

In that case, a sci. fa. was sued out on the 26th day of October, and served on Duncan the same day. No appearance or plea being entered, judgment nil dicit was entered with the clerk in the sum of \$3,000. There is nothing in the record to show precisely when application in that case was made, but there is a headnote which shows that the decision was rendered in 1863. Therefore, it is fair to assume that application for relief was made long after the term of the court at which judgment was entered had expired.

In the case of *United States v. McGlashen et al.* (C. C.) 66 Fed. 537, it was held:

"That in an action on a forfeited recognizance, only a legal defense can be heard; and the fact that there was an appearance or discontinuance after forfeiture is not a legal defense, though it would constitute matter for application, under Rev. St. § 1020, to the court which adjudged the forfeiture, to have the penalty remitted."

In that case, the recognizance was forfeited in the District Court of the United States for the District of Kansas, but application for relief was made in the Circuit Court of the United States for the Eastern District of Wisconsin; and that court, therefore, held that it was without power to grant relief. The court said:

"It would constitute matter for an application, under section 1020, Rev. St., to have the penalty remitted, in whole or in part; but that must be addressed to the court which adjudged the forfeiture, and where alone is lodged a discretion to grant relief when it appears that there has been no willful default of the party, and that a trial can, notwithstanding, be had in the cause, and that public justice does not otherwise require the same penalty to be enforced."

This case was carried by writ of error to the Circuit Court of Appeals for the Seventh Circuit, where it was disposed of without passing upon the question as to the power of the court to remit the penalty after the term had expired at which the judgment was rendered.

In the case of *United States v. Santos*, Fed. Cas. No. 16,222, it

does not appear whether or not the term at which default was made had expired before application for relief was made by the surety; but it is fair to assume that, notwithstanding the default had been estreated, no final judgment had been entered thereon in the Circuit Court. However, it does appear that the defendant in that case answered to the indictment, but left without leave of the court before the trial was concluded. He was called and defaulted, and recognizance was duly estreated for the purpose of being prosecuted. The trial proceeded, inasmuch as he was only charged with a misdemeanor, and resulted in the acquittal of the defendant. Nelson, Circuit Judge of the Southern District of New York, holding a term of the Circuit Court for that district, and before whom this case was heard, said:

"This case is rather stronger in favor of the application than those contemplated in the statute. Here the trial has been had and the prisoner has been acquitted. The condition of the recognizance has been performed in fact, though not in contemplation of the law, for the defendant has stood the trial. The case being a misdemeanor, it was competent to proceed with the trial in his absence. Although it must be assumed that the default was willful, as it respects the prisoner, for aught that appears the bail is innocent, and he is the person most materially interested in the success of the motion. Under the actual circumstances of the case, I think that the breach of the condition of the recognizance is technical, and that it would be unreasonable to impose it. I shall therefore direct the default and estreat to be set aside."

In the case of *United States v. Mercer et al.*, Fed. Cas. No. 15,758, it appears that judgment was entered in November, 1868, but it does not appear when the application was made. However, the headnote shows that the case was decided December 19, 1868. The court in that case recognized the right of the defendant to make application in pursuance of section 1020; but, in disposing of the matter, held:

"That it appearing to the court that the defendant was guilty of the crime charged, and that the amount forfeited was not commensurate with the punishment deserved, that public justice required that the forfeiture should be enforced."

In the case of *United States v. Winstead and Another* (D. C.) 12 Fed. 50, heard by Dick, D. J., it appeared that Winstead, the principal, failed to appear and answer to a criminal prosecution, and a judgment was entered against him as surety on a forfeited recognizance upon which a scire facias was issued to the parties to show cause why execution should not be issued. The surety filed a plea stating that the defendant had died before service of the scire facias, and asked to be discharged from liability as bail. The court, in disposing of this motion, said:

"The entry of judgment nisi in this case at the last term was irregular. *State v. Smith*, 66 N. C. 620. A judgment nisi is one that is to be valid unless something else should be done within a given time to defeat it. When a witness is duly summoned to appear at court and fails to do so, a judgment nisi may be entered for the penalty imposed by law for such default; and upon being served with a scire facias he may show cause at a future day why the judgment nisi shall not be made absolute. If the witness should die before such judgment is made absolute, the proceeding abates and cannot be revived against his personal representative.

"A recognizance duly entered into is a debt of record, and the object of a scire facias is to notify the cognizor to show cause, if any he have, wherefore

the cognizee should not have execution of the same thereby acknowledged. *State v. Mills*, [19 N. C.] 552.

"The recognizance is in the nature of a conditional judgment, and the recorded default makes it absolute, subject only to such matters of legal avoidance as may be shown by plea, or such matters of relief as may induce the court to remit or mitigate the forfeiture. The death of a principal after such default, and before the service of a scire facias, does not entitle the bail as a matter of right to claim an exoneretur.

* * * * *

"As the judgment in this case was joint, the execution must follow the judgment, and cannot be issued against a dead man's estate until his personal representative has had a day in court. I therefore direct a scire facias to be issued to the personal representative of the deceased principal, returnable to next term. When such scire facias has been duly served or returned, I will hear evidence and consider the question of modifying the forfeiture in accordance with the provisions of section 1020 of the Revised Statutes."

There is nothing in the record to indicate the term at which judgment was entered in the foregoing case. However, the court in that case treats the judgment on a forfeited recognizance as being absolute, and it is obvious from an examination of the opinion of the court that the term at which the judgment was entered had expired before the defendant made application for relief; and the court held that the facts were such as to entitle the defendant to make application in accordance with section 1020 of the Revised Statutes.

In the case of *United States v. Barger* (C. C.) 20 Fed. 500, heard by Acheson, District Judge, the application was treated as a motion to vacate a judgment, and it was held that a judgment or order, however conclusive in its character, is under the control of the court pronouncing it, during the term at which it is rendered; and that the same may be set aside, vacated, or modified; and, upon the ground that the court can correct, modify, or vacate a judgment during the term at which such judgment may be entered, relieve the party from liability upon payment of the costs. In that case the court said:

"The recognizance here was taken, not for the defendant's appearance for trial, which strictly seems to be the case contemplated by section 1020, but after trial and conviction, and was conditioned upon the defendant's appearance on the first day of the present (May) term to abide the sentence of the court. He did not appear then, but did subsequently during the term and was sentenced. The party making application for the remission is the bail, who certainly was guilty of no 'willful default,' however it may have been with the defendant himself. Public justice does not require the penalty to be enforced if the defendant pay his fine and costs. The case is within the spirit and reason of the said section 1020, and substantial justice will be subserved by remitting the forfeiture upon terms."

This court, in the case of *United States v. Alonzo Robinson et al.*, 158 Fed. 410, 85 C. C. A. 520, considered the question involving the power of the court, in the exercise of its discretion, to grant relief under this section, but the question as to when application should be made was not determined in that controversy.

It is true the Attorney General in 1854 (6 Ops. Attys. Gen. 408), held:

"That when the proceedings have reached the final point of return of execution to judgment in scire facias they have passed beyond the stage at which the courts can remit, and the only relief which can be given to the parties is by pardon."

Notwithstanding this opinion the greater weight of authority is in conflict with the views entertained by the Attorney General in that case. In referring to this subject, the American and English Encyclopedia of Law (2d Ed.) p. 724, says:

"In the United States it has been held by eminent authority that such power existed at common law, of which the statutes were merely declaratory, and this power as a common-law right has been very generally exercised by our courts. In many states the matter has been made, as in England, the subject of special statutory provision."

In note 2, on the same page, is the following:

"At common law, where the recognizance has been forfeited and was sent to the exchequer, the party became an absolute debtor to the crown, but by statute that court was then empowered to discharge on petition any person whom it thought a fit subject to favor. 1 Chitty, C. L. 92; In re Pelleri, 13 Price, 299; Rex v. Tomb, 10 Mod. 278."

Chapter 33, § 83, Battle's Revisal, which is now section 3220 of the Revisal of North Carolina 1905, provides as follows:

"The judges of the Superior Court may hear and determine the petition of all persons who may conceive they merit relief on a forfeited recognizance, and may lessen or absolutely remit the same and do all or anything therein as they may deem just and right, consistent with the welfare, of the state and the persons praying such relief, as well before as after final judgment is entered and execution ordered."

It will be observed that this section empowers the court to remit or lessen forfeited recognizances, either before or after final judgment; and, in an application of this kind, it is within the judicial discretion of the court below, in a proper case, to remit the penalty; and, in the case of the Board of Education v. Moody, 74 N. C. 73, it was held that the action of the court in remitting the penalty under this section is not subject to review except for some error in matter of law or legal inference. This provision of the North Carolina statute is almost identical with the terms of section 1020, Rev. St., with the exception that it is more definite as to the time when application in pursuance of its provisions may be made. We find, upon examination of the decisions of the courts of the various states, that the weight of authority is to the effect that a court, wherein judgments of this kind are rendered, has judicial discretion to grant at any time the remission of penalties. While this provision of the North Carolina law is not controlling in this instance, inasmuch as Congress has seen fit to legislate upon the subject, nevertheless we feel that this statute should be considered in this connection, inasmuch as it tends to show the policy of the Legislature, as well as the courts, in dealing with this question. While neither the Circuit Court of Appeals of this or any other circuit, or the Supreme Court of the United States, have passed upon this question, yet some of the Circuit and District Courts have passed upon it, and are almost of one accord in sustaining the view that a proceeding under section 1020 for the remission of a penalty is not to be treated as a motion to vacate, modify, or set aside a judgment, and is, therefore, not subject to the rule that such application must be made during the term at which the judgment was entered. This legislation was evidently intended for the purpose of enabling

sureties situated as in this instance to obtain substantial relief by the payment of such costs as may have been incurred by the issuance of a *scire facias*, judgment, etc. There is every reason why such relief should be granted, and we know of no valid reason in support of the contention that sureties in cases of this kind should be required to pay into the registry of this court the entire penalty of a bond, when the requirements of such bond have been complied with, and the undertaking of the surety entered into in the first instance has been substantially performed. It is inconsistent with the principles of justice and equity to insist upon any other rule; and, while counsel seem to have prepared their briefs, as we have said, upon the theory that this is in the nature of a motion to set aside a judgment, evidently the court below had in mind section 1020, and, we think, under that section, had ample power to render the judgment it did.

That a surety, with the rarest exception, in a case where the defendant is produced, stands his trial and is acquitted, understands that such trial not only exonerates the defendant in so far as the charge against him is concerned, but likewise has the effect of releasing the surety from liability on his bond, is within the knowledge of every one familiar with proceedings in criminal cases. Under such circumstances, it is but natural that a surety, not being versed in legal procedure, should fail to file an answer to the *sci. fa.*, and thus have the case regularly disposed of according to the strict rules of procedure. It is highly important that parties arrested and charged with crime should give bond rather than be confined pending a hearing at the expense of the government. If all the parties who have been arrested on charges of violating the Internal Revenue Laws had been confined in prison to await trial, the expense of such confinement would have been enormous; and, for several years after the enactment of these laws, we doubt very much if the government could have found accommodations for this class of defendants. Therefore, unless there is some way by which relief of this character may be afforded to sureties in cases wherein the default is not willful, and the trial of the accused has been, or can be, had, it would be well-nigh impossible for any defendant to secure bail when charged with a crime. The purpose in granting bail is to secure the prompt appearance of the accused at the term of the court at which his trial is to be had. This is the sole purpose sought to be accomplished, but, in a case like the one at bar (wherein it appears that the defendant was sick and unable to attend the term of court, and appeared at the next term of court, was tried and found not guilty), it would be unjust and inequitable to require the defendant to do more than pay the expenses and the costs incident to the *sci. fa.*; and, when a sum greater than that amount is exacted, under such circumstances, such judgment renders it possible for the government to take from the citizen such amount without the slightest justification, and we feel sure that there is no disposition on the part of the government to deprive a citizen of its property without compensation.

Chief Justice Marshall, in the case of *United States v. Feely*, *supra*, in referring to this view of the matter, said:

"The object of a recognizance is not, to enrich the treasury, but to combine the administration of criminal justice with the convenience of a person accused, but not proved to be guilty. If the accused has, under circumstances which show that there was no design to evade the justice of his country, forfeited his recognizance, but repairs the default as much as is within his power, by appearing at the succeeding term, and submitting himself to the law, the real intention and object of the recognizance are effected, and no injury is done. If the accused prove innocent, it would be unreasonable and unjust in government to exact from an innocent man a penalty, intended only to secure a trial, because the trial was suspended, in consequence of events which are deemed a reasonable excuse for not appearing on the day mentioned in the recognizance. If he be found guilty, he must suffer the penalty intended by the law for his offense, and it would be unreasonable to superadd the penalty of an obligation entered into only to secure a trial. The reasonableness, then, of the excuse, for not appearing on the day mentioned in the recognizance, ought to be examined somewhere, and no tribunal can be more competent than that which possesses all the circumstances of the original offense, and of the default."

Section 1020 is remedial in its character, and we must if possible construe the same so as to give full force and effect to the legislative intent; and thus afford the relief contemplated therein. While this section is not as broad in expressed terms as to when application may be made as the section of the North Carolina Revisal to which we have referred, yet it should be borne in mind that this statute contains no limitation as to the time when such application is to be made; and, from the very nature of things, being different in its character from the ordinary motion to vacate or set aside a judgment, cannot be treated as a motion of that character. At the time of the enactment of the section in question, the rules of procedure relating to motions to vacate or set aside judgments were well established, and the rights of parties clearly defined. The remedy afforded by this section does not undertake to authorize the court to vacate or set aside judgments of this character, but, on the other hand, its sole purpose is to empower the court to remit the whole or a portion of any penalty for which a surety may be liable upon a forfeited recognizance. Therefore, if it had been the intention to provide that the remedy was to be by motion to vacate or set aside a judgment, it would have been an easy matter for Congress to have said as much; but, inasmuch as the statute undertakes to vest the court with discretionary power, it was clearly the intention of Congress that the court should have the power to act whenever it was made to appear that an applicant under this section had brought himself clearly within the purview of the statute. At the time this statute was enacted, sureties had the right to move to vacate or set aside a judgment, and, if this was the only purpose for which the statute was enacted, it would, indeed, be a useless piece of legislation. Therefore, inasmuch as it was evidently the purpose of Congress to afford relief to all parties in cases like the one at bar, it necessarily follows that, in all such cases, application may be made at any time before property is sold under execution, and that it was the purpose of Congress in the enactment of this statute to give the court wherein such judgments are rendered control over the same, with full power, in its discretion, to remit the whole or a part of any penalty upon a forfeited recognizance, "when it shall appear to the court that there has been no willful default of the party, and that a trial can, not-

withstanding, be had in the cause, and that public justice does not otherwise require the same penalty to be enforced." No possible harm can come from the construction which we place upon this statute, inasmuch as all matters arising thereunder are to be passed upon by the judge of the court wherein forfeited recognizances are recorded, and it is but fair to assume that judges, in the exercise of their discretion, will amply protect the interests of the government when applications of this character are made.

For the reasons stated, we are of opinion that there is no error, and it necessarily follows that the judgment of the court below should be affirmed.

Affirmed.

McDOWELL, District Judge (dissenting). I find myself unable to concur in the opinion of the court. Leaving out of view section 1020, Rev. St., for the present, the judgment sought to be reviewed appears to me to be one by which a judgment rendered over 13 years previously was in large part vacated and set aside on the ground of excusable neglect in failing to make defense to the scire facias. Section 513 of the North Carolina Revisal of 1905 reads as follows:

"Mistake, surprise, excusable neglect. The judge shall, upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order, verdict, or other proceeding taken against him through mistake, inadvertence, surprise or excusable neglect, and may supply an omission in any proceeding."

Waiving all question as to the time within which application for relief must be made under this statute, it seems to me settled that no state statute, adopted since 1789, can give to a federal common-law court power to vacate or modify its judgment of a former term for excusable neglect or other distinctly equitable ground for relief. The reason for this conclusion is set out at length in the concurring opinion in *Virginia, etc., Co. v. Harris*, 151 Fed. 428, 430, 80 C. C. A. 658 et seq., citing, inter alia, *Bronson v. Schulten*, 104 U. S. 410, 26 L. Ed. 797. Reference is made to the foregoing state statute because this case was argued wholly without reference to section 1020, U. S. Rev. St.

The next question is whether or not section 1020, Rev. St., can be considered as giving the court in or to which a recognizance or bail bond is given or is returnable the power to remit all or a part of the penalty of the bond after the end of the term at which final judgment is rendered on the scire facias. To my mind this statute gives the court no power after the end of the term at which final judgment is rendered in the scire facias proceeding.

(1) It may be argued that there was no reason for enacting the statute if it relates only to the powers of the court at, or before, the term of trial of the scire facias proceeding. But this argument can be made with equal force as to any one of the numerous statutes which are merely declaratory of the common law. And it is not altogether improbable that the chief purpose of the statute was to emphasize the fact that the courts must not (at the trial term) remit the penalty where the default was willful.

(2) Authority for the contention that power to set aside a judgment after the end of the term of rendition is certainly not very profuse. *U. S. v. Duncan*, Fed. Cas. No. 15,004, seems to be the only case to which any importance can be attached. And the statement in that case to the effect that Chief Justice Marshall's reasoning in *U. S. v. Feely*, Fed. Cas. No. 15,082, "sanctions the exercise of the power as well after as before judgment" seems to me to be a misconception. That opinion relates only to the power of the court prior to final judgment on the *scire facias*. It seems to me to contain nothing indicating the existence of power in the Court of Exchequer (which alone rendered judgments on forfeited recognizances and bail bonds) to modify or vacate its judgments after the end of term of rendition.

(3) If the statute was intended to give the court power to relieve after the term of final judgment, it is to be noted that nothing in the statute forbids the exercise of the power although the court may previous to judgment have heard evidence pro and con, and although the judgment may be a judicial ascertainment of disputed questions of fact and not a default judgment. The motion or petition for relief in such a case is in effect also a petition for rehearing, which may be filed without notice and after any lapse of time. But it may be argued that the statute was intended to apply only to final judgments by default. No warrant for such theory is supplied by the statute itself; but if such assumption be entertained, we are driven to the very improbable theory that Congress contemplated and intended to relieve from the consequences of a double default—both the default in performance of the condition of the bond and the default on the *scire facias*. While it is true that the equity courts have power to relieve from judgments obtained by excusable neglect or mistake, it is difficult to conceive that Congress could have intended that the law courts could relieve for inexcusable neglect. Nor does it detract from the strength of this argument that the court below has seemingly adopted the inconvenient practice of calling the *scire facias* cases only after the last criminal trial of the term has been completed. There would seem to be no good reason why the *scire facias* cases should not be called on the first day of the term.

(4) It is too well settled to require discussion that the federal law courts, subject to some well-defined exceptions, have no power to vacate or modify a judgment after the end of the term of rendition of the judgment. It is therefore improper as it seems to me to construe a statute, which is either merely declaratory of the common law or which was intended to limit the common-law powers of the court, in such wise as to give the courts a very great increase of power. Again, it would be difficult to find any principle of law more highly esteemed and more generally accepted as wise than the rule giving finality to judgments. "*Interest reipublicæ ut sit finis litium.*" And this fact assuredly argues against a construction which makes of section 1020 an ordinance to the effect that a judgment on *scire facias* on a forfeited bail bond shall have no finality.

(5) If Congress had intended that the power under this statute could be exercised after the end of the term of rendition of final judg-

ment on scire facias, assuredly some time limit would have been prescribed within which the application for relief must be made.

(6) If the intent was to authorize the court to give relief after the end of the term, the statute has in effect given principals and sureties in bail bonds a right to sue the government, and this by implication and without notice or process to any officer of the government being required.

(7) The language, "may remit the whole or a part of the penalty," used in the statute, is appropriate if relief granted prior to judgment on the scire facias was intended, and is very inappropriate as applied to relief granted after the term of rendition of judgment on the scire facias. If the intent were to authorize relief after the end of the term at which final judgment had been rendered, the only appropriate language would be "may vacate or set aside, in whole or in part, the judgment."

(8) It seems unnecessary to do more than suggest some of the consequences which might and probably would flow from construing this statute as authorizing relief after the term of final judgment, such as the surprises that might be suffered by the government, and the trickery which the belated exercise of the power would breed. Such consequences assuredly argue against the probability of an intent to bring them about, or even to make them possible.

The power given by this statute is discretionary, and it may be that this court has no power to review a judgment remitting a penalty, if exercised before the end of the term at which final judgment is rendered. See *Morsell v. Hall*, 13 How. 212, 215, 14 L. Ed. 117; *Cook v. Burnley*, 11 Wall. 672, 676, 20 L. Ed. 29; *Steines v. Franklin Co.*, 14 Wall. 15, 22, 20 L. Ed. 846; authorities cited 1 *Michie*, U. S. Ency. 983-4. But if the construction hereinabove given the statute is correct, the judgment below was rendered by a court without jurisdiction, and no reason presents itself why this court should not decide that the trial court had no discretion and declare the nullity of the judgment. See *In re Farmers' Loan & Trust Co.*, 129 U. S. 206, 215, 9 Sup. Ct. 265, 32 L. Ed. 656.

COPLEY et al. v. BALL et al.

(Circuit Court of Appeals, Fourth Circuit. December 13, 1909.)

No. 878.

1. LIFE ESTATES (§ 8*)—ADVERSE POSSESSION—POSSESSION CONSISTENT WITH THAT OF ANOTHER—BY OWNER OF LIFE ESTATE AGAINST REMAINDERMEN.

The owner of a life estate, whether the life tenant or a grantee, cannot acquire a fee-simple title by possession against the remaindermen, but his possession inures to their benefit as against an adverse claimant.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. §§ 24-28; Dec. Dig. § 8.*]

2. ESTOPPEL (§ 29*)—ESTOPPEL OF GRANTEE—DEED BY LIFE TENANT.

Defendants' predecessors in title purchased land from a life tenant under a will, the remainder being in her heirs, and took a deed from her and her husband which was recorded, and which described the land as that de-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

vised by the testator to the grantor and heirs. *Held*, that defendants could not assert as against the remaindermen, after the death of the life tenant, a prior title in the husband which, if it existed, he was prior to the conveyance estopped to set up as against his wife or her testator, but that the deed conveyed only the wife's life estate; the rule in *Shelley's Case* not being in force in the state.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. §§ 69-73; Dec. Dig. § 29.*]

3. COURTS (§ 36*)—PRESUMPTIONS AS TO JURISDICTION—COURTS OF SPECIAL AND LIMITED POWERS.

Under the rule of the federal courts, presumptions cannot be used in support of the jurisdiction of courts of special and limited powers.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 142-144; Dec. Dig. § 36.*]

4. WILLS (§ 426*)—PROBATE—EFFECT—FOREIGN PROBATE—EVIDENCE OF TITLE.

Under Code W. Va. 1868, c. 118, § 5, and related provisions, the county recorder of any county was given the power of a court of probate to admit to record and certify wills and "to hear proof of and admit wills and authenticated copies thereof to probate," including foreign wills as wills of real estate if it appeared that they were so executed as to be valid wills of lands in that state. *Held* that, such a recorder having jurisdiction to determine the sufficiency of a foreign will as a will of lands, his determination could not be collaterally attacked, and his certificate that he admitted a copy of a foreign will devising lands in that state "to record" was in effect that it was admitted to probate and was sufficient to entitle the will to admission in evidence to establish the devise in an action of ejectment by the devisees.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 915; Dec. Dig. § 426;* *Evidence*, Cent. Dig. § 1418.]

5. EJECTMENT (§ 111*)—TRIAL—EXCESSIVE VERDICT—POWER OF COURT TO ALLOW REMITTITUR.

Where plaintiffs in ejectment have recovered a general verdict, it is within the power of the court to allow them to remit the same as to lands not covered by their proof of title.

[Ed. Note.—For other cases, see *Ejectment*, Cent. Dig. §§ 331, 344; Dec. Dig. § 111.*]

In Error to the Circuit Court of the United States for the Southern District of West Virginia, at Charleston.

Action by Millard F. Ball, Nannie F. Reed, John Reed, R. Louisa Paisley, Rosa Lee Findley, and Charles Findley against William M. Copley, Yawkey & Freeman Company, Limited, and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

This is an action in ejectment instituted in the Circuit Court of the United States for the Southern district of West Virginia by Millard F. Ball, Nannie F. Reed, R. Louisa Paisley, and Rosa Lee Findley, four of the twelve children and heirs at law of Eliza Jane Ball, deceased, for the recovery of their respective interests in a certain boundary of land supposed to contain 390 acres, situate on Spruce fork of Little Coal river, in the county of Boone, W. Va., which was devised by the will of Parkinson Shumate to the said Eliza Jane Ball during her life and then to her heirs.

It appears from the evidence that some time prior to the year 1848, one Clendennin was deputy sheriff of Logan county, Virginia—now West Virginia—became involved, and to indemnify his sureties on his official bond he executed a trust deed over certain lands held by him and lying in Boone county. Richard Stratton was the trustee in that deed of trust. Afterwards, in consideration that Augustus Ball pay off the debts, Clendennin conveyed the lands covered by this deed of trust (the subject of controversy in this suit) to Au-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

gustus Ball. This conveyance was made about the year 1848, but the trust deed was never properly released. Augustus Ball was the husband of the said Eliza Jane Ball. Shortly after the conveyance of the land to Ball, in the year 1848, Clendennin moved to the West and died, leaving a number of children and heirs at law. It appears from the evidence of Jacob Ball, who is a brother of Augustus Ball, that Augustus Ball placed his father on said land, who remained there until about 1849 or 1850, as his tenant, at which time said Augustus Ball sold the lands to Burwell Hinchman for a consideration of about \$800 and placed the said Hinchman in actual possession of the said Clendennin lands; and that, while the said Hinchman occupied the same, he claimed it as his own. It further appears that, after the sale to Hinchman, Augustus Ball left that section of the country and went to Flat Top Mountain; he and his wife separated, and Augustus Ball went West, and his wife went to her father, Parkinson Shumate, who lived in Giles county, Va. After the death of two of their children, Augustus Ball returned from the West to the neighborhood of the lands in question, his wife joined him there, and they lived together. It further appears that Augustus Ball was without means and without a home, and that he and his family lived around among their relations; that Eliza Jane Ball went to see her father in Giles county, Va., and as a result of the visit, he (Parkinson Shumate) purchased from Burwell S. Hinchman the 390 acres, being the 173-acre boundary sold to said Hinchman by the said Augustus Ball, and an adjoining tract of 217 acres for which Hinchman had obtained a patent in the meantime. The deed from Hinchman to Shumate bears date of December 31, 1859, and on January 10, 1860, the said deed was duly recorded and the following statement incorporated as a part of the record:

"This deed, together with the certificate thereto annexed as acknowledgment, was this day received into this office for record, and at the instance of Augustus Ball, the same is admitted."

It further appears that Augustus Ball and Eliza Jane Ball, his wife, and their children, immediately after this purchase, took possession of the land in question under the said Parkinson Shumate, and continued to reside there under Shumate until his death, which occurred in 1866.

The will of the said Shumate bears date of June 30, 1866, and was probated in Giles county August 13, 1866, and afterwards in Mercer county, W. Va., and contains the following clause:

"Fourth. I will and bequeath to my daughter Eliza Jane Ball during her natural life, and then to her heirs, the plantation which she now lives on, in the county of Boone, West Virginia."

After the death of Parkinson Shumate, Ball and his family continued to live on said plantation, Eliza Jane Ball claiming the same under said will, until the 10th day of February, 1868, when in the way of an exchange of lands the said Augustus Ball and Eliza Jane Ball executed a deed purporting to convey to Johnson Copley said several tracts of land, estimated to be a boundary of 390 acres, described therein as "the same land Parkinson Shumate devised to Eliza Jane Ball and heirs," and the said Johnson Copley and wife, by deed of same date, conveyed to the said Eliza Jane Ball a tract of land near the town of Madison. In said deed from Copley to Eliza Jane Ball there is the following provision:

"However should any part of the lands taken in exchange for the lands hereby conveyed be recovered by the heirs of the party of the second part the lands hereby conveyed shall stand good for this recovery."

The deed from Ball and wife to Copley was recorded February 11, 1868, and the land transferred on the land books for that year, from Parkinson Shumate, in whose name it had been assessed for 1866 and 1867 (there being no land books for 1861 to 1865, inclusive) to Johnson Copley. Augustus Ball was the assessor for Boone county at that time, and in his handwriting is an entry on said land books, in the column "From Whom Transferred, etc.," as follows:

"Heirs of P. Shumate, deceased; deed from A. Ball and wife."

Johnson Copley took possession of said 390 acres of land immediately after the execution of said deed in 1868, and he and those claiming under him held and occupied the same down to the year 1905, when Eliza Jane Ball died.

The children—heirs at law of the said Eliza Jane Ball—the owners of the remainder in fee under the will of the said Parkinson Shumate, demanded possession of said land, which being refused, this action of ejectment was instituted.

W. R. Thompson and F. C. Leftwich, for plaintiffs in error.

W. E. R. Byrne (Linn & Byrne, on the brief), for defendants in error.

Before PRITCHARD, Circuit Judge, and WADDILL and McDOWELL, District Judges.

PRITCHARD, Circuit Judge (after stating the facts as above). The plaintiffs below bring this action in ejectment to recover certain lands described in the complaint.

It is insisted by plaintiffs in error "that a plaintiff in ejectment can never recover upon an equitable title." This is a broad proposition and is subject to many exceptions; but we do not think this question arises in this controversy, as will hereinafter appear.

The plaintiffs allege that they are the heirs at law of Eliza Jane Ball, who, under the will of her father (Parkinson Shumate), held a life estate in the lands in controversy with a remainder in fee to the plaintiffs in this action.

From an examination of the laws of West Virginia, we find that the rule in Shelley's Case has been practically abolished in that state. Otherwise, we would feel bound to hold that, under the will of Parkinson Shumate, the ancestor of plaintiffs took a fee-simple title to the lands therein devised.

This being an action in ejectment, the general rule is that, in order to entitle the plaintiffs to recover, they must show by sufficient legal evidence that they are the owners and entitled to possession of the lands in controversy. While there was evidence as to the title of this land prior to the alleged deed from Augustus Ball to Burwell Hinchman, yet the real controversy begins at that stage of the proceedings. The court submitted the question as to whether Ball conveyed the lands in controversy to Hinchman, and the issue thus raised was found by the jury in favor of the plaintiffs. This question having been submitted to the jury with proper instructions for their guidance, and there being sufficient legal evidence to sustain the finding of the jury on this point, we can now see no reason for disturbing the verdict in that respect.

It appears from the record that the state parted with the title to these lands by patents, duly issued, and there seems to be no controversy as respects that question.

As already stated, the real contest in this case begins with the deed to Hinchman. The deed to Hinchman was executed about 1849 or 1850. The evidence as to the exact date is not specific. Immediately after the execution of this deed, Hinchman entered into possession of the premises, and he and those claiming under him remained in continuous possession of the same until the 31st day of December, 1859, at which time Hinchman, by proper conveyance, transferred his title to Shumate, the grandfather of these plaintiffs. Soon thereafter, Eliza Jane Ball, the daughter of Shumate, plaintiffs' mother, together with her husband, Augustus Ball, took possession of the lands as

the tenants of Shumate and continued in possession of the same as such until the death of Shumate, which occurred in the year 1866. Shumate, during his lifetime, made a will, by the fourth clause of which he devised the lands in question to his daughter, Eliza Jane Ball, for her natural life and then to her heirs, the present plaintiffs, which clause is in the following language:

"I will and bequeath to my daughter Eliza Jane Ball, during her natural life, and then to her heirs, the plantation which she now lives on, in the county of Boone, West Virginia."

It also appears that, notwithstanding the fact that the said Eliza Jane Ball only had a life estate in the lands, she and her husband, Augustus Ball, conveyed the same in fee simple to Johnson Copley on the 10th day of February, 1868, by way of exchange for other lands in that community. This deed was recorded on the 11th day of February, 1868, and the land transferred on the land books for that year from Parkinson Shumate, in whose name it had been assessed for taxation for the years 1866-67 (there being no tax books for the years 1861-65, inclusive) to Johnson Copley.

It is insisted by counsel for defendant in error that article 13, section 3, of the West Virginia Constitution, which pertains to waste and unappropriated lands, would apply in this instance, and that, inasmuch as Copley held possession of these lands for more than ten years and paid taxes on the same five years, he and those holding under him thereby acquired perfect legal title to the same. We are inclined to think that this provision does not apply to the case at bar; but, be that as it may, it is made perfectly clear by the evidence that Hinchman held possession of these lands for some time, and then, on the 31st day of December, 1859, made a deed to Parkinson Shumate for the same. Immediately thereafter, Ball and wife entered into possession of the premises as tenants of Shumate and remained in continuous possession until the title to the same was transferred to Copley, and Copley and those holding under him continued in possession of the same until the commencement of this action. Thus it will be seen that Parkinson Shumate and those claiming under him held these lands under color of title a sufficient length of time to acquire title to the life estate under the laws of West Virginia, and the heirs at law of Eliza Jane Ball, the plaintiffs below in this action, also thereby became vested with the legal title in fee, independent of any constitutional provision. In other words, the possession of Copley inured to the benefit of the remaindermen, and had the effect of ripening into a perfect legal title that which might otherwise have been an imperfect title. Under the deed from Ball and wife the possession of Copley was adverse to all parties except the remaindermen; but, from the very nature of things, the law will not permit one who holds a life estate to acquire a fee-simple title by possession against the remaindermen, who would become entitled to the possession of the premises at the death of the party holding the life estate. To hold otherwise would be manifestly unjust, inasmuch as a right of action never accrues to remaindermen until the death of the party holding the life estate.

The case of *McNeeley v. South Penn Oil Company et al.*, 52 W. Va.

616, 44 S. E. 508, 62 L. R. A. 562, is very much in point. The first paragraph of the syllabus in that case reads as follows:

"Husband and wife being seised as joint tenants of land, her interest being separate estate, the husband alone, during coverture, sells the whole tract by executory contract, and the purchaser goes into possession during coverture, and later the wife dies, leaving the husband and children surviving her, and later the husband conveys the whole tract to the purchaser by deed. The possession of the purchaser is not adverse to the wife in her lifetime, and right of entry or action does not accrue to her children until the husband's death, and the statute of limitation begins to run against them first at his death."

It is insisted by plaintiffs in error that Augustus Ball never acquired the legal title to the premises in question until subsequent to the conveyance of this land by him to Hinchman; that it was not until he instituted suit in the circuit court of Boone county that he acquired the legal title. In the first place, we think the court below was eminently correct in holding that he acquired nothing by the proceedings in that suit. It should be borne in mind that in that proceeding only the heirs at law of Clendennin were made parties, and not the trustee (Stratton), in whom the legal title was vested if outstanding at that time. It also appears that neither Parkinson Shumate, Eliza Jane Ball, or any of the heirs at law of Eliza Jane Ball were made parties to that suit; and, as was properly held by the court below, any decree entered in that suit, or deeds executed in pursuance thereof, would be "inoperative and of no force or effect against the said Parkinson Shumate or the heirs at law of Eliza Jane Ball."

Augustus Ball certainly acquired the equitable title by the conveyance which he took from Clendennin in the year 1848. The same having passed to him for a valuable consideration (the payment of the debt secured in the trust deed to Stratton), and, he and those claiming under him having gone into possession of the premises from the date of said deed, the possession thus acquired thereby became adverse to the trustee and ultimately ripened into a legal title. But even if he did acquire the legal title in the suit of Augustus Ball against the heirs at law of Richard A. Stratton, deceased, his subsequent conduct in relation to these lands was such as to estop him from denying title of Parkinson Shumate, under whom he and his wife entered as tenants at the time Hinchman executed the deed to Shumate. He not only went into possession of the premises, but it was at his instance that the deed from Hinchman to Shumate was entered for record, as will appear from the following entry which was made at the time such deed was recorded:

"This deed, together with the certificate thereto annexed as acknowledgment, was this day received into this office for record, and at the instance of Augustus Ball the same is admitted."

If Ball really had title to the premises at that time, then was his opportunity to inform Shumate that he was the owner of the same. His failure to do so clearly indicates that at that time he was of opinion that he had no title to this land, and, instead of asserting a claim to the same, he acquiesced in the action of his wife in inducing her father to purchase it to be used as a home for her and her children.

His whole course of conduct shows conclusively that he recog-

nized Parkinson Shumate as being the true owner of the land, and having gone into possession of the same as tenant of Shumate, according to the well-settled rule, he was estopped from denying title to Shumate. From the evidence in this case it is obvious that Ball had abandoned this tract of land and had ceased to assert any claim whatsoever to the same, and that Parkinson Shumate, being desirous of providing for his daughter, Eliza Jane Ball, purchased it in order that she might have a home during her lifetime and that at her death her heirs should become the owners of this property.

It also appears that the deed from Ball and wife to Copley, in describing the lands, refers to them as "the same lands Parkinson Shumate devised to Eliza Jane Ball and heirs," and in the deed from Copley and wife to Ball, which conveyed the land given in exchange, also appears the following provision:

"However, should any part of the lands taken in exchange for the lands hereby conveyed be recovered by the heirs of the parties of the second part, the lands hereby conveyed shall stand good for this recovery."

This clearly shows that it was not only understood by Ball and wife, but Copley as well, that the estate which Copley took by that deed was only a life estate with a remainder to the heirs at law of Eliza Jane Ball. That deed was recorded and was no doubt examined by Copley at the time the purchase was made; but, be that as it may, the fact that such deed was registered had the effect in law to fix Copley, who was in privity with Ball and wife, with notice of the contents of the will by which the title to this land was transmitted to Mrs. Ball for her natural life and at her death in fee simple to her heirs. Therefore, in any event, the plaintiffs would be entitled to recover the lands in question.

We now come to consider the other assignments of error. Among other things it is assigned as error that the trial court admitted in evidence an inadmissible copy of the Shumate will over the objection of the defendant.

It was incumbent upon the plaintiff to produce to the court either the original or a duly authenticated copy of the will. It appears that two copies of the will were introduced, to wit: One from the record of wills of Boone county and one from the record of wills from Mercer county. The copy of the will from the Boone county records will first be considered. When the plaintiffs offered a copy of the will from Mercer county, it was objected to on the ground that it had not been probated in West Virginia. The court overruled the objection on the statement of counsel for plaintiffs that proof of the probate of the will in Mercer county would be introduced later. The offer of the Boone county copy was apparently made in lieu of the literal fulfillment of this promise. It was offered "simply to show that the will was recorded in Boone county" in 1864—whatever this may mean. There was an objection by defendants, which was overruled, an exception noted, and the first assignment of error is that there is no certificate to the copy of the will showing that the will had ever been duly or legally probated in West Virginia.

The statute (Act Feb. 22, 1883, Acts W. Va. 1883, p. 82, c. 55) gives

the county court clerk power to admit wills to probate only "during the recess of the regular sessions of said courts," and his order must be affirmed by the county court. It appears from the face of the Boone county certificate that the will was admitted to probate in the clerk's office. Whether it was done during the recess of the court or not does not appear. While the clerk is given by the statute at least preliminary judicial powers, and he is to be regarded as a court, in admitting wills to probate, it is settled in the federal courts that presumptions cannot be used in support of the jurisdiction of courts of special and limited powers. *Walker v. Turner*, 9 Wheat. 541, 548, 6 L. Ed. 155; *Ex parte Wood*, 9 Wheat. 603, 606, 6 L. Ed. 171; *Miller v. U. S.*, 11 Wall. 268, 299, 20 L. Ed. 135; *Galpin v. Page*, 18 Wall. 350, 366, 21 L. Ed. 959. See, also, 1 Black, *Judgments* (2d Ed.) pp. 431, 434.

It seems clear that the power of the clerk to admit wills to probate is special and limited and such as exists only under the specified circumstance that the court be in vacation. It follows that the jurisdiction of the clerk to admit the will to probate must affirmatively appear. As there was no evidence of such fact, the Boone county copy cannot be treated as admissible evidence.

Turning now to the copy of the will from Mercer county, W. Va., the record reads:

"Mr. Thompson: We object to the will.

"Court: On what ground?

"Mr. Thompson: It doesn't seem ever to have been probated in this state. (Here follows argument of counsel.)

"Upon the statement of counsel for the plaintiffs that proof of the probate of said will in Mercer county, W. Va., would be later introduced, the court overrules the objection of the defendants to the introduction of said will, to which action of the court in overruling said objection the defendants, by counsel, at the time excepted.

"Here said will, being 'Plaintiffs' Exhibit A,' is read to the jury, being in the words and figures following."

No further evidence of probate in Mercer county was ever offered. The record shows that, on rebuttal, the following occurred (Mr. Byrne being counsel for the plaintiffs, and Mr. Thompson for the defendants):

"Mr. Byrne: Your honor, we desire to offer the copy of the will which was heretofore offered with the certificate of its recordation in the county of Boone, to show simply that the paper was recorded in Boone county, on the 15th of February, 1884, marked 'Plaintiffs' Exhibit Aa.'

"Court: Well, perhaps that might be admitted that it was recorded.

"Mr. Thompson: We will admit that this paper was spread on the records in Boone in February, 1884; that it was spread upon the will book, or whatever book it says it was.

"Mr. Leftwich: That's where it was, the will book.

"Mr. Byrne: We offer it as recorded paper.

"Mr. Thompson: Well, we will object to it and let the court say.

"Court: If you desire to offer it simply to show that the will was recorded there, I will admit it over the objection of counsel for the defendants.

"Mr. Thompson: Save an exception."

Clearly the Mercer county copy was admitted in evidence conditionally, on an avowal that evidence showing the will to have been duly probated in Mercer county in 1866 would subsequently be introduced. Evidently counsel for plaintiffs abandoned this intention and sought to

rely solely on the Boone county copy. But if in fact the Mercer county copy was admissible, it would seem that the judgment below should not be reversed. Appellate courts do not sit to reverse for error merely, but only for prejudicial error. The error in admitting the Boone county copy of the will was not prejudicial to the defendants below if in fact the Mercer county copy was admissible.

The validity of the probate in Mercer county must therefore be now considered.

Without attempting to quote the law in force in West Virginia on October 9, 1866, it seems sufficient to say that under the West Virginia Constitution of 1861-63 (article 7, §§ 5 and 6) and Acts 1863 (pp. 35, 36, c. 36, embodied in Code 1868, pp. 587-588, 589, c. 118) the county recorder was given the power of a court of probate. No clearly jurisdictional limitation on his powers is expressed except that:

"Recorders may make all orders and do all things required to be done * * * in their respective offices, on any day, Sundays and holidays excepted."

The certificate of the recorder of Mercer county shows that he admitted the copy of the will from the court of Giles county, Va., to record on October 9, 1866. Upon reference to the calendar it appears that that day was Tuesday. The First of January, Christmas, and July 4th were at that date the only legal holidays in West Virginia (Code W. Va. 1868, p. 536, c. 99, § 4).

The point most relied upon by plaintiffs in error is founded upon this provision:

"Where a will relative to estate within this state has been proved without the same, an authenticated copy thereof, and the certificate of probate thereof, may be offered for probate in this state. When such copy is so offered, the recorder to whom it is offered shall presume, in the absence of evidence to the contrary, that the will was duly executed and admitted to probate as a will of personalty in the state or county of the testator's domicile, and shall admit such copy to probate as a will of personalty in this state. And if it appear from such copy that the will was proved in the foreign court of probate to have been so executed as to be a valid will of lands in this state by the law thereof, such copy may be admitted to probate as a will of real estate."

The contention is that the will and certificate of probate in Virginia do not show that the will was so executed as to be a valid will of lands in West Virginia. Granting this, the question remains whether or not the above-quoted statute is a jurisdictional limitation of the powers of the recorder, such as can be relied upon collaterally. The recorder is by the Acts of 1863 (section 5, c. 118, Code 1868) given the following powers:

"The recorder of each county shall have power, and it shall be his duty (except on Sundays and holidays), to receive acknowledgment or proof of, admit to record * * * and certify * * * wills * * * to hear proof of, and admit wills and authenticated copies thereof to probate. * * *"

Following section 5 above quoted as to admitting to probate copies of wills proved in other states or counties is a provision whereby the recorder may issue commissions for taking the depositions of attesting witnesses residing out of the state of West Virginia. Later provisions of the statute allow persons interested, within the time limited, to ap-

peal to the circuit court from "any order made by the recorder in relation to the probate of a will." It is evident that when a copy of a will probated in some other state was offered for probate in West Virginia the recorder was charged with the duty—clearly judicial in nature—of determining whether or not the will and the certificate of probate in the foreign state showed that the will had been so executed as to be a valid will of lands in West Virginia.

In *McNitt v. Turner*, 16 Wall. 352, 366, 21 L. Ed. 341, it is said:

"Jurisdiction is authority to hear and determine. It is an axiomatic proposition that, when jurisdiction has attached, whatever errors may subsequently occur in its exercise, the proceeding being *coram iudice*, can be impeached collaterally only for fraud."

See, also, *Vorhees v. Bank*, 10 Pet. 449, 9 L. Ed. 490; *Grignon v. Astor*, 2 How. 341, 11 L. Ed. 283; *Simmons v. Saul*, 138 U. S. 439, 11 Sup. Ct. 369, 34 L. Ed. 1054.

In the case at bar, the recorder had authority to inspect and determine, that is he had "jurisdiction." And if in his determination, to use the language in *Grignon v. Astor*, *supra*, "there was error of the most palpable kind," or if he "disregarded, misconstrued, or disobeyed the plain provisions of the law," yet his determination is not subject to collateral attack. And this rule applies to judgments by limited and special tribunals (if their jurisdiction affirmatively appears) as fully as to judgments of courts of general jurisdiction. *Secombe v. Railroad Co.*, 23 Wall. 108, 119, 23 L. Ed. 67; *Railroad Co. v. Backus*, 154 U. S. 421, 435, 14 Sup. Ct. 1114, 38 L. Ed. 1031.

From the certificate made by the recorder of Mercer county it appears that he admitted the will "to record." This is the established form, and means that the will, or copy, as may be the case, has been probated or admitted to probate. See *Minor's Insts.* (4th Ed.) p. 1035. This admission also is general and is an admission to probate and record as a will of lands.

The certificate by the recorder concludes:

"Certificate is granted them (the executors) for obtaining a probate of said will in due form."

It is sufficient for the purposes of this case to say that this formula does not justify a belief that something else remained to be done in order to probate the copy of the will from Virginia, or to make a certified copy from the Mercer county record admissible in evidence.

In *Smith v. Henning*, 10 W. Va. 596, 613, 614, will be found a certificate of probate where the will was proved in solemn form, per testes, before the county court of Bedford county, Va., which concludes exactly as does the certificate under consideration. The form which the recorder was intending to follow reads, when correctly written:

"Certificate is granted them for obtaining letters of probate of said will in due form." 2 *Minor*, 1035, note; *Bouv. Dict.* "Letters Testamentary."

It follows that the Mercer county copy of the Shumate will was admissible in evidence, and that this copy proved the essential facts that the plaintiffs were the successors in interest of Shumate, and that they took under his will the remainder in fee simple after the death of Eliza Jane Ball. See *Code Va.* 1860, p. 559, c. 116, § 11.

It also follows that none of the remaining assignments of error, except as to the court's action in allowing a remittitur, need be discussed. If it be assumed that the chancery suit of Ball against Clendennin's heirs and the commissioner's deed put the legal title in the defendants, still they were estopped to assert such title as against Shumate's successors in interest. And any error in the instructions in this respect was harmless. Again, if the trial court erred in instructing the jury that Copley had constructive notice that Shumate's will vested only a life estate in Mrs. Ball and the remainder in fee in her children, such instruction was harmless. The Mercer county copy of the will legally proved the fact.

The assignment based on the fact that the trial court refused to set aside the verdict and grant a new trial is mentioned only to say that the action of the trial court in this respect is not reviewable.

The action of the trial court in allowing the plaintiffs to remit the verdict for lands not covered by their title was clearly right. See *Tenant v. Gray*, 5 Munf. (Va.) 494; *Preston v. Bowen*, 6 Munf. (Va.) 271; *Gibson v. Stewart*, 11 Leigh, 600; *Williams v. Railroad Co.*, 9 W. Va. 33, 40; *Railroad Co. v. Blake*, 38 W. Va. 718, 18 S. E. 957; *Kennon v. Gilmer*, 131 U. S. 22, 29, 9 Sup. Ct. 696, 33 L. Ed. 110; *Hansen v. Boyd*, 161 U. S. 397, 411, 16 Sup. Ct. 571, 40 L. Ed. 746.

We have considered the remaining assignments of error and are of opinion that they are without merit.

For the reasons hereinbefore stated, the judgment of the court below is affirmed.

Affirmed.

MCDOWELL, District Judge, concurs in the conclusion reached.

ATLANTIC COAST LINE R. CO. v. FARMER.

(Circuit Court of Appeals, Fourth Circuit. November 4, 1909.)

No. 824.

1. COURTS (§ 366*)—INJURIES TO SERVANT—FELLOW SERVANTS—WHAT LAW GOVERNS.

In an action in a federal court for injuries to a servant of a railroad company, whether plaintiff and the engineer, by whose negligence plaintiff was injured, were fellow servants, depends on the law of the state where the accident occurred.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. § 326; Dec. Dig. § 366.*]

What law governs master's liability for injuries to servant, see note to *Mexican Cent. Ry. Co. v. Jones*, 48 C. C. A. 232.]

2. MASTER AND SERVANT (§ 196*)—INJURIES TO SERVANT—FELLOW SERVANTS.

Under the law of South Carolina, whether employes are fellow servants is to be determined, not by the department in which the servants are engaged, but by the relations they sustained to each other at the time of the accident.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 486-488; Dec. Dig. § 196.*]

Who are fellow servants, see notes to *Northern Pac. R. Co. v. Smith*, 8 C. C. A. 668; *Flippin v. Kimball*, 31 C. C. A. 286.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. MASTER AND SERVANT (§ 204*)—INJURIES TO SERVANT—NEGLIGENCE—ISSUES AND PROOF.

Where, in an action for injuries to a subforeman in a railroad repair yard by being crushed by the sudden backing of the engine as plaintiff was chaining two defective cars, the complaint did not allege any negligence of the foreman in not preventing the engine from moving, but the proof indicated that the sole cause of the accident was the negligence of the engineer in backing the engine without signal notwithstanding a signal to remain stationary, plaintiff was not entitled to have the case submitted to the jury on the theory that the foreman was negligent in permitting the engine to move back after directing plaintiff to go between the cars, under the South Carolina law that plaintiff cannot rely on a cause of negligence not alleged as a basis of recovery.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 875; Dec. Dig. § 281.*]

4. TRIAL (§ 169*)—DIRECTION OF VERDICT.

Under the law of South Carolina, as well as in the federal courts, it is the duty of the trial judge to direct a verdict where the evidence, with all inferences that the jury could justifiably draw therefrom, is insufficient to support a judgment for plaintiff, so that, if such a verdict were returned, it must be set aside.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 381-389; Dec. Dig. § 169.*]

Morris, District Judge, dissenting.

In Error to the Circuit Court of the United States for the District of South Carolina, at Florence.

Action by C. L. Farmer against the Atlantic Coast Line Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

On the 1st day of April, 1907, defendant in error instituted this action in the court of common pleas for Florence county, S. C., against plaintiff in error to recover the sum of \$10,000 damages alleged to have been sustained by him as the result of certain personal injuries suffered while in the employ of the railroad company. The complaint alleged: That on August 2, 1906, while employed by the railroad company, defendant in error was directed by J. J. Brown, the railroad company's foreman in charge of the work, to chain together two cars; that while so engaged the "defendant, its agents and servants, negligently, willfully, and wantonly, without giving any warning to the plaintiff, caused its said engine to suddenly strike and move said cars together, thereby catching plaintiff between said cars, giving to him thereby grievous bodily injuries," etc. The railroad company duly filed its answer, wherein it set up a general denial, and further that the injuries to defendant in error were received by him as a result of his own contributory negligence. Within due time the plaintiff in error removed the cause from the state court into the Circuit Court of the United States for the District of South Carolina, and a trial was had, resulting in a judgment in favor of defendant in error for the sum of \$5,000.

At the trial it appeared that Farmer, who was a subforeman in the car repair yard of the railroad company, on the afternoon of the accident, was engaged, along with others, in moving certain bad-order cars for the purpose of placing them in position for repairs. In the placing of these cars, a shifting engine was used. After the engine came around to shift the cars, Farmer got a chain and went between two of them to tie them together; they being bad-order cars with broken drawheads. At the time Farmer went between these cars, the engine was still, and he gave the engineer a signal not to move back. Just as he got between the cars, however, the engineer moved the engine back, catching him between the cars and mashing him in the chest. The foreman in charge at the time saw the engine when it began to move, and im-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

mediately endeavored to stop it, but could not do so. It thus appears that Farmer's injuries were sustained as a result of the negligence of the engineer in running the engine backward when he had been signaled to stand still. Such being the facts, the attorneys for plaintiff in error requested that a verdict be directed in its favor, as the only reasonable conclusion to be drawn from the testimony was that Farmer's injuries resulted from the negligence of his fellow servant, the engineer. This motion was overruled by his honor, to which exception was duly taken. This refusal to direct a verdict, the refusal to charge that there was no negligence on the part of the foreman, the leaving to the jury the question of the foreman's negligence, to all of which exceptions were duly taken and noted, as appears by the bill of exceptions, constitute the basis of the assignments of errors.

P. A. Willcox (Willcox & Willcox and Henry E. Davis, on the briefs), for plaintiff in error.

J. W. Ragsdale, for defendant in error.

Before GOFF and PRITCHARD, Circuit Judges, and MORRIS, District Judge.

PRITCHARD, Circuit Judge (after stating the facts as above). The first question to be determined is as to whether the injuries sustained by the defendant in error were due to the negligence of a fellow servant; in other words, whether such injuries resulted from the negligence of the engineer who was in charge of the shifting engine at the time the accident occurred. The question as to whether the engineer was a fellow servant of the defendant in error must necessarily depend upon the law relating to fellow servants as declared by the Supreme Court of South Carolina. The learned judge who heard this case below was of opinion that the engineer was a fellow servant of the defendant in error, and, in referring to this phase of the question before submitting this case to the jury, made the following statement:

"It seems to me that the plaintiff, when he received his injuries, was doing the work ordinarily done by a brakeman or any other laborer; he was not in a separate employment as a car repairer, for the work of repairing cars; he was doing the work ordinarily done by a brakeman, and the engineer and the plaintiff were engaged in the same occupation, or rather they were engaged in carrying out one purpose, that is, removing a disabled car from the place where it was to the repair shop where it was to be repaired, so that the plaintiff's case cannot fall under the section of the Constitution which provides against the negligence of a fellow servant engaged in another department of labor. (That I believe is the language of the Constitution.) If he had been a painter engaged in painting that car, standing on the track, and had been injured by the negligence of the engineer, in the circumstances, I would hold that he was in another department of labor, and therefore was not deprived of his remedy against the company. If he had been actually at work repairing the car, doing carpenter work on the car, and while so engaged was injured by an engine backing up against him, I think he would have a right to recover against the company, because of that fact (the negligence of a fellow servant engaged in a separate department of labor); but it looks to me, doing the work that he was, that is, attaching one car to another, that that was the work of a brakeman, and that the engineer was a fellow servant. That seems to be the result of the decisions in South Carolina, by which I am governed,

* * *

The portion of the South Carolina Constitution to which the court below refers is article 9, § 15, which reads as follows:

"Every employ  of any railroad corporation shall have the same rights and remedies for any injury suffered by him from the acts or omissions of said corporation or its employ s as are allowed by law to other persons not employ s, when the injury results from the negligence of a superior agent or officer, or of a person having a right to control or direct the services of a party injured, and also when the injury results from the negligence of a fellow servant engaged in another department of labor from that of the party injured or of a fellow servant on another train of cars, or one engaged about a different piece of work."

The Supreme Court of South Carolina, in the case of *Rutherford v. Southern Ry.*, 56 S. C. 446, 35 S. E. 136, in construing this section of the Constitution, said:

"It seems to us that the true construction of the constitutional provision above referred to is this: While it does not entirely deprive a railroad company, in a case like the present, from availing itself of the previously well-recognized defense that the injury complained of was the result of the negligence of a fellow servant, for which the company is not responsible, yet it does confine such defense within narrower limits than had been previously recognized; for it will be observed that the provision in question sets out with the declaration that every employ  of a railroad company shall have the same rights and remedies for any injury sustained by him from the acts or omissions of such company, 'or its employ s,' whether fellow servants or not, as are allowed to a person not an employ  of such company; and, if the section had stopped at that point, then the effect, manifestly, would have been to entirely deprive a railroad company of the right to set up as a defense to an action like this that the injury complained of resulted from negligence of a fellow servant of the plaintiff, for which the company was not responsible. But the section does not stop at the point indicated, and, on the contrary, goes on to show in what cases an employ  shall have the same rights and remedies as a person not an employ , as follows: (1) Where the injury results from the negligence of a superior officer or agent; (2) where it results from the negligence of a person having the right to control or direct the services of a party injured; (3) when it results from the negligence of a fellow servant engaged in another department of labor, or on another train of cars, or one engaged in a different piece of work. So that, in all other cases not falling under either of the classes above indicated, the law upon the subject of the defense of fellow servant remains the same as it was before."

In this case it appears that the engineer and the defendant in error were working under the direction of Brown, who was foreman in the repair yard. The defendant in error, while on the witness stand, testified as follows:

"Q. Who had entire charge of that yard? A. J. J. Brown.

"Q. Who directed all the services of all the employ s over there? A. J. J. Brown.

"Q. Who employed you to work for the Atlantic Coast Line? A. J. J. Brown."

In the case of *Lyon v. Charleston & W. C. Ry.*, 77 S. C. 336, 58 S. E. 15, the court said:

"Assuming that the engineer was the offending servant, through whose negligence the plaintiff was injured, the whole evidence shows that, in accordance with the well-understood custom, the master had intrusted to the conductor, and not the engineer, the duty of giving orders for the shifting and coupling of cars, and there was no evidence that the conductor was absent and the train in charge of the engineer. Therefore, in carrying out the conductor's orders, the plaintiff was not at the time under the engineer, as a person having the right to direct or control his services, but was under the conductor, and hence was a fellow servant of the engineer on the same train."

However, it is contended by counsel for defendant in error that the defendant in error and the engineer were engaged in different departments of labor. The defendant in error, on cross-examination, among other things, testified as follows:

"Q. You don't know the name of the engineer? A. Well, Parker. I have heard since his name was Parker.

"Q. He was on the engine if that was his name? A. Yes, sir.

"Q. And he was there ready to move these cars? A. Yes, sir.

"Q. And you were all engaged in moving cars, to couple them up, and to get them out of the way? A. Yes, sir.

"Redirect:

"Q. While you all were engaged in coupling cars, did he have anything to do with the coupling? A. No, sir.

"Q. Did you have anything to do with that shifting engine? A. No, sir.

"Q. Did you have anything to do with his work, or he with yours? A. Only as he would come in and get the cars and carry them out of the yard.

"Q. You were instructed to go in there and make the coupling? A. Yes, sir.

"Q. And his work was in a different department? The shifting engine? A. Yes, sir.

"Q. And you were there to perform the orders under J. J. Brown? A. Yes, sir.

"Q. And he had nothing to do with your work? A. No, sir."

Then he was again cross-examined by Mr. Willcox, of counsel for plaintiff in error, as follows:

"Mr. Willcox: Q. Did you mean by that he did not couple cars? A. No, sir.

"Q. And he did not work on cars? A. No, sir.

"Q. That is the difference you describe between your work and his? A. He was an engineer.

"Q. But that is the difference you are describing between your work and his? A. Yes, sir."

While it is true that the engineer and the defendant in error were employed by different officials of the railroad company, this could not affect the relations they sustained to each other at the time of the accident.

In view of the decisions of the Supreme Court of South Carolina, we think that the question of fellow servant is not to be determined by the department to which the servant belonged. The true test seems to be as to the relations they sustained to each other at the time of the accident. In the case of *McDaniel v. C. & W. C. Ry. Co.*, 70 S. C. 95, 49 S. E. 2, a roadmaster, who was in the department of the engineer of roadways, sustained an injury as the result of the negligence of a conductor, who was in the department of the trainmaster, at a time when they were engaged in the common undertaking of removing a wreck, and a nonsuit was ordered. The opinion in that case is very full and contains a clear and intelligent discussion of this phase of the subject. It reads as follows:

"This action for damages rested on evidence to this effect: While plaintiff was engaged as roadmaster in clearing a wreck from defendant's roadway, the other portion of the work train ran against the detached flat car on which he was standing with such violence that he was thrown from the car and injured. The work train was operated by a conductor and engineer. Plaintiff, as roadmaster, worked under the direction of the engineer of the railroad, and the conductor of the work train ran his train under orders of the trainmaster; but the plaintiff was familiar with the rules of the railroad com-

pany, which required him 'to attend in person all accidents' on his division, and provided that 'conductors and engineers of work trains shall receive instructions from the roadmaster in regard to work to be done by their train.' On this occasion, plaintiff was actually left by a superior officer in charge of the entire work of removing the wreck. Subsequently, he and the conductor of the work train, of their own motion, agreed on a division of the work, and in pursuance of the agreement the work train was parted so that each should have some of the cars. The locomotive was attached to the cars the conductor was using. The accident occurred from these cars being moved violently without warning against the car which the plaintiff was using and on which he was standing.

"The Circuit Judge ordered a nonsuit on the ground that, if the injury was due to negligence, it was the negligence of a fellow servant. The plaintiff's exceptions, as we understand, really involve three propositions which he undertakes to sustain: First, the conductor operating the train was the superior of the roadmaster in the conduct of the work, and had a right to direct or control his services. There is no evidence to sustain this statement; on the contrary, the plaintiff positively confutes it. Second, the plaintiff and the conductor and engineer were engaged in different departments of labor. In the mere running of the work train from place to place, doubtless, to avoid interference with other trains, the conductor received orders from the trainmaster; but, when actually at work, the rules placed the conductor and crew under the directions of the roadmaster and in his department of labor. Third, the plaintiff and the conductor and engineer were engaged about a different piece of work. Obviously removing different pieces of the wreck did not constitute being engaged about different pieces of work, within the meaning of section 15, art. 9, of the Constitution.

"The common enterprise—the piece of work—was the removal of the wreck. The engine and cars were instrumentalities provided for the purpose, to be used by the conductor and engineer under the plaintiff as their superior, just as jack screws and shovels were to be used by others, and the negligent moving of the train stands on the same footing as would the negligent placing of a jack screw. But aside from the rules of the company and the other evidence indicating that the conductor and engineer were engaged as fellow servants about the same piece of work, the plaintiff testified that he voluntarily agreed with the conductor as to what part of the wreckage each should remove, and the accident occurred while they were working about the common enterprise as fellow servants in conjunction with each other in pursuance of the agreement. Of the many cases on the subject it is only necessary to refer to *Wilson v. Railway Co.*, 51 S. C. 79, 28 S. E. 91, and *Koon v. Railway Co.*, 69 S. C. 101 [48 S. E. 86].

"The judgment of this court is that the judgment of the Circuit Court be affirmed."

As we have said, the court below, after a clear analysis of the evidence, reached the conclusion that the engineer was a fellow servant of the defendant in error; but it appears that he refused to direct a verdict on the ground that, although the engineer was negligent, still it should be left to the jury to say whether Brown, the foreman, was negligent in permitting the engineer to move back after directing Farmer to go between the cars. In referring to this phase of the question, the court said:

"* * * But since I reached that conclusion, another view has come into my mind. I am not sure whether it is sound or not. I will hear argument, and that is: J. J. Brown was the foreman of the repair shops at the yards, and this plaintiff was under his orders. The engineer likewise was subject to his orders. Now, if he was negligent, the company is liable. The company is not liable, that is my view, from the negligence of the engineer, for he was a fellow servant; but if there was negligence of the foreman, if he failed to do what he ought to have done in any way, and could have prevented this accident by due and reasonable care, it seems to me that the company is re-

sponsible, and that I ought to leave that question to the jury. Whether there is any evidence whereby the jury can impute negligence to the foreman, Brown, it is a very nice question. Both the engineer and the plaintiff were subject to Brown's orders, and when Brown directed the plaintiff to go and fasten those cars together with a chain, whether it was not his duty to so control that engine as to prevent his employé being injured while conducting that operation which he directed is a question, it seems to me, that I ought to leave to the jury."

Thus it will be seen that the determination of this matter turns solely upon the question as to whether the injuries sustained were due to the negligence of Brown, the foreman. It is admitted that Brown directed the defendant in error to go in between the cars (and, at the time of doing so, the cars were standing still); but, so far as we are able to find, the engineer, all of a sudden, without instructions from Brown, or any one else, began to move the cars, and as a result of which the injuries were sustained. Brown was a witness, and, among other things, said:

"Q. State the place where the accident occurred, generally the place. A. The place where the accident occurred was in the back yard at the Florence shops. The engine came around to do our shifting as usual in the afternoon, and I am not certain, but it strikes me that I had just come in from a wreck, been in about an hour, and I walked down through the yard. Mr. Farmer was attending to his business, assistant foreman. I noticed that a good many of the drawheads in the cars were broken out, and I said to Mr. Farmer, 'You will have to get some chains to chain those cars up so we can have them moved,' and I stopped on the engineer's side, just opposite the car that was going to be chained up, about halfway of the car, and about that time Mr. Farmer came up with the chains. Just before he attempted to go between the cars, he signed the engineer, gave him a signal not to move back, and the engineer while he was still, he gave him this (indicating the signal) as an extra precaution not to move back, and just as he stepped between the cars, I suppose, well, half a minute or about a minute, something like that, I noticed that the car commenced coming back that the engine was coupled to, and I signed him down to go back about six feet, I guess about three feet space between the cars when Mr. Farmer went back and the cars came back about six feet I guess, caught Mr. Farmer between them, and just as soon as I saw the car moving, then I signed him down and signed him ahead right quick, and as he fell out Mr. Farmer just made one step out between the cars and fell right on the ground.

"Q. When the engineer came back, did you sign him back on Mr. Farmer? A. No, sir; I signed him down quick, just as soon as I seen the car moving.

"Q. And he still came on? A. Yes, sir."

The complaint in this case is based upon the theory that Brown acted properly in telling Farmer to go between the cars, which was a necessary piece of work, and it is specifically charged that other agents of the defendant company moved the train at the time the injury was incurred. Paragraph 4 of the complaint, among other things, contains the following allegations:

"That on August 2, 1906, while the plaintiff was engaged in said work and was on defendant's tracks and between said cars as directed by his superior officer, J. J. Brown, the defendant, its agents and servants, * * * caused its said engine to strike and move said cars together, thereby catching plaintiff between said cars."

There is no allegation here to the effect that Brown was negligent in not preventing the engine from moving, while, on the other hand, the sole charge is that the defendant, its agents and servants, caused

the engine to move backward. There is no allegation that Brown was operating the engine, or that he was directing its operation, while, on the other hand, the proof shows that the engineer was in charge of the engine, and was the only one who could cause it to move. Under the ruling as laid down by the Supreme Court of South Carolina, the defendant in error not having alleged that Brown was negligent in not controlling the engine at the time that Farmer was making the coupling, he was thus precluded from proving such negligence as a basis for recovery. In the case of *Goodwin v. Railroad Co.*, 76 S. C. 557, 57 S. E. 530, the rule is thus stated:

"Where the complaint alleges specific acts of negligence, the plaintiff is restricted to proofs of such acts of negligence."

In the case of *Brown v. Spartanburg U. & C. R. R. Co.*, 57 S. C. 433, 35 S. E. 732, the court, in discussing this question, said:

"It seems to us that the ruling of the circuit judge is fully sustained by our own case of *Glenn v. Railroad Co.*, 21 S. C. 466, where the negligence alleged was in failing to furnish an engine, running at night, with a headlight; and the court said that, while there was quite sufficient evidence to show negligence in that respect, yet, there being no evidence tending to show that the injury complained of resulted from such negligence, there was no error in granting the nonsuit. To the same effect, see *Fell v. Railroad Co.*, 33 S. C. 198. 11 S. E. 691, and *Jenkins v. McCarthy*, 45 S. C. 278, 22 S. E. 883, where Mr. Justice Pope, in delivering the opinion of the court, well said: 'It would be hazardous to litigants, when brought into court to answer for a specified negligence, to open wide the door to proof of any kind of negligence.'"

This view is also sustained in the case of *Jenkins v. McCarthy*, 45 S. C. 278, 22 S. E. 883.

While such is the rule in that state, it is not material in this instance, inasmuch as there is not a scintilla of evidence to show that the injuries sustained by defendant in error were due to the negligence of Brown, the foreman. As we have already said, at the time that the foreman directed defendant in error to go between the cars and do the work in question, the cars were standing still, and the foreman had seen defendant in error signal the engineer not to move back—giving at the time an extra precaution not to move back—but that, within "half a minute or about a minute" after he stepped between the cars, the cars began to move back. Then it was that the foreman signed the engineer down and did all he could to prevent the engineer from running the car back in the manner described. Inasmuch as the foreman had seen defendant in error signal the engineer to remain where he was, and observing that there was ample space for him to get between the cars at the time, it is difficult to understand upon what theory he could be required to do more than he did on that occasion. If, after defendant in error went between the cars, the foreman had, without warning to defendant in error, signaled the engineer to move the train back, then, undoubtedly, the injuries would have been due to the negligence of the foreman; or if, when he saw the engineer moving back, he could have prevented the injuries by giving the engineer a proper signal, and failed to do so, that would also have been negligence on his part. But the evidence shows that, the moment he saw the engine beginning to move the cars, he at once signaled the engineer to stop,

and used all means in his power to prevent the injury. It seems to us that he did all that could have been required of one similarly situated.

Witness Farmer, in referring to the cars at the time he went between the same, said:

"Q. When you went in between the cars to chain it, was any part of the train in motion? A. No, sir.

"Q. Was the engine moving or not? A. No, sir; it was still.

"Q. How long had it been still? A. It had been still for some time. I could not say exactly how long.

"Q. At the time Mr. Brown gave you the order to go in there, could he see the engine? A. Yes, sir; he stood right at it until I got back with the chain.

"Q. You and he were standing very near together, and he could see the entire train? A. Yes, sir.

"Q. And he saw that the engine was still? A. Yes, sir.

"Q. And he ordered you to go in there and couple it when the engine was still? A. Yes, sir."

It seems to us, in view of the undisputed testimony, that the foreman did all that human foresight could suggest to prevent the accident.

Under these circumstances, we think the presiding judge was in error in permitting the jury to decide as to whether or not the foreman (Brown) was negligent.

We have examined the case of *Lyon v. C. & W. C. Ry. Co.*, 77 S. C. 328, 58 S. E. 12. That case is very much in point. There, the plaintiff was employed as a coupler, and was injured while carrying out the orders of the conductor to couple two cars. The evidence shows that the injury was due to the negligence of the engineer, and, in referring to the point which we are now considering, the court said:

"The general rule in this state and elsewhere is that an engineer is not ordinarily the representative of the master, but is the fellow servant of the train hands—all being under the orders of the conductor, as the representative of the master. The plaintiff in this instance testified, however, that, at the time of his employment as a flagman, he was told that he must obey the orders of the conductor or the engineer, and that, accordingly, he did obey, to use his own words, 'the conductor when he needed my services and the engineer when he needed my services.' The Constitution provides: 'Every employé of any railroad corporation shall have the same rights and remedies for any injuries suffered by him from the acts or omissions of said corporation as are allowed by the law to other persons who are not employées, when the injury results from the negligence of a superior agent or officer, or a person having a right to direct or control the services of a party injured, and also when the injury results from the negligence of a fellow servant engaged in another department of labor from that of the party injured, or of a fellow servant on another train of cars, or one engaged about another piece of work.'

"Under this constitutional provision, in view of the plaintiff's evidence as to obeying the orders of the engineer, the question arises whether in this case the engineer was a superior agent or officer, or person having the right to control or direct the services of the plaintiff. Under a constitutional provision identical with ours, the Supreme Court of Mississippi held an engineer not to be a person having the right to control or direct the services of a brakeman. *Evans v. Railway* [70 Miss. 527] 12 South. 581. In this state, the rule adopted is thus clearly stated in *Brabham v. Tel. Co.*, 71 S. C. 56, 50 S. E. 716, and is quoted and approved in *Martin v. Royster Guano Co.*, 72 S. C. 237, 243, 51 S. E. 680: 'In determining who are fellow servants, the test or rule in this state is not whether the servants are of different grade, rank, or authority, one of them having the power to control and direct the services of the other, but the test is in the character of the act being performed by the offending servant, whether it was the performance of some duty the master owed to the injured servant, the performance of which duty the master had intrusted

to the offending servant. In the case under consideration there was no duty resting upon the defendant to give notice to the plaintiff, as the danger was not hidden or unusual, and the plaintiff had knowledge thereof.' Assuming that the engineer was the offending servant, through whose negligence the plaintiff was injured, the whole evidence shows that, in accordance with the well-understood custom, the master had intrusted to the conductor, and not the engineer, the duty of giving orders for the shifting and coupling of cars, and there was no evidence that the conductor was absent and the train in charge of the engineer. Therefore, in carrying out the conductor's orders, the plaintiff was not at the time under the engineer, as a person having the right to control or direct his services, but was under the conductor, and hence was a fellow servant of the engineer on the same train."

The evidence in this case, as we have stated, shows that Brown, the foreman, was present, and that defendant in error was acting strictly under his directions. The case from which we have just quoted is based upon the assumption that the conductor was present at the time the engineer and coupler were engaged in making the coupling, and that the coupler was carrying out the orders of his superior, the conductor. Here, we have a case in which a coupler, acting under the directions of the conductor, goes between a train of cars for the purpose of making a coupling, and, while there, the engineer, acting in his capacity as engineer, without receiving an order to do so from the conductor, moves the train. Thus, we have a case practically on all fours with that case, and the Supreme Court of South Carolina held that, if the act of the engineer caused the accident, the doctrine of injury by a fellow servant obtained, and there could be no recovery.

Under the circumstances in this case, did the presiding judge err in refusing to direct a verdict in favor of the defendant below? Under the law in South Carolina, where only one reasonable inference can be drawn from the testimony, it is the duty of the court to direct a verdict. In the recent case of *McLean v. A. C. L. R. Co.*, 81 S. C. 100, 61 S. E. 900, 1071, 18 L. R. A. (N. S.) 763, 128 Am. St. Rep. 892, decided July 25, 1908, the court said:

"All questions of issues of fact are for the jury; but when the facts upon which the case must turn are undisputed or conclusively established, and they admit of but one inference, the question is one of law, since there is no issue of fact, and the court not only may, but when requested must direct the jury as to the proper conclusion. *Jarrell v. Railroad Co.*, 58 S. C. 495, 36 S. E. 910; *Lyon v. Railway*, 77 S. C. 344, 58 S. E. 12."

This rule is in accordance with the rule which prevails in the federal courts. In the case of *Randall v. B. & O. R. R. Co.*, 109 U. S. 478, 3 Sup. Ct. 322, 27 L. Ed. 1003, the court said:

"It is the settled law of this court that when the evidence given at the trial, with all inferences that the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant."

We have carefully considered the cases relied upon by defendant in error, but do not think that the rulings announced therein apply to the case at bar.

For the reasons herein stated, the judgment of the court below is reversed, and the cause remanded, with instructions to proceed in accordance with the views herein announced.

Reversed.

MORRIS, District Judge (dissenting). I am not able to concur with the majority of the court.

When Farmer, by direction of the foreman in charge, went underneath the broken cars to connect them with a chain, he put himself by order of the foreman in a dangerous place, where he was helpless. He had a right to look to the foreman for protection. The foreman was standing close at hand in position in which he could give that protection if he was watchful. An engine which was at a little distance began to move toward the broken cars, and before it stopped struck them, and Farmer was caught between them and injured.

It seems to me that from all the circumstances of the case there was ground for the finding of the jury that the foreman was inattentive and negligent at a time when he should have given his best attention, and that he could, by prompt action, have signaled the engineer to stop in time to have prevented the accident. If, as the jury found, the foreman was negligent, then the railroad company was responsible, and the verdict was justified.

Ex parte GLASER (two cases).

(Circuit Court of Appeals, Second Circuit. January 27, 1910.)

Nos. 216, 217.

1. EXTRADITION (§ 14*)—INTERNATIONAL EXTRADITION—PROCEEDINGS—EVIDENCE.

Under the treaty of 1852 of the United States with Prussia and the other states of Germanic Confederation for extradition of criminals, providing that they shall be delivered on such evidence of criminality as according to the laws of the place where the fugitive was found, would justify his apprehension and commitment for trial, it is not necessary, to justify extradition, to present evidence sufficient to sustain a conviction, evidence justifying a committing magistrate in holding accused by imprisonment or by bail to await subsequent proceedings being sufficient, and the provisions of New York Code that conviction cannot be had on the uncorroborated evidence of an accomplice having no application.

[Ed. Note.—For other cases, see Extradition, Cent. Dig. §§ 15, 16; Dec. Dig. § 14.*]

2. EXTRADITION (§ 14*)—INTERNATIONAL EXTRADITION—PROCEEDINGS—EVIDENCE.

Under Act Cong. Aug. 3, 1882, § 5, c. 378, 22 Stat. 216 (U. S. Comp. St. 1901, p. 3595), amending Rev. St. § 5271, providing that, where depositions are offered in evidence in an extradition case, they shall be admitted if they are properly authenticated to be received for similar purposes by the tribunals of the foreign countries from which accused shall have escaped, and the certificate of the principal diplomatic officers of the United States in such country shall be proof that the depositions are so authenticated, depositions so authenticated are properly admitted, though some of them are not sworn to.

[Ed. Note.—For other cases, see Extradition, Cent. Dig. §§ 15, 16; Dec. Dig. § 14.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. EXTRADITION (§ 14*)—INTERNATIONAL EXTRADITION—PROCEEDINGS—EVIDENCE.

In proceedings for the extradition of accused for forgery, and uttering forged documents, evidence *held* sufficient to justify the issuance of the warrant of extradition.

[Ed. Note.—For other cases, see Extradition, Cent. Dig. §§ 15, 16; Dec. Dig. § 14.*]

4. CRIMINAL LAW (§ 372*)—EVIDENCE—OTHER OFFENSES.

Where one is charged with uttering forged notes and similar crimes, evidence as to other offenses is admissible.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 372.*]

Appeals from the District Court of the United States for the Southern District of New York.

In the matter of the applications of Gustav Glaser for writs of habeas corpus. From orders dismissing the writs of habeas corpus and certiorari, the petitioner appeals. Affirmed.

This cause comes here upon appeal from two orders of the District Court, Southern district of New York, dismissing writs of habeas corpus and certiorari in two applications for the extradition to the German Empire of Gustav Glaser, a German subject, who is accused of having committed in Berlin various acts of forgery and of having uttered forged papers. Both appeals may be considered together.

The relevant provisions of the treaty of 1852 are as follows:

Excerpt from Treaty of 1852 Referred to, Article 1.

"It is agreed that the United States and Prussia and the other states of Germanic Confederation included in, or which may hereafter accede to this convention shall upon mutual requisitions by them or their ministers, officers or authorities, respectively made, deliver up to justice all persons, who, being charged with the crime of murder, or assault with intent to commit a murder, or piracy or arson, or robbery, or the utterance of forged papers, or the fabrication or circulation of counterfeit money whether counterfeit paper money or the embezzlement of public moneys, committed within the jurisdiction of either party, shall seek an asylum or shall be found within the territories of the other. Provided that this shall only be done upon such evidence of criminality as according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offense had there been committed, and the respective judges and other magistrates of the two governments shall have power, jurisdiction and authority upon complaint, under oath to issue a warrant for the apprehension of the fugitive or person so charged that he may be brought before such judges or other magistrates respectively to the end and that the evidence of criminality may be heard and considered and if, on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining judge or magistrate to certify the same to the proper executive authority that a warrant may issue for the surrender of such fugitive. The expense of such apprehension and delivery shall be borne and defrayed by the party who makes the requisitions and receives the fugitive."

Archibald Palmer, for appellant.

Carl L. Schurz, Jr., for appellee.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts as above). The contention of appellant is that the evidence presented before the com-

*For other cases see same topic & § NUMBERS in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

missioner was not sufficient to justify his apprehension and commitment for trial, if the crime had been committed here. His argument in support of this contention proceeds upon the theory that the evidence should be sufficient to sustain a conviction, which is a wholly mistaken conception of the practice in these cases. *Benson v. McMahon*, 127 U. S. 457, 8 Sup. Ct. 1240, 32 L. Ed. 234; *Ornelas v. Ruiz*, 161 U. S. 502, 16 Sup. Ct. 689, 40 L. Ed. 787. It is only necessary to present such evidence as would justify a committing magistrate in holding the accused by imprisonment or under bail to await subsequent proceedings. The provisions of the New York Code that conviction cannot be had on the uncorroborated testimony of an accomplice have no application.

Appellant further contends that some of the depositions should be rejected because they are not sworn to, and that, if so rejected, there will not be sufficient testimony left to justify the commissioner's decision.

By the Act Cong. Aug. 3, 1882, § 5, c. 378, 22 Stat. 216 (U. S. Comp. St. 1901, p. 3595), amending section 5271, Rev. St. U. S., it is provided:

"That in all cases where any depositions, warrants, or other papers or copies thereof shall be offered in evidence upon the hearing of any extradition case under title sixty-six of the Revised Statutes of the United States, such depositions, warrants, and other papers, or the copies thereof, shall be received and admitted as evidence on such hearing for all the purposes of such hearing if they shall be properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped, and the certificate of the principal diplomatic or consular officers of the United States resident in such foreign country shall be proof that any deposition, warrant or other paper or copies thereof, so offered, are authenticated in the manner required by this act."

All the depositions in this case were properly and duly authenticated as the statute requires. The witnesses testified in the Prussian court before a Councillor of the Landericht Foth as examining magistrate in a criminal proceeding against Glaser and others. It appears from the certificate that one of the witnesses, George Dietz, was not sworn, because he was a minor under 16 years of age, and the German law does not allow him to be sworn. Some of the other witnesses were accomplices, being prosecuted with Glaser, and the German law does not allow them to be sworn. Although not sworn, however, these witnesses gave their testimony in the presence of the court, fully informed of what they were doing, realizing what might be the result of their statements upon the personal liberty of the accused, and under circumstances which laid the obligation upon their consciences to tell the truth. Ordinarily we say here that a committing magistrate cannot hold a person accused of crime except upon "sworn" testimony; but that is not strictly accurate, there are persons who have conscientious scruples about taking any oath at all, and their testimony is received when they "solemnly, sincerely and truly affirm." Such testimony is accepted because the circumstances under which they make their statements are deemed the full equivalent of the invocation of the Supreme Being or of laying hand upon the Gospels. No magistrate here would decline to commit an accused person merely because all the witnesses against him had conscientious scruples about swear-

ing to the testimony. If such affirmations would be received in the case of an offense committed here, when the witness has conscientious scruples, we see no reason why similar affirmations made in a German court, because the German government has conscientious scruples about administering oaths to minors and accomplices, should not be accorded like competency. This opinion seems to be entirely in accord with the latest deliverance of the Supreme Court upon a similar question in *Elias v. Ramirez* (January 3, 1910) 215 U. S. 398, 30 Sup. Ct. 131, 54 L. Ed. —.

The first offense charged against the petitioner is that he forged the acceptance of one Fritz Dueker to a bill of exchange for 4,200 marks, and the acceptance of one L. Arndt to a bill of exchange for 4,000 marks; that he presented both of these forged bills to Solomon Delmonte of Berlin for discount, and that in order to convince Delmonte of their genuineness he gave to Delmonte a letter signed by the firm of Kuechling & Co., which Glaser had also forged; that Delmonte thereupon discounted the bills. Delmonte testified, under oath, that Glaser presented him the two bills, which Delmonte discounted for 3,100 marks and other valuable consideration. Dueker and Arndt both testified, under oath, that they never signed any such acceptances. The circumstances that the drafts were not shown to the witnesses is immaterial; a person's testimony that he never signed a described document might be quite convincing to a jury although the document itself were lost or destroyed. Hearing from Dueker and Arndt that they had never signed the acceptances, Delmonte sent for Glaser, who, on being informed of their statements, took out of his pocket and exhibited to Delmonte a letter purporting to be signed by Erich Kuechling & Co., in which it was made to appear that the acceptances had been sent to Glaser by that firm in the ordinary course of business. His suspicions being aroused, Delmonte arranged for a further interview with Glaser, at which a police officer, one Wolter, was present, and then made a charge against Glaser. Glaser made some excuse to go to the closet, where, as Wolter testified under oath, he attempted to destroy the Kuechling letter by tearing it up and throwing the pieces in the basin. They were rescued and pieced together, and Kuechling testified under oath that the letter was a forgery. It is difficult for us to understand upon what theory petitioner questions the sufficiency of this evidence. Had the facts taken place here it is inconceivable that any committing magistrate would have hesitated for a moment to hold Glaser for the action of the grand jury, under the charges of forgery and of uttering forged documents.

It is unnecessary to go in further detail through the other charges. In cases where one is charged with uttering forged notes, and similar crimes, evidence as to other offenses is admissible. *Sapir v. U. S.* (C. C. A., 2d Circuit, November 9, 1909) 174 Fed. 219. With the illumination cast upon the petitioner by the testimony under the first charge, it is sufficient to say that there is quite enough in the depositions presented by the demanding government to warrant the commissioner in holding, as to all the charges, that he should be sent to answer them to the country from which he fled.

Both orders are affirmed.

NORTHERN PAC. RY. CO. et al. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. February 7, 1910.)

No. 1,719.

1. PUBLIC LANDS (§ 81*)—LANDS SUBJECT TO SELECTION IN LIEU OF PARK LANDS—CONSTRUCTION OF STATUTE.

Act March 2, 1899, c. 377, 30 Stat. 993, creating the Mt. Rainier National Park, and authorizing the Northern Pacific Railroad Company, on reconveying its lands within such park to the United States, to "select an equal quantity of nonmineral public lands, so classified as nonmineral at the time of actual government survey, which has been or shall be made," etc., in lieu of those so reconveyed, requires that the lands so selected shall be in fact "nonmineral public lands," which is the plain provision of the act and in accordance with the settled policy of Congress; and the company was not entitled to select lands then known to be mineral lands, valuable for their coal deposits, merely because at the time of their survey, several years before, they were classified as nonmineral, and patents issued to it for such lands with knowledge of their true character were without authority of law, and will be canceled at suit of the government.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 81.*]

2. PUBLIC LANDS (§ 102*)—AUTHORITY OF LAND DEPARTMENT—CORRECTION OF MISTAKES.

Fraud in the entry or selection, or any mistake of law or lack of authority on the part of the officers of the Land Department to make the entry, sale, or exchange, as the case may be, of the public lands, may be inquired into and determined by that department at any time prior to the issuance of patent.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 102.*]

Appeal from the Circuit Court of the United States for the District of Montana.

Suit in equity by the United States against the Northern Pacific Railway Company and others. Decree for complainant (170 Fed. 498), and defendants appeal. Affirmed.

William Wallace, Jr., John G. Brown, R. F. Gaines, Charles W. Bunn, and Charles Donnelly, for appellants.

T. J. Walsh, C. B. Nolan, James W. Freeman, U. S. Atty., and Frank Hall, for the United States.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. The appellee brought this suit to obtain a decree annulling certain patents which had been issued to the appellant Northern Pacific Railway Company, as the successor in interest of the Northern Pacific Railroad Company, for certain coal lands situated in Carbon county, Mont. Congress, by act approved March 2, 1899 (30 Stat. 993, c. 374), provided for the creation within certain specified boundaries of a national park in the state of Washington, the title of the act being "An act to set aside a portion of certain lands in the state of Washington, now known as the Pacific Forest Reserve, as a public park to be known as the Mt. Ranier National Park." Prior to the passage of that act certain lands falling within those exterior boundaries had been conveyed by the government to the Northern

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Pacific Railroad Company as a part of the land grant made to it by Congress, and to which lands the Northern Pacific Railway Company subsequently succeeded. The third and fourth sections of the act of March 2, 1899, are as follows:

"Sec. 3. That upon execution and filing with the Secretary of the Interior by the Northern Pacific Railroad Company of proper deed releasing and conveying to the United States the lands in the reservation hereby created, also the lands in the Pacific Forest Reserve which have been heretofore granted by the United States to said company, whether surveyed or unsurveyed, and which lie opposite said company's constructed road, said company is hereby authorized to select an equal quantity of nonmineral public lands, so classified as nonmineral at the time of actual government survey which has been or shall be made, of the United States, not reserved, and to which no adverse right or claim shall have attached or have been initiated at the time of the making of such selection, lying within any state into or through which the railroad of said Northern Pacific Railroad Company runs, to the extent of the lands so relinquished and released to the United States: Provided, that any settlers on lands in said national park may relinquish their rights thereto and take from the public lands in lieu thereof to the same extent and under the same limitations and conditions as are provided below for forest reserves and national parks.

"Sec. 4. That upon the filing by the said railroad company at the local land office of the land district in which any tract of land selected, and the payment of the fees prescribed by law in analogous cases, and the approval of the Secretary of the Interior, he shall cause to be executed in due form of law, and delivered to said company, a patent of the United States conveying to it the lands so selected. In case the tract so selected shall at the time of selection be unsurveyed, the list filed by the company at the local land office shall describe such tract in such manner as to designate the same with a reasonable degree of certainty; and within the period of three months after the lands including such tract shall have been surveyed and the plats thereof filed by said local land office, a new selection list shall be filed by said company describing such tract according to such survey; and in case such tract as originally selected and described in the list filed in the local land office shall have precisely conformed with the lines of the official survey, the said company shall be permitted to describe such tract anew so as to secure such conformity."

On the 19th of July, 1899, the Northern Pacific Railway Company, as successor in interest of the Northern Pacific Railroad Company, executed its deed conveying to the United States its lands within the proposed park, and thereby became entitled to select and receive an equal quantity of the class of lands described in section 3 of the act of 1899 above set out. In December of the same year the railway company selected the lands in suit, which had been surveyed by the government several years theretofore, and had been by its surveyor "classified as nonmineral at the time of actual government survey." As a matter of fact the lands so surveyed were mineral lands, which fact was known to the railway company at the time of its selection of them, and it was because of their known mineral value that they were so selected. The selections were approved by the register and receiver of the local land office, and transmitted to the Commissioner of the General Land Office at Washington. Thereafter, and previous to the issuance of any patent for such lands, various persons, seeking to enter portions of them under the provisions of the United States statutes relating to mineral lands, asked for the cancellation of the selections made by the railway company, upon the ground that the lands in question contained valuable deposits of coal, and protested against the issu-

ance of patents therefor to the railway company. It was finally held by the Secretary of the Interior (*Davenport v. Northern Pacific Railway Co.*, 32 Land Dec. Dep. Int. 28) that the railway company was entitled to select these lands under the act of March 2, 1899, and accordingly on the 17th of August, 1903, patents covering them were issued to the company. The facts above stated are undisputed, and the case of the government rests upon the alleged mistake of law on the part of the officers of the Land Department in issuing the government patents, pursuant to their ruling that the railway company was entitled to select and have patented to it under the provisions of the act of March 2, 1899, mineral lands of the United States, at the time knowing them to be such, provided such lands had theretofore been erroneously classified by the government surveyor as nonmineral.

We agree with the court below that the construction placed by the Land Department upon the act of Congress was wrong. The provision for the exchange of lands is that for all lands within the exterior boundaries of the part conveyed to the United States by the railway company the latter was authorized "to select an equal quantity of non-mineral public lands, so classified as nonmineral at the time of actual government survey which has been or shall be made, of the United States, not reserved," etc. The effect of the Land Department's construction of this language is to practically eliminate the words "non-mineral" and "so," and give to the act the precise meaning it would have if the provision read:

"Said company is hereby authorized to select an equal quantity of public lands, classified as nonmineral at the time of the actual government survey."

It is manifest, we think, that that cannot be properly done, not only because each word in a statute must be given effect where that is possible, but also because such a construction absolutely eliminates the most important words in the clause in question, to wit, "nonmineral"; for in acts almost innumerable relating to the disposal of the public lands Congress has manifested its consistent and insistent intent that its known mineral lands should be disposed of only in accordance with the provisions of its statutes governing that class of lands. The ambiguity suggested in respect to the language is, in our opinion, more apparent than real. We repeat the language, as follows:

"Said company is hereby authorized to select an equal quantity of non-mineral public lands, so classified as nonmineral at the time of actual government survey which has been or shall be made, of the United States, not reserved," etc.

The words "public lands" in this clause are qualified by the adjective "nonmineral," which precedes them, as well as by the phrase "so classified as nonmineral at the time of the actual government survey which has been or shall be made," which follows them. In other words, the lands authorized by Congress to be taken by the railway company in lieu of lands conveyed by it to the United States must not only have been classified by the government surveyor as nonmineral, but must be nonmineral in fact. As is well said by the Attorney General:

"'He was a black Tartar of the Ukraine breed,' means exactly the same as 'He was a black Tartar, and of the Ukraine breed.'"

Under this act, if at the time of the application for the land by the railway company the Land Office finds the land applied for classified as mineral at the time of the actual survey, the selection must be rejected. If returned by the government surveyor as nonmineral, inquiry as to the true character of the land is still open to the government up to the time of issuance of its patent. The law in respect to that matter is well settled. Fraud in the entry or selection, or any mistake of law or lack of authority on the part of the officers of the Land Department to make the entry, sale, or exchange, as the case may be, of the public lands, may be inquired into and determined by that department at any time prior to the issuance of patent (*Orchard v. Alexander*, 157 U. S. 372, 383, 15 Sup. Ct. 635, 39 L. Ed. 737; *Lumber Co. v. Rust*, 168 U. S. 589, 593, 18 Sup. Ct. 208, 42 L. Ed. 591; *Diller v. Hawley*, 26 C. C. A. 514, 81 Fed. 651; *Hawley v. Diller*, 178 U. S. 476, 20 Sup. Ct. 986, 44 L. Ed. 1157), after which the matter becomes subject to inquiry only in the courts (*U. S. v. Stone*, 2 Wall. 525, 535, 17 L. Ed. 765; *Moore v. Robbins*, 96 U. S. 530, 24 L. Ed. 848; *U. S. v. Schurz*, 102 U. S. 378, 396, 26 L. Ed. 167; *Bicknell v. Comstock*, 113 U. S. 149, 151, 5 Sup. Ct. 399, 28 L. Ed. 962; *Mining Co. v. Campbell*, 135 U. S. 286, 10 Sup. Ct. 765, 34 L. Ed. 155; *Williams v. U. S.*, 138 U. S. 514, 11 Sup. Ct. 457, 34 L. Ed. 1026). But matters of fact, such as the character of the land, its condition as to occupancy, and the like, when once investigated and determined by the officers of the Land Department, and the applicant allowed to select or enter and pay for it, vests a right which cannot be affected by subsequent discoveries in respect to its character or condition. Authorities *supra*; *Colorado Coal & Iron Co. v. U. S.*, 123 U. S. 307, 328, 8 Sup. Ct. 131, 31 L. Ed. 182; *Spratt v. Edwards*, 15 Land Dec. Dep. Int. 290, 291; *Davis' Adm'r v. Weibbold*, 139 U. S. 507, 11 Sup. Ct. 628, 35 L. Ed. 238; *Jones v. Driver*, 15 Land Dec. Dep. Int. 514, 518; and numerous cases cited in *Olive Land & Development Co. v. Olmstead* (C. C.) 103 Fed. 568.

The judgment is affirmed.

HALLA et al. v. ROGERS et al.

(Circuit Court of Appeals, Ninth Circuit. February 7, 1910.)

No. 1,764.

MINES AND MINERALS (§ 67*)—MINING LEASE—WRONGFUL EXCLUSION OF LESSEE—JURISDICTION OF EQUITY TO GRANT RELIEF BY INJUNCTION AFTER EXPIRATION OF TERM.

Defendants leased a placer mining claim to complainants for a term of years with the right to work the same and extract the mineral therefrom, paying a percentage of its value as royalty, during the term; time being of the essence of the contract. Before the expiration of the first year, defendants wrongfully excluded complainants from the claim and prevented them from working it during the entire remainder of the term.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Held, that the instrument, in addition to being a demise of the claim for the term stated, also vested complainants with the right to become the owners of the mineral therein on condition that it be extracted and converted into personalty during such term; that, having wrongfully prevented complainants from complying with such condition, defendants thereby waived or estopped themselves from exercising the right to exclude complainants from the claim on the expiration of the term, and until they had a reasonable time to extract the ore they had contracted to purchase; and that a court of equity had power to protect complainants in the exercise of such right by injunction, where it would result in irreparable injury.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. § 187; Dec. Dig. § 67.*]

Appeal from the District Court of the United States for the Second Division of the District of Alaska.

Suit in equity by W. J. Rogers and Albert Fink, copartners as the Golden Bull Mining Company, and others, against Otto Halla and others. From an order granting a preliminary injunction, defendants appeal. Affirmed.

Elwood Bruner, J. Allison Bruner, Wm. A. Gilmore, Albert H. Elliot, and P. M. Bruner, for appellants.

J. C. Campbell, W. H. Metson, F. C. Drew, C. H. Oatman, and J. A. MacKenzie, for appellees.

Before GILBERT and MORROW, Circuit Judges, and HUNT, District Judge.

HUNT, District Judge. This is an appeal by defendants from an order of injunction pendente lite granted by the United States District Court for the Second Division of Alaska, restraining defendants from interfering with the peaceable possession of the Golden Bull placer mining claim, situated in the Cape Nome recording district. Omitting details and such other matters as are unnecessary to the consideration of the questions involved, the material facts may be stated thus:

The complaint filed June 30, 1909, states, in substance: That on February 26, 1906, defendants, who were owners of the Golden Bull placer claim, made in writing a so-called "lease" thereof to plaintiffs for a term ending July 1, 1909, which provided, among other things, that time was of its essence, that plaintiffs should at once enter upon and work and mine the claim steadily and continuously during the mining seasons, that they should do the necessary representation, that they should keep a true account of all clean-ups, and that they should pay to defendants certain percentages of the values of all gold and other metals extracted during the term; that on February 17, 1907, defendants wrongfully ejected plaintiffs from, and took possession of, the claim, whereupon plaintiffs brought a certain action against defendants to recover possession, in which action defendants pleaded that plaintiffs had breached the covenants of the lease, the action resulting in a judgment for plaintiffs, which was affirmed by this court; that, in obedience to the mandate of this court in that action, plaintiffs were reinstated and yet remain in possession of the claim; that as soon as plaintiffs were put in possession, June 1, 1909, defendants

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

conspired to secure an injunction against plaintiffs' opening or working the claim, and succeeded on June 3, 1909, in obtaining it upon giving a \$25,000 bond, whereby plaintiffs have been prevented from working the claim during the remainder of the term; that the conspiracy was for the purpose of preventing plaintiffs from enjoying the fruits and profits of the lease, and with an agreement that the plaintiffs therein would, on July 1, 1909, dismiss the collusive action, and thereupon the defendants would themselves take possession and work the claim and take the proceeds; that all the pay gravel could and would have been mined and extracted by plaintiff during the term but for the wrongful acts and conspiracies of defendants, and that because of such acts and conspiracies plaintiffs have been and are unable to enjoy any of the benefits or profits from the lease; that unless plaintiffs be permitted to enjoy the leasehold estate for such reasonable time as may be necessary for them to work the claim and extract the minerals which they could and would have taken out but for the wrongs of defendants, they will suffer damages in the sum of \$75,000; that defendants threaten to, and will, unless restrained by the court, on July 1, 1909, oust and eject plaintiffs, and thereupon extract the minerals to which plaintiffs are entitled and convert them to their own use; that defendants are unable financially to respond in damages to plaintiffs. Plaintiffs pray for a decree quieting title in them as to their leasehold estate, for an injunction against defendants restraining them from asserting that the leasehold estate terminated on July 1, 1909, and adjudging that plaintiffs' estate began February 26, 1906, and will end when the plaintiffs have had a reasonable opportunity, free from defendants' interference, to enjoy the benefits and profits which they would have enjoyed but for defendants' wrongs, and for general relief. Defendants demurred. On a rule to show cause why an injunction pending suit should not issue as prayed for, a hearing was had at which the evidence tended to establish the material allegations of the complaint, and on July 10, 1909, an order was entered enjoining pendente lite defendants from interfering with plaintiffs' possession of the claim, and at the same time restraining defendants from mining or extracting any gold or gold dust while the injunction remains in force. From that order the defendants have appealed.

Appellants contend that the complaint does not state facts sufficient to warrant the exercise of injunctive jurisdiction. It is insisted with vigor that, although courts in proper cases may reform or recast a contract so as to make it express the agreement actually made, or cancel or rescind a contract for fraud, accident, or mistake practiced, happening or existing when the agreement was reduced to writing, yet they may not make contracts for parties; and it is asserted in substance, that since the lease here involved was, when entered into, free from taint of fraud or infirmity of accident or mistake, plaintiffs cannot rightly seek, and the court cannot rightly grant, an enlargement of the term stipulated by the parties. From these premises defendants draw the conclusion that the complaint, which shows that the leasehold estate expired on July 1, 1909, is insufficient, and hence that the temporary injunction was erroneously granted.

We concede, as an elementary proposition, that no court, whether administering legal or equitable remedies, may make contracts. Courts may declare what contracts were made, and award appropriate relief by way of damages or specific performance, or both. But we cannot sustain the contention that in the case at bar plaintiffs seek only to induce the court to make or alter a contract, or that the court, by its order, has made a contract or altered the contract contained in the lease. Perhaps the words of the complaint, literally interpreted, bear the meaning which defendants place upon them. But the complaint sets up the facts and prays for general relief as well as for the specific remedies to which plaintiffs deem themselves entitled upon those facts. They will, therefore, be awarded such relief, if any, as the pleadings and proof warrant.

What, in brief, is the situation? On February 26, 1906, defendants made a lease to plaintiffs of an unpatented placer claim for a term ending July 1, 1909, under covenants on plaintiffs' part to do the annual representation work, to mine the claim steadily and continuously during the term on pain of forfeiture, and to pay of the value of the deposits extracted certain percentages as royalty. Within less than a year after the term began, defendants wrongfully ousted plaintiffs and kept them out of possession until plaintiffs regained possession on June 1, 1909, and on June 3d—two days later—in furtherance of the conspiracy, and by means of a collusive suit, and with the purpose of preventing plaintiffs from working the claim and to drive them to an action for damages, so that defendants, who are all insolvent, might, on July 1, 1909, and immediately thereafter, take possession, eject plaintiffs, and mine and extract deposits of great value, defendants stopped all work by plaintiffs. But for the wrongful acts, conspiracy, and collusion of defendants, plaintiffs could and would have extracted all the pay gravel in the claim, and unless permitted to work the claim for such reasonable time after July 1, 1909, as will enable them to do what they were prevented by defendants from doing, they will be irreparably damaged in the sum of \$75,000.

In an endeavor to ascertain what property, if any, is conveyed, and what rights, if any, are granted, by an instrument, whether it be called a lease or something else, affecting mining claims or minerals, some important distinctions must be observed. Minerals are land (*United States v. Castillero*, 2 Black, 17, 17 L. Ed. 360) so long as they are undisturbed, and must be conveyed with the same formalities as other lands are conveyed. The owner of both the minerals and the other land may convey the minerals, in which case the corpus—the corporeal hereditament—passes. Thereby a severance is effected, the vendor remaining the owner of that part of the land which does not consist of minerals, and the vendee owning the land which consists of minerals. The owner may, on the other hand, convey the minerals upon condition that the vendee extract them by a specific time, or in a stipulated mode, or that title shall pass only when certain royalties be paid; in these instances there is no present consummated sale. An example is found in *Plummer v. Hillside Coal & Iron Co.*, 104 Fed. 208, 43 C. C. A. 490, where the lease contained words of present demise with the right in the tenant to remove the coal within 100 years; and, although the court

in that case said that the words of the present demise operated as a "sale of coal with the right to removal within 100 years," it should seem that the court meant to declare that the demise operated as a contract for the sale of the coal, the sale to take place only when, within the term, the coal should be raised. In the case at bar there was no present or out-and-out sale of the minerals made in the instrument, called a "lease," of February 26, 1906. Its language is not such as, of itself, could then convey the minerals lying within the demised claim. But although the minerals were not sold to plaintiffs by that instrument, defendants parted with certain interests in them, and plaintiffs acquired certain vested rights to them. By that instrument defendants did two things: (1) They demised to plaintiffs the claim for a term ending July 1, 1909; (2) they granted to plaintiffs the right, expiring July 1, 1909, to work the claim and extract the minerals which upon extraction should belong to plaintiffs. Now, (1) the demise was of a corporeal thing or hereditament; (2) the grant of the right to plaintiffs to take the minerals, which right was exercisable by them within the lands of defendants, was an incorporeal thing or hereditament. This right is at common law that species of an incorporeal hereditament called the right of "turbary" or of "profit à prendre."

That such grant is of an incorporeal right or hereditament is well established (*United States v. Castillero*, *supra*; *Johnstown Iron Co. v. Cambria Iron Co.*, 32 Pa. 241, 72 Am. Dec. 783), notwithstanding the loose statement made by some text-writers and courts to the effect that such a grant is an out-and-out present sale.

The instrument of February 26, 1906, contained on the part of the defendants the implied covenant of quiet enjoyment during the term, and, of course, that defendants would not interfere with plaintiff's possession, work, and extraction. Defendants impliedly covenanted that plaintiffs might, without let or hindrance by them, have the full term of the lease for exploration and extraction, and also that immediately upon extraction the minerals should become the property of plaintiffs. In other words, defendants covenanted that they would not breach the contract, but would permit plaintiffs to exercise the right granted of being the owner of all, or so much of, the minerals, as plaintiffs could extract during the full term. Defendants, for a valuable consideration, therefore, granted to plaintiffs the right to acquire the ownership of that which was real property when the grant was made, upon the condition that the right should be exercised by July 1, 1909. Plaintiffs performed the agreement on their part, except in so far as they were prevented from doing so by the unlawful acts of the defendants. By such unlawful acts plaintiffs were prevented from extracting the minerals within the term expressly stipulated by the parties. True, time was declared to be of the essence of the contract; but defendants wrongfully prevented the plaintiffs from working steadily and continuously, and also from taking out the minerals, within the term so fixed.

Looking through the form and shadow to the substance, as we must (*Texas v. Hardenberg*, 10 Wall. 89, 19 L. Ed. 839), we perceive that defendants contracted in writing for the sale or disposal to plain-

tiffs of certain land, the sale or disposal to be consummated and the legal title to pass when, and as soon as, plaintiffs, by extraction before July 1, 1909, converted the lands into chattels. What is called a mineral lease is, said Lord Cairns, in *Gowan v. Christie*, 2 Scottish Appeals, L. R. 273, really "a liberty given to a particular individual, for a specific length of time, to go into and under the land, and to get certain things there if he can find them, and to take them away, just as if he had bought so much of the soil," and, when his Lordship remarked that such a lease is a sale out-and-out, he referred, as we think, to the time of extraction. Whether we hold the conduct of defendants was a waiver, or amounted to a quasi estoppel, the effect is the same. An injunction restraining defendants from taking advantage of their own wrong which prevented plaintiffs' enjoyment, within the term, of the profits of the contract, bears, in its nature and effect, much resemblance to a decree specifically enforcing the contract in plaintiffs' favor; defendants, by their own wrongful acts, either having waived the stipulation as to the term, or being quasi estopped to assert it. Equity acts specifically, endeavoring to award such remedy as will put the parties precisely in the condition which they should occupy, and does not award relief by way of compensation except under extraordinary circumstances. It will not suffer the invasion of a right without affording the appropriate remedy, and such is the flexibility of the remedies which such a court may grant that it is indeed difficult to conceive of a state of facts in which its strong arm is powerless to interfere. The wrongful acts which the defendants threatened to do are destructive trespasses—trespasses which, if not restrained by the court, will result in a destruction of part of the freehold, in and to which freehold the plaintiffs have a vested right which will, if they be protected therein, ripen into a perfect title. The effect of a perpetual injunction, if decreed, will be to prevent defendants from working the claim and extracting the minerals, and to permit plaintiffs, who have not been able so to do because of the wrongs of defendants, to mine the claim and extract the minerals therefrom.

The destructive trespasses threatened by the defendants are injuries which are irreparable by definition, the injury going to the substance of the estate (*Boyd v. Desrozier*, 20 Mont. 444, 52 Pac. 53); and it is therefore unnecessary to consider the question of the adequacy of the \$25,000 bond, or the insolvency of the defendants, though these considerations might be of moment under different circumstances. The equitable doctrines which are applied every day to other contracts for the sales of lands seem to be those which should here govern. Where a vendor wrongfully prevents a vendee from performing a condition precedent on his part to be performed, under a valid executory contract, courts will not suffer the vendor to escape on the ground of such default occasioned by his own wrong, but will order that if the vendee perform within a time certain, the vendor must convey. So if the lessor unlawfully prevents the lessee from removing from the demised property a house which the latter had the right to remove during the term, by virtue of an agreement in the lease, and the legal remedy be inadequate, the chancellor will, we think, after the expiration of the

term, enjoin the lessor from interfering with its removal by the lessee, even though the house belong to the lessor. Were the plaintiffs now working the claim and extracting the minerals, could defendants in a suit brought by them to oust plaintiffs, or to enjoin them from working and extracting the deposits, prevail against the facts in this suit if pleaded by the plaintiffs? Would the court declare that plaintiffs were without right within a reasonable time to become the owners of the property which defendants agreed might become theirs? We believe that both questions would be answered in the negative.

It is apparent to us that if the plaintiffs be not granted the remedy of injunction they will be irreparably injured. The awarding of this remedy is not discordant, but is in harmony, with the principles which must guide a court of equity. The lack of case precedent for the application of the principles which we invoke is no obstacle to the granting of the remedy, which is clearly indicated, and, indeed, required, by the undisputed facts.

The order is, therefore, affirmed.

OREGON CO. v. ROE.

(Circuit Court of Appeals, Ninth Circuit. February 7, 1910.)

No. 1,727.

1. CARRIERS (§§ 320, 347*)—ACTION—QUESTIONS FOR JURY.

In an action by a woman to recover for an injury received by having her foot caught between an elevator and the side of the well in defendant's building, while she was waiting for or stepping into the elevator, the evidence held to justify the submission to the jury of the questions of defendant's negligence in maintaining the elevator in a defective condition and of plaintiff's contributory negligence.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. §§ 320, 347.*]

2. CARRIERS (§ 317*)—DEFECTIVE ELEVATOR—ACTIONS—EVIDENCE.

In an action to recover for a personal injury alleged to have been caused by the defective condition of a passenger elevator in defendant's building, which caused it to rise or fall suddenly, and prevented its proper control by the operator, where there was evidence tending to show that such effect would follow leaking valves, and that the valves were found leaking immediately after the accident, evidence was admissible to show that sudden movements of the elevator, similar to that at the time of plaintiff's injury, had previously been observed by others.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1299; Dec. Dig. § 317.*]

3. NEGLIGENCE (§ 13*)—DEGREES OF NEGLIGENCE—INSTRUCTIONS.

An instruction as to the division of negligence into slight, ordinary, or gross cannot be usefully applied in trials of cases; their signification varying according to the circumstances, until there are so many real exceptions that the words can scarcely be said to have any real application.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 15; Dec. Dig. § 13.*]

In Error to the Circuit Court of the United States for the District of Oregon.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Action by Julia J. Roe against the Oregon Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Dolph, Mallory, Simon & Gearin, for plaintiff in error.

James N. Davis and Frank W. Walden, for defendant in error.

Before GILBERT and MORROW, Circuit Judges, and HUNT, District Judge.

HUNT, District Judge. Action at law by Julia J. Roe, plaintiff, against the Oregon Company, defendant, to recover damages for an injury to her foot, which was caught between the bottom of an hydraulic elevator and the seventh floor of the Marquam Building, in Portland, on April 28, 1908. The complaint sets forth that the defendant company was the owner of the Marquam Building, and of a certain passenger elevator therein, which had been negligently permitted to be out of repair and to remain in an unsafe and dangerous condition. The alleged fault with the elevator was that at times it would not stop and remain still for passengers to enter or leave it, but would move up and down without the operator's power of control. Plaintiff also alleged that:

"On said 28th day of April, 1908, the plaintiff, while going from the seventh floor of said building to the exit thereof, when the door of the said cage of said defective elevator was opened and the cage was in readiness, plaintiff was invited by the operator thereof to step into said cage. She stepped forward to enter it, and at the same time said cage, because of said defective condition, suddenly moved upward, and the plaintiff, without any fault or neglect on her part, was caught by the recoil or sudden dropping downward of said cage, and plaintiff was thrown down, and her foot was by said cage crushed, broken, and injured, and she was caused great pain and suffering, and her foot and leg were paralyzed and made lame by said injuries, all of which has damaged the plaintiff in the sum of twenty-five thousand (\$25,000) dollars."

The defendant's answer denied all the material allegations of the complaint with respect to the injury and the way it occurred, and set up contributory negligence on the part of the plaintiff in the following manner:

"That while this defendant, by its agent and servant, was so operating its said elevator, and while the said elevator cage was being moved down to be on a level with the floor upon which the plaintiff was standing, the plaintiff carelessly and negligently stood so near the door of said elevator well that one of her feet projected over the floor and into said elevator well, so that when said elevator cage was moved down it caught plaintiff's foot between the elevator cage and the floor; that neither this defendant, nor any officer or agent of this defendant, had, up to the time plaintiff was injured, any notice or knowledge of plaintiff's peculiar position; and that the injury, whatever it was, that was received by the plaintiff, was by reason of her own carelessness and negligence in carelessly and negligently protruding her foot into the elevator well while the elevator cage was descending, and not on account of any carelessness or negligence of this defendant, its officers, agents, or servants."

From a verdict and judgment of \$4,500 in favor of the plaintiff, the defendant prosecutes this writ of error.

One of the specifications of error relates to the refusal of the court to instruct the jury to return a verdict for the defendant, for the reason that upon the whole testimony it appeared that plaintiff was not entitled to recover. Two contentions are involved in this specification:

(1) That the evidence introduced to prove the culpable negligence of the defendant is insufficient to sustain the material allegations of the complaint; (2) that the evidence shows contributory negligence on the part of the plaintiff. There is no doubt that the testimony as printed in the record does not give the reader a very clear idea of exactly how the accident occurred; but this is due to the fact, noted in the record, that several of the important witnesses illustrated and explained their testimony by getting down from the witness box and going through the motions and positions which they were attempting to describe. These visual explanations and illustrations of the oral descriptions are, of course, not accessible to this court; but they doubtless helped to make things plain to the jury, and aided the lower court in its decision that the case was one for the consideration of the jury; and, after an attentive examination of the evidence, it is far from apparent to us that, as a matter of law, no recovery could be had upon any view which could properly be taken of the facts the evidence tended to establish.

There are two theories concerning the manner in which this plaintiff, Mrs. Roe, was injured. One, advanced by the defendant, is that leaking valves had nothing to do directly with the accident, but that in attempting to enter the elevator she stepped too far with her left foot, and was not observant of what she was doing, and that in approaching the elevator her left foot passed over the edge of the well, and the elevator, being up at the time, quickly descended and caught her foot. The court instructed the jury that, if it found such a state of facts to be the true account of the accident, then the plaintiff was guilty of contributory negligence, and could not recover. On the other side, the plaintiff's theory was that she had stepped into the elevator when the floor thereof was on a level with the floor of the building, and that she had stepped in with her right foot, and that, as she was attempting to make the final step with her left foot, the elevator, owing to defective or leaking valves, sprang up, and that her foot, instead of striking the floor of the elevator, struck beneath the floor, and was caught as the elevator dropped down. The exclusive duty of the jury was to determine from the evidence which of these versions was the correct one, and, by bringing in a verdict for the plaintiff, her theory must have been adopted; that is, if the jury obeyed the instructions of the court, and every presumption points to the conclusion that they did.

The defendant company contends, however, that the verdict is unsupported by credible evidence and is wholly unreasonable. But, inasmuch as plaintiff's evidence tended to sustain her theory, which was a very reasonable explanation of how she was hurt, and refutes the plea of contributory negligence, the verdict in her favor will not be disturbed.

There was evidence tending to establish the fact that immediately after the accident the valves of the elevator were found leaking, and that the effect thereof was to cause the cage to descend or to rise suddenly, and to place the cage beyond the full control of the operator; and there was evidence tending to show that generally the effect of leaking valves upon elevators, such as the one involved in this action, is to cause them to ascend or descend quickly, without full control of the

operator. Plaintiff was allowed to show that similar sudden movements of the elevator had been observed by others at various times in 1907 and 1908, prior to the date of plaintiff's injury. Defendant objected, and now argues that it was error to have admitted such evidence, because it did not appear that the elevator was in substantially the same condition at the date of the accident as it was in the winter of 1907 and 1908. Inasmuch as there was evidence to sustain the contention that the sudden movements of the elevator at the time of the accident were caused by defective valves, and inasmuch as prior like movements of the elevator were evidence of the prior existence of leaky valves, testimony tending to establish such prior movements was competent, in order to show knowledge of the defect on the part of the defendant. The point is not well taken.

Error is also assigned upon the refusal of the court to give the following instruction:

"Before the plaintiff in this action can recover, you must be satisfied that such injury as she may have received was received by her without any fault or negligence on her part; the rule of court in this state being that any negligence on the part of the plaintiff, however slight, directly contributing to the injury, is sufficient to bar the plaintiff's right of recovery."

The court gave the instruction as requested, but struck out the words "however slight." We find no error in the action of the court. In *Steamboat New World v. King*, 16 How. 469, 14 L. Ed. 1019, the Supreme Court expressed its doubt whether the terms "slight," "ordinary," and "gross," in reference to the division of negligence into three degrees, could be usefully applied in the trial of cases. "One degree," said Justice Curtis, "thus described, not only may be confounded with another, but it is quite impracticable to distinguish them. Their signification necessarily varies according to circumstances, to whose influences courts have been forced to yield, until there are so many real exceptions that the words can scarcely be said to have real application." This view was approved in the later case of *Milwaukee, etc., R. R. Co. v. Arms et al.*, 91 U. S. 489, 23 L. Ed. 374, where the court expressed its disapprobation of attempts to fix the degrees of negligence by legal definitions. Thompson (volume 1, § 18, of his work on Negligence) discusses attempts to divide negligence into three classes, slight, ordinary, and gross, saying it cannot be done "by mathematical lines," and that such classifications indicate only that "under special circumstances, great care and caution are required or only ordinary care, or only slight care. If the care demanded is not exercised, the case is one of negligence." The instructions clearly explained the requisites of ordinary care by proper standards, and in applying the principles governing contributory negligence the court expressly laid it down as proper that plaintiff could not recover, if there was any negligence on her part directly contributing to the injury she received.

Our conclusion is that there was sufficient evidence to sustain the verdict, that no error was committed in the ruling upon the evidence, and that the charge to the jury guided them correctly as to the principles of law pertinent to the issues.

Judgment affirmed.

JOCHEM v. COOLEY.

(Circuit Court of Appeals, Eighth Circuit. February 21, 1910.)

No. 3,102.

1. EXECUTION (§ 258*)—VALIDITY OF SALE IN ATTACHMENT SUIT—COLLATERAL ATTACK.

Code Civ. Proc. S. D. §§ 209-211, authorize an attachment to be issued to any county in the state and there levied on any property of the defendant. Section 218 provides that, if judgment be entered for the plaintiff, the sheriff shall satisfy the same out of the property attached upon an execution issued on the judgment. Sections 321, 331, and 332 provide for the filing and docketing of a judgment for money in any county, which shall then be a lien on the real estate of the defendant therein, and that an execution against property may be issued to the sheriff of any county where the judgment is docketed. *Held*, that a sale of attached real estate on an execution issued to the sheriff of another county, in which the land is situated, although the judgment has not been docketed in such county, is not void, but at most voidable, and cannot be collaterally attacked.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 736-739; Dec. Dig. § 258.*]

2. PROCESS (§ 151*)—"VOID PROCESS"—"IRREGULAR PROCESS."

"Void process" is defined to be such as is issued without power in the court to award it, or which the court has not acquired jurisdiction to issue in the particular case, or which fails in some material respect to comply with the requisite form of legal process. "Irregular process" is such as a court has general jurisdiction to issue, but which is unauthorized in the particular case, by reason of the existence or nonexistence of some fact or circumstance rendering it improper in such a case.

[Ed. Note.—For other cases, see Process, Dec. Dig. § 151.*]

For other definitions, see Words and Phrases, vol. 8, p. 7341; vol. 4, p. 3768.]

In Error to the Circuit Court of the United States for the District of South Dakota.

Action by Leopold E. Jochem against B. R. Cooley. Judgment for defendant, and plaintiff brings error. Affirmed.

James F. Trottman (Sioux K. Grigsby, on the brief), for plaintiff in error.

Robertson & Dougherty and Bailey & Voorhees, for defendant in error.

Before SANBORN, Circuit Judge, and RINER and Wm. H. MUNGER, District Judges.

Wm. H. MUNGER, District Judge. On the 2d day of June, 1893, one Melvin Grigsby commenced an action against Frederick T. Day in the circuit court in and for the county of Minnehaha, state of South Dakota, said court having jurisdiction thereof, to recover the sum of \$37,700, and caused a writ of attachment to issue in said action out of said court, directed to the sheriff of Moody county in said state, which attachment was duly executed by the sheriff by levy upon the W. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section 30, township 106, range 49, in said county, said lands then being owned by the defendant, Frederick T. Day, and a return of such levy was duly made to the said circuit court of Minne-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

haha county. A notice of lis pendens was also issued on said 2d day of June, describing said land, and recorded in the office of the register of deeds of said county of Moody, on June 3, 1893. Such proceedings were thereafter had in said action that on the 23d day of November, 1894, a judgment was entered and docketed in said circuit court in favor of the plaintiff and against the defendant, for the sum of \$30,084.25, which was thereafter reduced by order of said court to \$26,128.84. On January 29, 1896, an execution was issued out of said court, directed to the sheriff of Moody county, which execution recited the levy of the attachment upon said real estate, the rendition of said judgment, the amount and date thereof, and also recited that a transcript of the judgment was duly filed and docketed in Moody county on October 12, 1895. Said execution directed the sheriff to satisfy the judgment out of the property so attached by the sale thereof, or so much as should be sufficient to satisfy said judgment, and that return of the execution be made within 60 days thereafter. Pursuant to said execution, the sheriff of said Moody county advertised the lands for sale, pursuant to the statute, and sold the same on March 14, 1896, to Melvin Grigsby, and issued to him a sheriff's certificate of said sale, and on March 14, 1896, the sheriff made due return of said execution and his proceedings thereunder in the manner provided by law. Said sale was, by the court, on April 10, 1896, duly approved and confirmed. On November 16, 1896, for the consideration of \$400, said Melvin Grigsby assigned said certificate of sale to the defendant herein, B. R. Cooley. After the expiration of one year from the date of sale, no redemption having been made thereon, the sheriff of Moody County executed and delivered to the defendant herein, B. R. Cooley, a sheriff's deed for said real estate. Thereafter, on February 4, 1903, said Melvin Grigsby assigned the judgment to one E. R. Wynans, and a duly certified and authenticated transcript of said judgment, with the assignment thereof, was filed and docketed in the office of the clerk of the circuit court of Moody county, on the 26th day of February, 1903. On the 11th day of August, 1899, said Melvin Grigsby recovered another judgment against said Frederick T. Day in the said circuit court for the county of Minnehaha for the sum of \$11,278.05, including costs, and a duly certified transcript thereof was docketed in the office of the clerk of the circuit court for said county of Moody, on the 22d day of August, 1899, and on the 4th day of February, 1903, said judgment was also assigned by said Grigsby to said E. R. Wynans, and a certified transcript of said judgment was filed in Moody county on the 26th day of February, 1903. On February 24, 1903, an execution was issued upon said judgment, delivered to the sheriff of Moody county on the 27th day of February, 1903, who levied the same upon the lands hereinbefore described. The sheriff, after giving notice as required by statute, sold the same on April 11, 1903, to Leopold E. Jochem, plaintiff herein, for \$150, and issued to him a sheriff's certificate of sale therefor. Said sheriff, on April 13, 1903, made a return of said execution to said circuit court with his proceedings under said writ, which sale was, on June 6, 1903, approved and confirmed by the court, and on April 30, 1904, the sheriff of Moody county executed and delivered to said Jochem, plaintiff herein, a sheriff's deed for said

land. The defendant herein, B. R. Cooley, entered into the possession of said real estate on or about August 7, 1897, and continued the occupation and possession of said premises until the commencement of this action. The records of the clerk of the circuit court for Moody county do not show entries of the filing or docketing of the judgment obtained by Grigsby against Frederick T. Day on November 23, 1894, prior to the 26th day of February, 1903.

On August 2, 1907, Leopold E. Jochem, plaintiff herein, commenced an action of ejectment against the defendant, B. R. Cooley, in this court. Issues were joined, trial by jury waived in writing, and trial had to the court. Findings of fact were made and judgment entered in favor of defendant, to reverse which plaintiff brings the case to this court by writ of error. Both plaintiff and defendant claim title to the land by virtue of the respective sales made by the sheriff of Moody county under executions issued upon said judgments. Plaintiff bases his contention that the sale under the execution of November 23, 1896, was void, and no title passed, because of the fact that, prior to the execution and sale, no transcript of the judgment had been filed and docketed in Moody county.

Section 209 of the Code of Civil Procedure of the state of South Dakota authorizes an attachment to be issued to the sheriff of any county in the state in which property of the defendant may be. Section 210 requires the sheriff to whom such warrant is directed to attach all the real property of such debtor, and all of his personal estate, or so much thereof as may be sufficient to satisfy the plaintiff's demand, costs, and expenses, etc. Section 211 requires the sheriff to make an inventory of the property so seized, and where real estate is attached to describe the same and return the warrant and such inventory within 20 days. Section 218 provides that if judgment be entered for the plaintiff in such action the sheriff shall satisfy the same out of the property attached by him, if it shall be sufficient for that purpose, upon an execution which shall be issued on such judgment. Section 321 provides for the filing of a transcript of any judgment for the payment of money in any county in the state, and upon the filing of the same with the clerk of the circuit court of said county it shall be a lien upon all the real estate of the judgment debtor, except the homestead, from the date of the filing. Section 331 provides for three kinds of executions: One against the property of the judgment debtor, another against his person, and the third for the delivery of the possession of real or personal property. Section 332 provides that, when the execution is against the property of the judgment debtor it may be issued to the sheriff of any county where the judgment is docketed. Real property adjudged to be sold must be sold in the county where it lies by the sheriff of such county, or by a referee appointed by the court for that purpose.

If such sale was void, and no title passed, it may be questioned in this collateral proceeding. If such sale was voidable merely, it can only be assailed by an appropriate proceeding of review. In support of plaintiff's contention that the sale was void because issued to Moody county before the docketing of a transcript of the judgment therein, we are cited to the cases of McDonald v. Fuller, 11 S. D. 355, 77 N. W. 581,

74 Am. St. Rep. 815; *Carson v. Fuller*, 11 S. D. 502, 78 N. W. 960, 74 Am. St. Rep. 823; *Locke v. Hubbard*, 9 S. D. 364, 69 N. W. 588. These cases, however, related to general executions, in which the court acquired no jurisdiction over the property except by levy of the execution. In this case, however, the court had jurisdiction of the parties in Minnehaha county, and acquired jurisdiction over the real estate in question in Moody county, not by levy of the execution, but by virtue of the attachment. Much of plaintiff's argument has been directed to the proposition that, upon the rendition of the judgment, the attachment lien became merged in the judgment lien; but under the statute the judgment rendered in Minnehaha county did not become a lien upon the real estate of defendant in Moody county until the filing of the transcript in that county, and we know of no authority holding that an attachment lien is lost by merger in the judgment before the judgment becomes a lien. The court having jurisdiction of the property, such jurisdiction continued until the sale and conveyance thereof by the court; and, if the sale was directed and made before a transcript of the judgment was filed in Moody county, that was an irregularity which rendered the sale voidable but not void. The court having jurisdiction of the property, its process directing the sale, before a transcript of the judgment had been filed in Moody county, may have been voidable; but we do not think it void.

In *Bryan v. Congdon*, 86 Fed. 221-223, 29 C. C. A. 670-672, this court defined void process and irregular process as follows:

"Void process is defined to be such as was issued without power in the court to award it, or which the court has not acquired jurisdiction to issue in the particular case, or which falls in some material respect to comply with the requisite form of legal process. Irregular process is such as a court has general jurisdiction to issue, but which is unauthorized in the particular case by reason of the existence or nonexistence of some fact or circumstance rendering it improper in such a case."

Applying these principles to the case at bar, it is clear that the court had power and jurisdiction to issue its process for the sale of the attached property over which it had acquired jurisdiction by virtue of the attachment. The form of the process was in compliance with the statute, and hence the execution in question does not fall within such definition of void process. It falls rather under the definition of irregular process, as the court had general jurisdiction to issue the same, and, if unauthorized in the particular case, it was because of the fact that the transcript of the judgment had not been filed in Moody county. The objection to the sale because the transcript had not been filed could have been made in the court from which the execution issued, upon proper proceeding to vacate the same, or upon objections to the confirmation of the sale. No such steps were taken, no action was brought until this one, which was not commenced until five days before the 10-year statute of limitations would have run. The law is elementary that a judgment which is not void, but voidable merely, cannot be assailed in a collateral proceeding.

As the sale in this case was not void, but at most voidable, it is not subject to collateral attack in this proceeding, and the judgment is affirmed.

THE JOHN ENGLIS.

THE GENEVA.

(Circuit Court of Appeals, Second Circuit. February 8, 1910.)

No. 130.

1. COLLISION (§ 95*)—STEAM VESSELS—SPECIAL CIRCUMSTANCES—FAILURE TO KEEP PROPER LOOKOUT.

A collision took place at night on the East River, near the New York side, between a ferryboat passing down and one of three barges in tow alongside of a tug passing up. The tug was at the time rounding to under a port helm to make a landing of one of her barges. The vessels were in sight of each others' lights when a mile apart, but neither saw the other until they were within 200 feet. *Held*, that the overtaking rule did not apply, the tug having at the time no definite course, but that the case was one of special circumstances under article 29 of the inland rules (Act June 7, 1897, c. 4, § 1, 30 Stat. 102 [U. S. Comp. St. 1901, p. 2384]), requiring each vessel to watch and be guided by the movements of the other, and that both were in fault for not observing such rule and keeping a vigilant lookout.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 200-202; Dec. Dig. § 95.*]

Appeal from the District Court of the United States for the Eastern District of New York.

Suit in admiralty by Thomas Monk, Jr., and another, as owners of the barge Mary A. Monk, against the ferryboat John Englis, the tug Geneva impleaded. Decree against The John Englis, and claimant appeals. Decree modified.

Willcox & Green (Herbert Green, of counsel), for appellant.

Wallace, Butler & Brown (A. G. Thacher, of counsel), for the tug.

James J. Macklin (De Laguel Berier, of counsel), for the libelants.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

WARD, Circuit Judge. November 15, 1906, at about 5:25 a. m. on the New York side of the East River near the Grand street ferry slips, the ferryboat Englis came into the collision with the grain-laden boat May A. Monk, which was the outer of two barges alongside the starboard side of the tug Geneva; there being another boat on her port side. As a result, the Monk sank, and considerable damage was sustained by her and her cargo. The libelants as owners of the boat and bailees of the cargo proceeded against the ferryboat, whose claimant brought in the tug under the fifty-ninth rule. The decree of the District Court was against the ferryboat alone, and the petition under the fifty-ninth rule was dismissed, with costs.

The morning was very dark and the tide strong flood. The ferryboat was coming down stream from Twenty-Third street, New York, bound to Broadway, Brooklyn, with her regulation lights and cabin lights burning. The tug was bound up the river showing her side lights and towing lights, the boats in tow showing white lights on poles. She rounded to under a hard aport helm for the purpose of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

landing the Monk at Jones' Mills, a little below the Grand street ferry on the New York side. The parties in their pleadings treated the situation as governed by the rule regulating overtaking vessels; the ferryboat being bound to keep out of the way of the tug. Subsequently the ferryboat claimed that the vessels were on crossing courses at the time of collision, and that the tug, having the ferryboat on her starboard hand, was bound to keep out of the way. We think it quite clear that the overtaking rule did not apply. The ferryboat was on a course down and the tug on a course up the river; but in making her landing the tug was not on any steady course at all. She was circling and with reference to the course of the ferryboat was going part of the time up and across the river toward Brooklyn showing her red light, part of the time going down the river showing neither side light, part of the time going toward New York, showing her green light. Therefore the situation was one of special circumstances under article 29 of the inland rules (Act June 7, 1897, c. 4, § 1, 30 Stat. 102 [U. S. Comp. St. 1901, p. 2884]), which requires both vessels to exercise precaution in such case. Her maneuver was analogous to that of the Noordland, in the case of *The Serbia*, 149 U. S. 144, at page 156, 13 Sup. Ct. 817, at page 822, 37 L. Ed. 681. The steamship Noordland backed out from her pier in Jersey City almost across the river to New York, and then went ahead on a starboard helm for the purpose of straightening down on her course to sea. The Serbia, coming down the river on the New York side, struck the Noordland on her starboard quarter. The Noordland claimed among other things that the Serbia, having her on her own starboard hand, was the burdened vessel, but the Supreme Court rejected this contention, Mr. Justice Blatchford saying:

"The Noordland was at no time before the collision on a definite course, as contemplated by the statute and rules of navigation; and on the facts found she cannot claim that she had the right of way as against the Serbia. The statutory steering and sailing rules before referred to have little application to a vessel backing out of a slip before taking her course, but the case is rather one of 'special circumstances,' under rule or article 24, requiring each vessel to watch, and be guided by, the movements of the other."

The vessels in the present case were in view of each other for at least the space of a mile in distance, and, considering their respective speeds, of seven or eight minutes in time. Yet they concededly did not discover each other until they were not more than 200 feet apart. There was nothing to obstruct vision except the momentary passage between them of the ferryboat Vermont as she entered the Grand street ferry slip on the New York side. The fault of the ferryboat is unquestionable. In respect to the tug we think her maneuver of crossing and recrossing the course of vessels bound up and down the river was such as to require her to keep a vigilant lookout for the purpose of warning such vessels of her movements. Yet the attention of her master in the pilothouse and her two deckhands was entirely fixed on the operation of making the landing, and during the latter part of the maneuver the deckhands, being on the port side of the tug's house, could not see up the river if they had looked. Enough has been said to show that both vessels were grossly negligent in respect to the lookout kept.

The decree is modified by directing the court below to enter the same in favor of the libelants with interest against both vessels, the claimant of the ferryboat to recover costs of both courts against the claimant of the tug.

BEAVER HILL COAL CO. V. LASSILLA.

(Circuit Court of Appeals, Ninth Circuit. February 7, 1910.)

No. 1,760.

1. TRIAL (§ 251*)—ACTION FOR INJURY TO SERVANT—INSTRUCTIONS—APPLICABILITY TO ISSUES.

Where the sole ground of negligence alleged in an action by an employé against a mining company to recover for personal injury was in sending plaintiff to work in a dangerous place, knowing him to be inexperienced and unacquainted with the danger, without warning or instruction, it was not error to refuse an instruction requested by defendant on the duty of defendant to furnish the servant a reasonably safe place to work; such question not being in issue.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 587-595; Dec. Dig. 251.*]

2. TRIAL (§§ 251, 260*)—ACTION FOR INJURY TO SERVANT—REFUSAL OF INSTRUCTIONS ASKED.

The refusal of requests for instructions in an action by a servant against the master for personal injury *held* not error, where such instructions were either not applicable to the issues, or covered by the charge given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 587-595, 651-659; Dec. Dig. §§ 251, 260.*]

3. APPEAL AND ERROR (§ 1004*)—MATTERS REVIEWABLE—EXCESSIVE VERDICT.

An assignment of error that the verdict was excessive, and against the weight of the evidence, cannot be considered by an appellate federal court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3944-3947; Dec. Dig. § 1004.*]

In Error to the Circuit Court of the United States for the District of Oregon.

Action by Leander Lassilla, by Josephine Sommerville, guardian ad litem, against the Beaver Hill Coal Company. Judgment for plaintiff, and defendant brings error. Affirmed.

The defendant in error was the plaintiff in an action brought against the plaintiff in error to recover damages for personal injuries. The complaint alleged that the plaintiff in error employed the defendant in error to work about its coal mine as a general roustabout; that on or about March 6, 1908, the foreman in charge of the coal mine, and who was in charge of the employées therein and gave them their orders, directed the defendant in error to work in an abandoned tunnel, known as "Gangway No. 3," in removing old rotten timbers therefrom and retimbering the same; that the defendant in error was a minor of the age of 17 years, inexperienced and unfamiliar with the work he was required to perform, and by reason of his tender years and inexperience was unacquainted and unfamiliar with the hazards and dangers incident thereto; that the plaintiff in error knew that the work in which the defendant in error was directed to engage was extra hazardous, and that the gangway No. 3 was in an unsuitable and dangerous condition, that the timbers therein were likely to give way and fall at any time, all of which was unknown and not appreciated by the defendant in error, as was known by the officers and agents of the plaintiff in error then in charge of the mine; that they carelessly and negligently failed and neglected to caution and warn him of the dan-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes

gerous condition of said gangway or of the hazards and dangers incident to working therein; that while defendant in error was so engaged in said work a large portion of the ceiling in said gangway suddenly and without warning fell down upon him, throwing him to the ground, breaking his arm, and inflicting other serious injuries upon him. The answer denied the allegations of the complaint, and pleaded as affirmative defenses assumption of risk and contributory negligence, and alleged that the plaintiffs in error furnished all materials and supplies necessary for making the place where the defendant in error was working safe, and that the cause of the accident was the failure of the defendant in error and his fellow servants to use the supplies, implements, and appliances so furnished. The jury returned a verdict for the defendant in error, and judgment was thereupon rendered.

Wilbur & Spencer, A. M. Dibble, and Wilfred E. Farrell, for plaintiff in error.

Bates, Peer & Peterson and Caldwell & Reeder, for defendant in error.

Before GILBERT and MORROW, Circuit Judges, and HUNT, District Judge.

GILBERT, Circuit Judge (after stating the facts as above). Error is assigned to the admission of the testimony of one Stonelake, a witness for the defendant in error, in that he was permitted to say that he told the foreman of the plaintiff in error that he was not a good enough miner to work there, and would have to quit the job, unless he was given another job. The witness was working with the defendant in error at the time when the latter was injured. The ground of the objection to the testimony was that it tended to show that the mining company had placed in the tunnel to work with the defendant in error an incompetent miner, and that evidence to that effect was incompetent for the reason that no negligence of that nature had been charged against the company in the complaint. But, if there was error in the admission of the testimony, it was harmless, for the same testimony had already been elicited from the witness and received by the jury without objection on the part of the plaintiff in error, and the court in charging the jury, after reading to them the allegations of negligence contained in the complaint, instructed them that their first duty was to determine whether the defendant in the action had been negligent in the particulars so alleged. "I mean this particular question alleged in the complaint, because plaintiff must succeed, if he succeeds at all, upon the allegations of negligence set out in the complaint and upon none other."

Error is assigned to the refusal of the court to give certain requested instructions on the subject of the duty of the master to furnish the servant a reasonably safe place in which to work. The sole act of negligence charged against the mining company in the complaint was its act of sending the defendant in error to work at a dangerous place, knowing him to be unacquainted with the dangers thereof, and in failing to notify him of the perils of the work in which he was engaged. The court very properly refused the requested instruction on the ground that the question of furnishing the defendant in error a safe place in which to work was not in the case. It is true that a party to an action has the right to have his theory of the case submitted to the

jury, when proper foundation for such theory is laid in the pleadings and in the evidence. But there was no such foundation in this case. The defendant in error did not see fit to allege in his complaint that the plaintiff in error was negligent in failing to furnish him a safe working place, and the mere fact that in the answer it was alleged that the plaintiff in error had furnished its employes in the tunnel supplies and materials necessary to make their working place safe did not have the effect to inject into the case the question of the liability of the mining company on the ground of its failure to furnish the defendant in error a safe place in which to work, and it was not introduced for that purpose. It was set forth in the answer as a premise for the further allegation that the defendant in error was guilty of contributory negligence in not availing himself of the materials so furnished, whereby he might have made the place safe.

There are several assignments of error to the refusal of the court to give the jury certain instructions which were requested on behalf of the plaintiff in error. One of the instructions so requested was that the mere hiring of a minor does not constitute negligence, and that the mere fact that the plaintiff in error employed the defendant in error was not negligence. Clearly there was no error in refusing that instruction. There was no issue in the case to which it was applicable. Other instructions requested presented at length the views of the plaintiff in error as to the law in regard to the dangers and risks assumed by a minor, and the duty of the master to instruct the minor of the dangers of his employment, also in regard to contributory negligence, and the duty of an employé to give careful attention to the business in which he is engaged, and his duty to observe his surroundings and discover the dangers which attend his work. We do not deem it necessary to discuss seriatim the various instructions so requested. The most of them might properly have been given. But the trial court gave clear and lucid instructions to the jury upon every branch of the law applicable to the issues, and we find no ground for holding that the rights of the plaintiff in error were in any way prejudiced by the refusal of the court to give the instructions which it requested.

The further assignment of error that the verdict was excessive and against the weight of the evidence, this court has no power to consider. The judgment is affirmed.

STRETTON, U. S. Immigrant Inspector, v. RUDY.†
(Circuit Court of Appeals, Fifth Circuit. March 8, 1910.)
No. 1,954.

1. HABEAS CORPUS (§ 79*)—RETURN—FACTS.

The return to a writ of habeas corpus, reciting facts, imports verity until impeached.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 70; Dec. Dig. § 79.*]

2. HABEAS CORPUS (§ 90*)—DEPORTATION—RETURN.

A return to a writ of habeas corpus on petition of a female alien detained under an order of deportation, alleging that she was arrested under

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied April 5, 1910.

a warrant of the Department of Commerce and Labor as a prostitute having entered the United States for immoral purposes; that proceedings were had according to law, ending in a decree of deportation on the ground that she was an alien prostitute when she entered the United States and had practiced prostitution within three years thereafter; and that the Secretary of Commerce and Labor had reviewed all the evidence and had confirmed the deportation order—showed that she was lawfully in custody, and, without evidence controverting such facts, the court erred in releasing her from custody.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 80; Dec. Dig. § 90.*]

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

Habeas corpus on petition for the discharge of Mrs. Fanny Rudy from the custody of Peter H. Stretton, United States Immigrant Inspector. From a judgment discharging petitioner, the inspector appeals. Reversed, with instructions.

Charlton R. Beattie, for appellant.

H. L. Landfried, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. This is an appeal from a judgment on habeas corpus discharging Mrs. Fanny Rudy from the custody of the United States immigrant inspector.

Mrs. Rudy, describing herself as a citizen of the United States, in her petition addressed to the Circuit Court, among other things not necessary to recite, alleged that she had been a resident of the United States for the past seven years, and that she was being illegally held and detained in the House of the Good Shepherd in the city of New Orleans under an alleged violation of Act Feb. 20, 1907, c. 1134, § 3, 34 Stat. 899 (U. S. Comp. St. Supp. 1909, p. 450); that at first she was given to understand that she was detained as a witness in some (not mentioned) criminal case; that she had been deceived while so held into making a statement on which was predicated an order for her deportation from the United States under the aforementioned section 3 of the act of July 1, 1907, and she charges the immigration officer with deceit and misrepresentation, and a violation of rule 35 of the Immigration Bureau of Commerce and Labor; that she had been denied the opportunity to show cause why she should not be deported; that she was not represented by counsel; and that she had been denied the right to inspect the evidence, or any part of it, upon which the Secretary of Commerce and Labor had acted in ordering her arrest and deportation, and had been denied the right to give evidence.

Her petition was sworn to by her attorney, and thereupon a writ of habeas corpus was issued.

Peter H. Stretton, immigration inspector, made respondent, filed an answer to the petition, in which he denied all the allegations to the petition not therein admitted, and states:

"That he is the inspector in charge of immigration at the port of New Orleans, and as such a warrant for the arrest of plaintiff was issued to him under date of February 3, 1909, by the Department of Commerce and Labor,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

commanding him to arrest the said Fanny Rudy, born Fanny Rothenburg, as an alien and a member of one of the excluded classes, in that she is a prostitute, and that she was such at the time of her entry into the United States, and that her entry into the said United States was for the purpose of prostitution and for immoral purposes, in violation of the act of February 20, 1907, she having landed at the port of New York, ex steamer Velasco, on the 6th day of May, 1908, and by virtue of said warrant for arrest your respondent held the said Fanny Rudy in custody; that your respondent, before arresting the said Fanny Rudy, took her testimony, and informed her that she had the right to be represented by counsel and to furnish bond, all this being done in the presence of D. Downing, inspector and stenographer, but that she declared she would not avail herself of counsel. Your respondent further states that the proceedings were according to law and regular, and her testimony was transmitted to the Department of Commerce and Labor by your respondent, and that the said Department of Commerce and Labor did on the 11th day of February, 1909, decree that the said Fanny Rudy should be held for deportation, and deported to the country from whence she came, as being an alien prostitute at the time of her entry in the United States, and having been found practicing prostitution within a period of three years subsequent to her entry into this country, and accordingly issued on the 11th day of February, 1909, an order of deportation for the deportation of the said Fanny Rudy, born Fanny Rothenburg, and that by virtue of the said original warrant of arrest, and the said order of deportation, your respondent, Peter H. Stretton, inspector as aforesaid, holds the said Fanny Rudy in custody.

"Further answering, your respondent, Peter H. Stretton, states that, pending this order of deportation, it became necessary to hold and detain the said Fanny Rudy as a material witness in the case of United States v. Samuel Felix, alias Sam Felix, in the United States Circuit Court for the Eastern District of Louisiana; hence she was not forthwith transported as commanded in the said order of deportation."

Thereafter the petitioner filed a supplemental petition, in which she alleged as follows:

"That under the decision of the Department of Commerce and Labor, ordering her deportation to Brazil, she will be subjected to extreme hardship, if such order shall be executed, for these reasons to wit:

"Petitioner avers that when she went to Brazil, some 14 months ago, her intention was only to remain there temporarily, and as a matter of fact she did remain there only one week, when she returned to her home in New York. She alleges, further, that she is a native of Austria, where her father now lives, with the remaining members of her family, except a sister and a brother, who, as the record in this case shows, live in New York. She avers that, to be deported to a country like Brazil, where she has neither friend nor relative, and no absolute visible means of supporting herself, would be subjecting her to hardships, which the immigration statutes of this country do not contemplate or permit.

"Petitioner alleges that the Department of Commerce and Labor, in ordering her deportation to Brazil, used its broad discretion adversely to her at a time when petitioner was to have been used as the government's main witness in a serious criminal case, then pending before this honorable court; but she alleges and now points out to the court that that condition no longer exists, that the criminal case referred to has been terminated, and that, while the exercise of the Department's discretion may have been justifiable under the conditions previously existing, such an exercise of departmental discretion would now be harsh and unwarranted under the law."

This was also sworn to by attorney.

A sworn answer was filed to the supplemental petition by Thomas V. Kirk, commissioner of immigration of the port of New Orleans, saying:

"That since filing the said petition, and since filing the original answer herein by Peter H. Stretton, inspector in charge of immigration, he has been

appointed and qualified and assumed the duties of commissioner of immigration at the port of New Orleans.

"And, further answering, respondent says that the Secretary of Commerce and Labor, under date of February 11, 1909, issued a warrant of deportation for the alien Fanny Rudy (born Fanny Rothenburg), after due consideration and decision upon all the evidence offered and filed in this case on behalf of the government, as well as on behalf of said alien.

"That the said warrant of deportation is the result of the conclusion of the immigration officers of the government, and especially the Secretary of Commerce and Labor, based upon all the evidence adduced, and on the laws of the United States, especially immigration act of February 20, 1907."

After these pleadings, and so far as the record shows without other pleadings or evidence, the cause came on to be heard before the court, whereupon the writ of habeas corpus was made absolute, and Mrs. Rudy discharged from custody.

The immigration officer sued out this appeal, and thereupon the court ordered Mrs. Rudy to give bond for her appearance before this court when required.

The transcript shows no traverse either by pleadings or evidence of facts recited in the returns of the immigration officers to the writ of habeas corpus. The return on a writ of habeas corpus reciting facts imports verity until impeached. *Crowley v. Christensen*, 137 U. S. 86-94, 11 Sup. Ct. 13, 34 L. Ed. 620.

The returns show a state of facts under which Mrs. Rudy was lawfully held in custody; and, without evidence controverting the said facts, the court erred in releasing her from the custody of the immigration officers. See *Japanese Immigrant Case*, 189 U. S. 86, 23 Sup. Ct. 611, 47 L. Ed. 721, and *Chin Yow v. U. S.*, 208 U. S. 8, 28 Sup. Ct. 201, 52 L. Ed. 369.

The decree appealed from is reversed, and the cause is remanded, with instructions to enter judgment dismissing the writ, and returning Mrs. Rudy to custody of immigrant officers.

UNITED STATES v. HERMANN BOKER & CO.

(Circuit Court of Appeals, Second Circuit. January 11, 1910.)

No. 108 (4,472).

CUSTOMS DUTIES (§ 26*)—CLASSIFICATION—NICKEL-COATED WIRE—"COATED WITH METAL."

In Tariff Act July 24, 1897, c. 11, § 1, Schedule O, par. 137, 30 Stat. 161 (U. S. Comp. St. 1901, p. 1639), the provision for wire "coated with * * * metal" includes an article produced by pushing a steel or iron rod through a nickel tube and then wire-drawing the whole, thus bringing it down to the required diameter, and welding the nickel to the core. It makes no difference whether the coating referred to is affixed by welding, dipping, electrolysis, or otherwise.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 26.*]

Appeal from the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon appeal from a decision (168 Fed. 464) of the Circuit Court, Southern District of New York, reversing a de-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

cision of the Board of General Appraisers (G. A. 6,414, T. D. 27,544), which affirmed the action of the collector of the port of New York in assessing duty on certain wire.

D. Frank Lloyd, Deputy Asst. Atty. Gen. (Martin T. Baldwin, Sp. Atty., of counsel), for the United States.

Walden & Webster (Howard T. Walden, of counsel), for importers.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. The process of manufacture is as follows: A steel or iron rod or wire is pushed through a nickel tube, and the whole is then wire-drawn, which brings it down to the required diameter and welds the nickel to the iron or steel. The result is a core of iron or steel wire with an outer surfacing of nickel permanently affixed thereto. The relevant paragraph in the tariff act of 1897 (Act July 24, 1897, c. 11, § 1, Schedule C, par. 137, 30 Stat. 161 [U. S. Comp. St. 1901, p. 1639]) is:

"137. Round iron or steel wire, not smaller than number thirteen wire gauge, one and one-fourth cents per pound; smaller than number thirteen and not smaller than number sixteen wire gauge, one and one-half cents per pound; smaller than number sixteen wire gauge, two cents per pound: Provided, that all the foregoing valued at more than four cents per pound shall pay forty per centum ad valorem. Iron or steel or other wire not specially provided for in this act, including such as is commonly known as hat wire, or bonnet wire, crinoline wire, corset wire, needle wire, piano wire, clock wire, and watch wire, whether flat or otherwise, and corset clasps, corset steels and dress steels, and sheet steel in strips, twenty-five one-thousandths of an inch thick or thinner, any of the foregoing, whether uncovered or covered with cotton, silk, metal, or other material, valued at more than four cents per pound, forty-five per centum ad valorem: Provided, that articles manufactured from iron, steel, brass, or copper wire, shall pay the rate of duty imposed upon the wire used in the manufacture of such articles, and in addition thereto one and one-fourth cents per pound, except that wire rope and wire strand shall pay the maximum rate of duty which would be imposed upon any wire used in the manufacture thereof, and in addition thereto one cent per pound; and on iron or steel wire coated with zinc, tin, or any other metal, two-tenths of one cent per pound in addition to the rate imposed on the wire from which it is made."

It will be perceived that by this paragraph one rate of duty is imposed on (1) "iron or steel or other wire, not specially provided for * * * whether uncovered or covered with * * * metal," and a different rate of duty on (2) "iron or steel wire coated with * * * any * * * metal." The collector assessed this wire under the first of these categories; the importer contends it belongs under the second. The use of the words "not specially provided for" in connection only with the first of these categories would seem to indicate that the correct interpretation of the paragraph is: Such and such a duty shall be laid upon all iron or steel wire, which is covered with cotton, silk, metal, or other material; but, if such wire is coated with zinc, tin, or any other metal, it shall pay at a different rate.

It is not controlling, therefore, that the iron or steel wire is found to be *covered* with metal, if such metal covering can fairly be held to be a *coating*. The covering of many of the varieties of wire which are enumerated in the first category—hat wire, bonnet wire, crinoline wire, corset wire, piano wire—is not the sort that one could properly

call a coating. On the contrary, unless some peculiar and unusual meaning be given to the words "coated with metal," it is difficult to conceive of any article which more aptly illustrates them than the wire now before us. We agree with Judge Holt that it makes no difference by what process the coating is affixed—by welding, by dipping, by electrolytic action, or in any other way. The act refers only to the finished product.

It is further contended that this is not an iron or steel wire coated with nickel, but is really a nickel wire containing iron or steel. Examination of the sample "Illustrative Exhibit 1," where the relative quantities and the disposition of the two metals are clearly displayed, is sufficient to dispose of this suggestion. The other sample is of so small a gauge that the end, which has been pinched off rather than cut off, does not show the line where the two metals come together; but, as the smaller is drawn down from the larger, it may, in the absence of proof to the contrary, be assumed that the relative proportions are the same.

The decision is affirmed.

UNITED STATES v. RICH.

(Circuit Court of Appeals, Second Circuit. February 8, 1910.)

No. 148 (5,243).

CUSTOMS DUTIES (§ 44*)—CLASSIFICATION—CONCENTRATED FRUIT JUICE—SIMILITUDE.

Concentrated fruit juice is dutiable, under Tariff Act July 24, 1897, c. 11, § 1, Schedule H, par. 299, 30 Stat. 174 (U. S. Comp. St. 1901, p. 1655), as fruit juice by similitude under section 7 of said act, 30 Stat. 205 (U. S. Comp. St. 1901, p. 1693), because it resembles ordinary fruit juice (1) in material, from which it differs only in having had some of its water removed by evaporation, and (2) in use, being applied to the same purposes.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 44.*]

Appeal from the Circuit Court of the United States for the Southern District of New York.

For decision below, see 172 Fed. 293, reversing a decision by the Board of United States General Appraisers, which had affirmed the assessment of duty by the collector of customs at the port of New York on material imported by E. C. Rich.

The merchandise herein involved consists of certain fruit juices. The importer contends that they are dutiable under paragraph 299 of Act July 24, 1897, c. 11, § 1, Schedule H, 30 Stat. 174 (U. S. Comp. St. 1901, p. 1655), either directly or by similitude. The collector classified them as a nonenumerated manufactured article. The paragraph reads:

299. Cherry juice and prune juice, or prune wine, and other fruit juices not specially provided for in this act, containing no alcohol or not more than eighteen per centum of alcohol, sixty cents per gallon; if containing more than eighteen per centum of alcohol sixty cents per gallon, and in addition thereto two dollars and seven cents per proof gallon on the alcohol contained therein.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

D. Frank Lloyd, Deputy Asst. Atty. Gen. (Charles Duane Baker, Asst. Atty., of counsel), for the United States.

Comstock & Washburn (Albert H. Washburn, of counsel), for importer.

Before LACOMBE and WARD, Circuit Judges.

LACOMBE, Circuit Judge. The Board of General Appraisers state that when the tariff act of 1897 was passed the fruit juice which was being imported was the juice as it was expressed from the fruit—a thin, watery liquid of not much strength. In some instances such liquid was combined with alcohol as a preservative. The present article differs from the old fruit juice solely by having some of the water removed by evaporation—a process which, of course, increases the strength of the residuum. Nothing else is done to it. It has not even received any alcoholic admixture. We should be inclined to hold that, although more concentrated than the fruit juice of 1897, it has not ceased to be fruit juice. But it is not necessary so to hold. Certainly it is similar to the fruit juice of 1897 in material, being nothing but the expressed juice of fruit, and in use, being applied to the same purposes, viz., flavoring confectionery, jellies, creams, etc.

Smith v. Rheinstrom (Circuit Court of Appeals, 6th Cir.) 65 Fed. 984, 13 C. C. A. 261, mainly relied upon by the government, does not apply, because the concentrated cherry juice in that case had been fortified with so much alcohol as to warrant its classification as an "alcoholic compound" under a separate paragraph of the act of 1890, then under discussion. Being there specifically enumerated, it could not be classified under the similitude clause which covers only non-enumerated articles.

Decision affirmed.

POITEVENT & FAVRE LUMBER CO. V. HONEY ISLAND LAND & TIMBER CO.†

(Circuit Court of Appeals, Fifth Circuit. March 1, 1910.)

No. 1,923.

1. QUIETING TITLE (§ 12*)—RIGHT OF ACTION—TITLE AND POSSESSION.

A bill to quiet title, alleging ownership and possession in complainant, cannot be maintained, where the proof shows possession in defendant under a claimed title when the suit was commenced.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 8; Dec. Dig. § 12.*

Necessity of possession in suits to quiet title, see note to Jackson v. Simmons, 39 C. C. A. 522.]

2. TAXATION (§ 804*)—TAX TITLE—VALIDATION—LOUISIANA CONSTITUTION.

Const. La. 1898, art. 233, providing that suits to annul tax titles on sales theretofore made shall be brought within three years from the adoption of the Constitution, which as construed by the Supreme Court of the state operates merely as a bar by limitation, is not available to sustain a suit based on such a tax title, where within the three years the land was ju-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied April 5, 1910.

ditionally sequestered in a succession, and remained in the custody of the court until just prior to the commencement of the suit.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1590; Dec. Dig. § 804.*]

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

Suit in equity by the Poitevent & Favre Lumber Company against the Honey Island Land & Timber Company. Decree for defendant, and complainant appeals. Affirmed.

B. M. Miller, for appellant.

E. Howard McCaleb, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. Under the repleading in the Circuit Court, the suit before us is one by Poitevent & Favre Lumber Company, alleging itself to be the owner and in possession of a certain tract of land in St. Tammany parish, La., to remove clouds from title.

The answer denies both ownership and possession. The proof shows only constructive possession by any party up to July 23, 1900, when the land was judicially sequestered in the succession of E. B. Benton, a former owner, and taken into the possession of the Twenty-Sixth judicial district court for the parish of St. Tammany, where it remained until March 16, 1904, when by order of the civil district court for the parish of Orleans, Charles J. Hillard, who purchased for the account and benefit of the Honey Island Land & Timber Company at a judicial sale under executory process issued by that court, was put in possession by the sheriff of St. Tammany parish.

Without showing any divestiture of the Honey Island Land & Timber Company, this suit was brought July 21, 1904, so that at the beginning of this suit it appears that possession under claimed title was in the Honey Island Land & Timber Company. The tax title under which complainant claims was recorded June 14, 1894, and appears to have been voidable, under the then existing laws of the state of Louisiana in relation to tax sales, for defective assessments.

Article 233 of the Constitution of Louisiana of 1898, under which complainant claims a validation of his tax title, provides for a suit to annul as to tax sales theretofore made within three years from the adoption of the Constitution. As the property was judicially sequestered in the year 1900, and remained in the possession of the St. Tammany court until about the time this suit was brought, and as the said article 233 is held by the Supreme Court of Louisiana to be merely a bar by limitation (see *Ashley v. Bradford*, 109 La. 641, 33 South. 634), it would seem that said article 233 cannot avail complainant in this suit.

The judge of the Circuit Court filed no reasons for his decree dismissing the complainant's bill; but, for the above and other reasons argued at bar, we think his decision was correct, and should be affirmed. And it is so ordered.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

STRETTON et al. v. SHAHEEN.

SAME v. SHADDY.

(Circuit Court of Appeals, Fifth Circuit. March 1, 1910.)

Nos. 1,915, 1,916.

HABEAS CORPUS (§ 75*)—RETURN—REQUISITES AND SUFFICIENCY.

Returns to writs of habeas corpus obtained on behalf of immigrants upon petitions alleging their illegal detention by an inspector, which allege no facts, but merely as a conclusion of law that the respondent had the right to detain the petitioners, *held* insufficient.

[Ed. Note.—For other cases, see Habeas Corpus, Dec. Dig. § 75.*]

Appeals from the Circuit Court of the United States for the Eastern District of Louisiana.

Proceedings by Sadie Shaheen and Kelly J. Shaddy against Peter H. Stretton and John Clark for writs of habeas corpus. From orders granting the writs, respondents appeal. Affirmed.

Charlton R. Beattie and W. J. Waguespack, for appellant.

Chas. I. Denechaud, for appellees.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. In neither of these appeals was there any bond given. If intended to be taken by the United States, or at the direction of any department of the government, as provided for in Rev. St. § 1001 (U. S. Comp. St. 1901, p. 713), it is not shown by the record.

The return in each case of Peter H. Stretton, "captain and inspector in charge of immigration office at the port of New Orleans," and John Clark, captain of the steamer Chickahominy, sets forth only conclusions of law, and there was no necessity to traverse. In the said returns Stretton claims that by virtue of the authority vested in him as "inspector in charge at the port of New Orleans," he "was fully authorized to appoint, constitute, and qualify the special board of inquiry alleged in the plaintiff's petition," referring to Act Cong. Feb. 20, 1907, c. 1134, § 24, 34 Stat. 906 (U. S. Comp. St. Supp. 1909, p. 461).

The returns further allege that the respondent had the right to detain Abdala Shaddy and Georges Shaheen "for examination by the special board of inquiry whenever that board should be legally constituted," but alleged no facts. The Circuit Court examined the matter, and found in favor of the petitioner, and against the sufficiency of the said returns.

As we agree with the Circuit Court in its findings, the judgment of the Circuit Court in each of the above-entitled cases is affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

UNITED STATES v. ASHCROFT MFG. CO.

(Circuit Court of Appeals, Second Circuit. February 8, 1910.)

No. 144 (2,041).

CUSTOMS DUTIES (§ 25*)—CLASSIFICATION—PRISMATIC GLASS.

In Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 110, 30 Stat. 158 (U. S. Comp. St. 1901, p. 1635), the provision for strips of glass ground or polished to "prismatic form" is not limited to strips so ground that a side in itself forms a prism, but includes also strips that fulfill the functions of a prism, as where there are ground in one side fine parallel longitudinal incisions forming prisms.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 25.*]

Appeal from the Circuit Court of the United States for the District of Connecticut.

For decision below, see 172 Fed. 449, which affirmed a decision by the Board of General Appraisers, which had reversed the assessment of duty by the collector of customs at the port of Bridgeport.

The merchandise in question consists of articles of glass which are designated in the record as "prismatic gauge glasses." They are about 5¼ inches long, 1½ inches wide, and five-eighths of an inch thick. The edges are ground, and one side is plain and polished. The reverse side is also polished, and contains fine parallel longitudinal incisions for prisms. These articles are used as parts of water gauges on steam boilers. The side having the incision is placed against a dark background, and as water rises in the spaces formed by the incisions it shows black, and its level is clearly indicated. The refraction of the light by the prisms is different when the spaces are filled with air and when they are filled with water.

The collector assessed the articles under paragraph 100 of the tariff act of 1897 (Act July 24, 1897, c. 11, § 1, Schedule B, 30 Stat. 157 [U. S. Comp. St. 1901, p. 1633]), which reads as follows:

"100. Glass bottles, decanters, or other vessels, or articles of glass, cut, engraved, painted, colored, stained, silvered, gilded, etched, frosted, printed in any manner or otherwise ornamented, decorated, or ground (except such grindings as is necessary for fitting stoppers), and any articles of which such glass is the component material of chief value, and porcelain, opal and other blown glassware; all the foregoing, filled or unfilled, and whether their contents be dutiable or free, sixty per centum ad valorem."

The Board of General Appraisers overruled the collector, and assessed the articles under paragraph 110 of said act, which reads as follows:

"110. Strips of glass, not more than three inches wide, ground or polished on one or both sides to a cylindrical or prismatic form, and glass slides for magic lanterns, forty-five per centum ad valorem."

The Circuit Court affirmed the action of the Board of General Appraisers, and the government has appealed to this court.

D. Frank Lloyd, Deputy Asst. Atty. Gen. (John A. Kemp, Asst. Atty., of counsel), for the United States.

McLaughlin, Russell, Coe & Sprague (Frederick C. McLaughlin, of counsel, and Edward P. Sharretts, on the brief), for the importers.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

NOYES, Circuit Judge (after stating the facts as above). The article in question is a "strip" of glass. It is "a narrow piece comparatively long." Standard Dictionary. While not so ground that any

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

sides in themselves form a prism, yet one side is so ground that prismatic forms are produced upon it. The strip of glass, though not a prism, fulfills the functions of one. That is its essential feature. As, then, this article is a strip of glass ground so as to constitute a prism and possesses optical properties, we think that it is more specifically described in paragraph 110, which is among the paragraphs relating to glass articles possessing such properties, than it is in paragraph 100, which would include it only because it is ground glass.

The decision of the Circuit Court is affirmed.

MALDONADO & CO. v. UNITED STATES.

HENSEL, BRUCKMANN & LORBACHER v. SAME.

(Circuit Court of Appeals, Second Circuit. February 8, 1910.)

Nos. 121, 125 (4,448, 4,679).

CUSTOMS DUTIES (§ 28*)—CLASSIFICATION—STEEL FORMS AND SHAPES—HORSESHOE CALKS—BALL BEARINGS.

The provision for "steel in all forms and shapes," in Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 135, 30 Stat. 161 (U. S. Comp. St. 1901, p. 1638), does not include completed articles, such as horseshoe calks and ball bearings, to which nothing needs to be done to fit them for immediate use.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 28.*

For other definitions, see Words and Phrases, vol. 7, p. 6656.]

Appeals from the Circuit Court of the United States for the Southern District of New York.

For decision below, see 172 Fed. 170, in which the Circuit Court affirmed decisions by the Board of United States General Appraisers, which had affirmed the assessment of duty by the collector of customs at the port of New York.

The importations in dispute had been classified as manufactures of metal under Tariff Act July 24, 1897, c. 11, § 1, par. 193, 30 Stat. 167 (U. S. Comp. St. 1901, p. 1645), against the importers' contention for classification under the provision in paragraph 135, 30 Stat. 161 (U. S. Comp. St. 1901, p. 1638), for steel in all forms and shapes.

Brooks & Brooks (Frederick W. Brooks, of counsel), for importers.

D. Frank Lloyd, Deputy Asst. Atty. Gen. (William K. Payne, Asst. Atty., of counsel), for the United States.

Before LACOMBE, WARD, and NOYES, Circuit Judges (Maldonado Case), and LACOMBE and WARD, Circuit Judges, and HAND, District Judge (Hensel Case).

PER CURIAM. In these two cases, arising under the tariff act of 1897, the articles imported are, respectively, steel calks, for insertion in horseshoes, and ball bearings, consisting of raceways and balls, for use in automobiles. Nothing needs to be done to either to fit it for immediate use. The calk is merely screwed into the threaded hole provided in the shoe; the ball bearing is merely assembled with the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs, 1907 to date, & Rep'r Indexes

other parts to make up an automobile. We are satisfied that both are covered by our recent decision in *Morris & Co. v. U. S.*, 174 Fed. 656 (Dec. 7, 1909), and not to be included within the provisions of paragraph 135.

The decisions in both cases are affirmed.

JOHNS-PRATT CO. v. SACHS CO. et al.
(Circuit Court, D. Connecticut. March 4, 1910.)

Nos. 1,305, 1,306.

1. MONOPOLIES (§ 21*)—INFRINGEMENT—SUIT IN EQUITY—DEFENSES.

That a holder of a patent is a party to an unlawful conspiracy, which tends to restrain trade and oppress the defendants in their business, does not afford a defense to a suit for infringement of the patent.

[Ed. Note.—For other cases, see *Monopolies*, Dec. Dig. § 21.*]

2. EQUITY (§ 264*)—PLEADING—MOTION TO STRIKE OUT PART OF PLEADING.

In a suit in equity for infringement of a patent, a paragraph of the answer alleging that complainant is a party to an unlawful conspiracy, which tends to oppress defendants in their business, will be stricken out on motion.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. §§ 536-540; Dec. Dig. § 264.*]

In Equity. Action by the Johns-Pratt Company against the Sachs Company and another. Heard on motion to strike out a paragraph of the answer. Granted.

See, also, 168 Fed. 311.

The following is one of the paragraphs of the answer:

"(15) And these defendants, further answering on information and belief, say: That since November 14, 1905, and in or about the year 1907, the complainant, said the Johns-Pratt Company, wrongfully and illegally combined, conspired, and confederated against these defendants, and each of them for the purpose of wrongfully harassing and oppressing them in their lawful trade and business, diminishing the profits thereof, and destroying the same, with the General Electric Company, a corporation of New York, doing business at Schenectady, New York, the Westinghouse Electric & Manufacturing Company, a corporation of Pennsylvania, doing business at Pittsburg, Pennsylvania, the Bryant Electric Company, a corporation of Connecticut, doing business at Bridgeport, Connecticut, and the D. & W. Fuse Company, a corporation of Rhode Island, doing business at Providence, Rhode Island. That said complainant company, together with said named confederating companies, are all engaged in the manufacture and sale of protective devices similar in their general kind to the manufacture of defendants, and that said companies control a large proportion, to wit, about seventy-five per cent. of all the goods of that class sold in the United States. That pursuant to such wrongful conspiracy and confederation said named confederating companies entered into an agreement with each other by which, among other things, it was agreed in substance that the entire business of the said parties should be allotted to them severally, each to have its certain percentage of the whole, whether in any given period it actually sold more or less than such percentage; that uniform prices should be obligatory upon all of said parties; that any and all letters patent pertaining to the said fuse or protective device business of said parties should be amalgamated in the joint interest, and licenses thereunder from each of said parties to the others be interchanged at nominal figures; that a commissioner should be, and was, designated, who

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

should have and receive reports as to prices, business done, etc., and have power to control said business and to settle disputes, if any, between the parties; that a fund should be established by payment thereinto by each of said parties severally of sums agreed upon; that alleged infringers of said patents, or any of them, might be sued; that the expenses of such litigation should be borne by such common fund; that the recoveries from such litigation, if any, should be divided among said parties severally pro rata to the contribution severally to said common fund; that the title to said letters patent should remain as it was in said parties severally, but that the entire control of litigation under said patents, as to the instigation of the same, settlement, etc., should be and was vested in a committee made up of representatives of said parties, or some of them; that the question as to whether such suits should or should not be brought was relinquished by said parties severally and vested in said committee. That pursuant to said wrongful conspiracy and confederation said named companies wrongfully agreed and conspired together and fixed prices, not only on fuses and fuse appliances alleged to embody such letters patent, or any of them, but on such devices as did not embody the inventions of any existing patent. That pursuant to said unlawful conspiracy and confederation it has been the purpose of said named parties, avowed to the trade and customers of these defendants, to put these defendants out of business by the establishment and maintenance of ruinous prices, by the instigation and maintenance through various counsel of a multiplicity of suits simultaneously against said defendants or the customers of said defendant corporation, and by threats and intimidation. That pursuant to said unlawful conspiracy and confederation said named companies, acting jointly as herein set forth, have maintained and brought some thirteen suits against said defendant corporation or its customers. That pursuant to said conspiracy and unlawful confederation said named companies, acting jointly, have for the time being ruinously lowered prices on the goods involved, for the purpose of and with the intent of depriving defendants of their trade and business and wrongfully destroying the same, said prices to be thereafter by said parties raised to normal or higher level. That pursuant to said conspiracy threats have been made against the customers of said defendant corporation, and false reports as to said defendant corporation and its business have been spread. That the bringing and prosecution of said suits, including this suit, is the result of and for the purpose of carrying out said unlawful conspiracy and the unlawful agreements thereunder. That said unlawful conspiracy and confederation, and the acts thereunder, has caused and is causing these defendants, and each of them, great and irreparable damage and injury. That the object of said unlawful conspiracy and confederation is the wrongful crippling of said defendants in their said business and its ultimate destruction, the unlawful restraint of trade in the devices and appliances referred to, and the wrongful and illegal monopolizing in said named companies of all, or substantially all, of the said business in the United States. Wherefore said bill of complaint is without equity and should be dismissed."

Wetmore & Jenner and Oscar W. Jeffery, for complainant.

Bartlett, Brownell & Mitchell and Henry B. Brownell, for defendants.

PLATT, District Judge. The paragraph of the answer above set forth is the cause of this contention. It has been excepted to as impertinent, and a motion to strike it out has also been entered, charging that it is impertinent, immaterial, and irrelevant. The question of law which stares us in the face is this: Does an allegation that the complainant is a party to an unlawful conspiracy, which tends to restrain trade and oppress the defendant in its business, afford any defense to a suit for the infringement of letters patent, the title to which is vested in the complainant?

This question has been answered in the negative by the courts with

such unanimity and decisiveness that it would be wasted energy for me to do more than cite *National Folding Box & Paper Co. v. Robertson* (C. C.) 99 Fed. 985, in which my very dear friend, the late Judge Townsend, examined the matter with care. I trust that no one will deem it indelicate on my part to avail myself of his efforts. At the hearing last fall no attempt was made by counsel for the defendants to analyze and explain the weakness of the decisions; but it was contended that, if the paragraph should be stricken out, the rights of the defendants on final hearing would be curtailed.

I am not of that opinion. To leave the paragraph in, because it sets up an alleged substantive defense, which has been, time and again, decided by the courts to be a futile defense, would be, to my mind, an idle thing and a travesty. If it shall so happen that upon final hearing the issues shall be decided against the defendants, it seems to me to be obvious that the action of the court with regard to the objectionable paragraph, if wrong, could be remedied on appeal.

The motion to strike out is granted.

This ruling applies, *mutatis mutandis*, to the similar motion in No. 1,306.

In re EAGLE STEAM LAUNDRY CO. OF QUEENS COUNTY.

(District Court, E. D. New York. February 4, 1910.)

BANKRUPTCY (§ 184*)—SECURED CREDITORS—VALIDITY OF MORTGAGE.

Chapter 688 of the Laws of New York of 1892, as amended by chapter 354 of the Laws of 1901 (now section 6, c. 59, Consol. Laws [Laws 1900, c. 61]), provides that a stock corporation may borrow money and mortgage its property on the consent of not less than two-thirds of the capital stock in writing, and that a certificate of consent shall be filed and recorded in the office of the clerk or register of the county wherein the corporation has its principal place of business. The owner of a laundry business transferred his business to a corporation organized by him, subject to a chattel mortgage held by his wife. Thereafter the mortgage was renewed, but no consent of two-thirds of the stockholders was obtained, and the new mortgage was given within four months prior to bankruptcy. *Held*, that the mortgagee must be left as a general creditor of the estate.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 184.*]

Proceeding in the matter of the Eagle Steam Laundry Company of Queens County, a bankrupt. A mortgagee determined to have no rights save as a general creditor.

Wyckoff, Clarke & Frost, for claimant.

Robert McC. Robinson, for trustee.

CHATFIELD, District Judge. One Thomas Meany organized a laundry corporation, now in bankruptcy, and transferred his own business to that corporation, subject to a chattel mortgage of \$1,500 held by his wife. The original validity of this chattel mortgage is not disputed. At the time of the transfer Mrs. Meany took \$1,000 in stock for an additional claim held by her, and apparently agreed to renew her mortgage when the time of expiration came around. The or-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r indexes

ganization of the corporation and these transfers took place in October, 1907, and in January, 1908, a new mortgage was drawn up to take the place of the then expiring \$1,500 mortgage. This new mortgage was properly executed and recorded; but no consent of two-thirds of the stockholders was obtained, as required by the statutes of New York, being chapter 688, p. 1824, of the Laws of 1892, as amended by chapter 354, p. 961, of the Laws of 1901 (now section 6, c. 59, Consol. Laws [Laws 1909, c. 61]), by which a stock corporation is given power to borrow money and mortgage its property, upon the consent of not less than two-thirds of the capital stock in writing, or by vote at a special meeting called for that purpose, upon a similar notice to that required for the annual meeting, unless the mortgage in question be a purchase-money mortgage.

The petition in bankruptcy was filed upon the 23d day of May, 1908, which was within four months after the execution of the last chattel mortgage; but the satisfaction of one chattel mortgage and an extension of time to collect would seem to be sufficient consideration to make a mortgage valid, if all requirements are observed. It would also seem that a trustee in bankruptcy can, for the benefit of creditors, under the New York state statutes, contest the validity of a chattel mortgage.

The 12 months within which Mrs. Meany can file a claim as a general creditor, if her security is not held valid, has elapsed; but her claim has been presented in such a way that it would need but an amendment to protect her in that regard. In *re Strobel* (D. C.) 155 Fed. 692. If the corporation attempted to question the giving of the mortgage, it might be estopped, under the doctrine of *Hamilton Trust Co. v. Clemes*, 17 App. Div. 152, 45 N. Y. Supp. 141, affirmed 163 N. Y. 423, 57 N. E. 614, unless it returned the property; but creditors are not subject to such equitable estoppel. It is also impossible to find, as a determination of fact, that Mrs. Meany, some three or four months before the expiration of her mortgage, intended to be a party to the sale of the chattels to the new corporation, and then and there agreed to take later a corporate mortgage as a purchase-money mortgage to herself. On the contrary, it is plain that she allowed the chattels to be transferred subject to her title, with the idea that she could be secured in the future.

If all the creditors were stockholders who had knowledge of the making of the chattel mortgage in question, but who had not signified their consent, the doctrine of estoppel might apply as to them; but in the absence of a certificate or consent in writing, to accompany the mortgage when filed, making it presumptively valid, it would not seem that creditors can have lost their rights by the filing of a mortgage, which ultimately proves not to have been properly executed, and where no ground of estoppel can be shown.

Mrs. Meany must be left as a general creditor of the estate for the amount of her debt, and an amended claim therefor may be filed.

WESTLAKE v. MARRIN et al

(Circuit Court, E. D. Pennsylvania. February 15, 1910.)

No. 231.

EQUITY (§ 412*)—REFERENCE TO MASTER—EXAMINATION OF PARTIES PRO INTERESSE SUO—REMAND.

Where, in a suit involving title to real property, an order was made for the examination of certain claimants of an interest therein pro interesse suo, and they filed no answer to the petition, order, and affidavits, and offered no proof in their own behalf, and it appeared that they did not fully understand what was required of them, the master's finding, on the evidence introduced, that the claimants had no title to the property, and that it belonged to complainant as administrator, would be set aside, and the record referred back to the master for further proceedings.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 924-926; Dec. Dig. § 412.*]

Suit by Walter Westlake, as administrator of Caroline Barry, against Frank C. Marrin and others. On the master's report, following an examination pro interesse suo. Case remanded to master for further proceedings.

William P. Maloney, for complainant.

John McConaghy and Hampton L. Carson, for respondents.

HOLLAND, District Judge. This is a petition, filed by the complainant in the original suit above mentioned, upon which this court made an order for the examination of certain parties pro interesse suo, and appointed Henry M. Tracy master for the purpose of conducting this examination. Certain parties, to wit, Eugene C. Bonniwell, Benjamin T. Welsh, Franklin Lyle, James R. Shoch, Edward P. Doyle, and Thomas Killough, claimed an interest in property which had been conveyed to Walter Westlake, the above-mentioned complainant, by Marrin and wife, under a decree of this court some time ago, and subsequently to acquiring title Westlake attempted to sell this property so claimed in Philadelphia at public sale, when these parties asserted their claim under an alleged contract of sale which they had placed of record in this city.

The parties appeared before the master, but did not present any evidence of their title, nor did they controvert any of the allegations set forth in the original bill above mentioned, filed in this court, upon which the decree was made directing Marrin to convey the property to the complainant. The master, upon the evidence submitted by complainant, came to two very important conclusions in connection with this proceeding. The first is that this court had jurisdiction to make this order for an examination pro interesse suo; and, second, he found that the claimants to this property had no title whatever, but that it belonged to the complainant, as administrator of Caroline Barry, deceased.

I regard the statement of these two important findings as sufficient for such disposition of the case as the record as it now stands seems

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to warrant. At the argument it appeared that the parties claiming an interest in this real estate did not fully understand what was required of them. At any rate, as stated by the master in his report, they "made and filed no answer thereto [that is, the petition, order, and affidavits in this proceeding] and offered no proof on their own behalf." So that, while the findings of fact in the master's report may be justified from the evidence submitted to him, although upon this I express no opinion, yet it is clear that these parties have not had a hearing as to their title to this property, and, if this proceeding can be maintained in its present form, it is proper that they should be given a fair chance to present their proofs in support of their claim.

As this whole matter must go back to the master for the purpose of taking further testimony, in order that all the material facts may appear, and the claimants be given a chance to defend their title to the property in dispute, it is proper, we think, at the same time to have the master report on the matters of law which are properly raised on the record. The report and whole record are referred back to the master for the purpose of passing upon the following questions:

1. As this proceeding is brought in the name of Walter Westlake, as administrator of the goods, chattels, and credits of Caroline Barry, deceased, can it be maintained in the United States courts sitting in Pennsylvania, he being an administrator deriving his authority as such from the courts of another state?

2. And, even if this proceeding could be amended, substituting Westlake as the record owner of this property, instead of Westlake, as administrator, etc., could he then, as owner, try the title to this real estate in this proceeding?

3. Can an examination pro interesse suo be had by any one, except a claimant for property, real or personal, in the hands of the court in sequestration proceedings, or by reason of the appointment of a receiver, or by some other means?

4. If this proceeding be restricted to a claim for property in the hands of the court, can the property in question be regarded as within the control of the court to an extent to enable it to settle the claim of title of parties in such a proceeding?

5. In case this proceeding is properly instituted, and can be maintained under the circumstances, are the claimants entitled to a decree in their favor upon the proofs they may see fit to offer, and, if entitled to a decree, the form thereof?

SOVEREIGN BANK OF CANADA v. STANLEY.

(Circuit Court, S. D. New York. February 21, 1910.)

1. PLEADING (§ 192*)—DEFENSES—ARGUMENTATIVE DENIALS.

In an action for the value of certain ostrich feathers alleged to have been received by defendant's testator in a fiduciary capacity, defendant alleged for her first defense that her testator was a member of a firm which received the feathers under agreement that plaintiff would make advances on them; second, that the firm should sell the feathers, deposit the pro-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ceeds to its account in the bank, and pay out the advances to plaintiff; and, third, that the feathers were not received by the firm or testator in a fiduciary capacity. The fourth defense alleged the same transaction, but that the advances were a firm obligation, and that plaintiff had not exhausted its remedies against the surviving members. The fifth defense repeated the agreement, and alleged that defendant's testator died insolvent, and that plaintiff's claim was subordinate to the claims of the individual creditors. *Held*, that such defenses were demurrable, as argumentative denials.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 416; Dec. Dig. § 192.*]

2. PLEADING (§ 392*)—VARIANCE.

Where plaintiff sought to recover the value of certain ostrich feathers, alleged to have been deposited with defendant's testator in a fiduciary capacity, proof that the transaction was with a firm of which testator was a member would constitute a fatal variance.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1315, 1316; Dec. Dig. § 392.*]

3. PLEADING (§ 11*)—DEFENSES—IRRELEVANT SURPLUSAGE.

Where plaintiff sought to recover the value of certain goods alleged to have been deposited with defendant's testator in a fiduciary capacity, allegations in separate defenses that the transaction was with a firm of which testator was a member, that plaintiff had not exhausted its remedies against the firm, and the insolvency of the estate constituted a pleading of evidence, and were irrelevant surplusage.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 81; Dec. Dig. § 11.*]

4. PLEADING (§ 114*)—TRAVERSE.

In general, all evidence is admissible under a traverse which contradicts the truth of the allegations denied, and should not be pleaded.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 238; Dec. Dig. § 114.*]

Action by the Sovereign Bank of Canada against Martha F. M. Stanley, as executrix, etc. On demurrer to certain alleged defenses. Sustained.

The complaint is to recover for the value of certain ostrich feathers, which the defendant's testator received as the plaintiff's property and in a fiduciary capacity. Having received it, he sold it, and in exchange received as the property of, and in a fiduciary capacity for, the plaintiff, certain negotiable instruments, which he then transferred to certain banks to which he was indebted, and so converted them to his own use. The answer contains denials and six defenses. Of these, the plaintiff demurs to the first, fourth, and fifth.

The first defense alleges, first, that the defendant's testator was the member of a firm which received the ostrich feathers under agreement that the plaintiff would make advances upon them; second, that the firm should sell the feathers, deposit the proceeds in its accounts in banks, and pay out the advances to the plaintiff from these accounts; third, that the feathers were not received by the firm, or the defendant's testator, in a fiduciary capacity. The fourth defense alleges the same transaction as is stated in the first, but also that the advances were a firm obligation, and that plaintiff has not exhausted its remedies against the surviving members. The fifth defense repeats the agreement, and alleges that the defendant's testator died insolvent, and that the plaintiff's claim is subordinate to the claims of individual creditors.

Rounds, Hatch, Dillingham & Debevoise, for plaintiff.
Kellogg & Rose, for defendant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

HAND, District Judge (after stating the facts as above). The demurrer is well taken, for all the defenses are argumentative denials. The plaintiff, to succeed, must prove an individual transaction between itself and the defendant's testator. If it proves to be a firm transaction, it will be a fatal variance, without amendment. The only thing necessary for the defendant to show will be that the transactions upon which it relies were not with the defendant's testator, but with a firm of which he was a member. That shown, his complaint will have been answered. To plead that the agreement was with the firm is to plead evidence which will meet the allegation that it was with him. This being true, all the allegations as to the character of the transactions with the firm, the failure of the plaintiff to exhaust its remedies against the firm, and the insolvency of the estate of the defendant's testator, are irrelevant surplusage. The two last would perhaps be valid defenses, if the defendant's testator was sued for what the complaint alleged to have been a firm debt, but not when it relies upon an individual transaction.

The defendant's citations are not apposite. In *Linton v. Unexcelled Fireworks Co.*, 124 N. Y. 533, 27 N. E. 406, the defense was that the plaintiff had given ground for discharge. That evidence did not meet the issue of the existence of the employment or its termination. It should therefore have been pleaded. In *Duryee v. Lester*, 75 N. Y. 442, the matter of defense did not tend to disprove the fact of the employment or the rendition of the services, which was all the complaint alleged. *Wilbur v. Collins*, 4 App. Div. 417, 38 N. Y. Supp. 848, seems to be the contrary, and I must concede that the reasoning of the case is not apparent to me. *McKyring v. Bull*, 16 N. Y. 297, 69 Am. Dec. 696, decides that payment must be pleaded, which was the law in *in-debitatus assumpsit*, even before the Hilary Rules, as I recall.

In general terms it may be laid down that all evidence is admissible under a traverse which contradicts the truth of the allegations denied, and it must not be pleaded. The defendant does not raise any question of the validity of the complaint, and therefore the demurrers must be sustained.

The plaintiff may take judgment sustaining the demurrers, with a respondeat ouster within 10 days after entry.

OLD DOMINION COPPER MINING & SMELTING CO. v. LEWISOHN et al.

(Circuit Court, S. D. New York. December 30, 1909.)

1. EQUITY (§ 271*)—BILL—AMENDMENT.

Complainant in equity, after the pleadings have been closed and the evidence has been taken and is ready for printing, is not entitled to leave to file a substituted bill of complaint, except to make the pleadings correspond to the evidence.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 558-560; Dec. Dig. § 271.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. EQUITY (§ 290*)—COMPLAINT—AMENDMENT.

Where leave is asked to file a substituted bill of complaint, the court can only permit or reject it, and cannot be expected to revise it, and permit it to be filed if drawn in a different form.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 549; Dec. Dig. § 290.*]

3. EQUITY (§ 290*)—BILL—AMENDMENT.

Where, after the pleadings are closed and the evidence taken, complainant deems it necessary to file an amendment to the bill, he should present specific amendments to the paragraphs of the original bill, supporting his application by affidavits, according to equity rule 29, and not make an application to file a substituted bill, which the court would not grant unless satisfied that complainant is entitled to make all the changes which would be made by the substituted bill.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 549; Dec. Dig. § 290.*]

Action by the Old Dominion Copper Mining & Smelting Company against Frederick Lewisohn and others. On motion for leave to file a substituted bill of complaint. Denied.

Edward F. McClennen, for the motion.

Eugene Treadwell, opposed.

NOYES, Circuit Judge. It appears that the pleadings in this case were long since closed, and that the evidence has been taken and is ready for printing. In this situation it is not obvious why the complainant, in seeking an amendment, should not strictly follow equity rule 29. The complainant, however, without any supporting affidavits and without specific amendments, asks leave to file a substituted bill of complaint. Aside from matters of form, it is clear that such leave at this late day should only be granted for the purpose of making the pleadings correspond to the evidence. But, without affidavits or proper references presenting the relevant evidence, it is quite impossible for the court to determine whether the changes in the original bill made by the substituted bill are necessary, and only such as are necessary, to make the allegations conform to the proofs.

Of course the objection just noted might be met by now receiving references to the testimony. But that would not be sufficient to enable the court to really dispose of the questions presented upon the motion. The complainant desires to file a substituted bill. The court can only permit it to be filed or reject it. The court cannot be expected to revise it, and permit it to be filed if drawn in a different form. Consequently, as I am not satisfied that the complainant should be permitted to make all the changes which would be made by the substituted bill, I have no other course than to refuse the complainant leave to file it. Had the complainant presented specific amendments to the paragraphs of its original bill, I should have taken a different course, and should have passed upon each of the proposed changes.

The motion is denied, without prejudice to the right of the complainant to ask leave to amend the paragraphs of the original complaint in accordance with the rules of courts of equity.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

MAZIEKA v. NORTH & JUDD MFG. CO.

(Circuit Court, E. D. New York. February 8, 1910.)

REMOVAL OF CAUSES (§ 112*)—DISMISSAL OF CAUSE—PROCEEDINGS FOR DISMISSAL.

Where defendant, by obtaining an order to show cause on a motion to dismiss for insufficiency of service of process, permits the record on removal of the cause to be completed by including a stipulation that the service made should have the same effect as if made on an officer of the defendant company within the state, provided that this should not be construed so as to prejudice defendant's rights in the United States Circuit Court if the action should be removed to that court, and he contends that on removal plaintiff is limited to reliance on the actual service, but argues that, even if service were on an officer, dismissal could be demanded, the court will require defendant to elect which interpretation it will assert it intended.

[Ed. Note.—For other cases, see Removal of Causes, Dec. Dig. § 112.*]

Action by Joseph Mazieka against the North & Judd Manufacturing Company. On motion by defendant to dismiss. Motion set for hearing.

O'Neill, McDowell & Kennedy, for plaintiff.
George H. Mitchell, for defendant.

CHATFIELD, District Judge. The defendant has moved to dismiss by obtaining an order to show cause, which called upon the plaintiff to furnish proof, by way of affidavits, as to the facts relating to the allegations that the defendant did no business in the state of New York, and had no officers here engaged in business and capable of being served with process. The plaintiff has submitted affidavits and a stipulation in the following language:

"It is stipulated on behalf of defendant that the service of the summons and complaint herein on John C. Moore, managing agent, on the 9th day of September, 1909, shall have the same force and effect as if served upon an officer of the company within the state. Nothing herein, however, shall be construed so as to prejudice in any way the rights of the defendant in the United States Circuit Court, should this action be removed to that court."

One motion to set aside service in the state court had been granted, and the second service was no better. If the present motion rested upon the removal record alone, this stipulation would appear to have been unavailable, as it had never been filed, and this court would have had no knowledge thereof. The order to show cause has given the plaintiff the right to complete the record by including the stipulation. But under the defendant's interpretation the plaintiff is still limited to reliance upon the actual service, which has apparently been held insufficient in the state court. On the other hand, if the stipulation be held to mean that no waiver or consent shall be claimed which would interfere with the defendant's rights in the United States court, even if the summons had been served upon an officer, then this court would have to pass upon the question of whether such service would be held sufficient after removal. As the defendant has by its own act al-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

lowed this ambiguous stipulation to be submitted to the court, and yet has argued that, even if the service had been upon an officer, a dismissal could be demanded, the court is unwilling to decide what the defendant intended thereby. The defendant must elect which position it will take, or, rather, which meaning of the stipulation it will assert it intended.

To hold that the service was the same as if upon an officer would be to the prejudice of the defendant, if it could have demanded a dismissal in the United States court upon the service actually made, and it would then be necessary to determine whether the case ought to be remanded to prevent injustice to the plaintiff, inasmuch as the stipulation conferring jurisdiction upon the state court was signed, and an entire failure of consideration for the \$20 paid would result if it be treated as futile. If the defendant elects to treat the stipulation as equivalent to service upon an officer, but to be without prejudice (that is, not to be considered as a voluntary appearance or waiver) to any rights it may urge, even upon such service, then this court will be in a position to decide the question of federal jurisdiction upon the merits.

The motion may be brought on February 18th, at 3:30 p. m., when either party may make such motion as they are advised.

MORRISDALE COAL CO. v. PENNSYLVANIA R. CO.

(Circuit Court, E. D. Pennsylvania. February 5, 1910.)

No. 102.

CARRIERS (§ 36*) — DISCRIMINATION — DISTRIBUTION OF CARS — PAST ACTS — ACTIONS FOR DAMAGES — INTERSTATE COMMERCE COMMISSION — COURTS — JURISDICTION.

Where an alleged unlawful discrimination in the distribution of coal cars in violation of Interstate Commerce Act (Act Feb. 4, 1887, c. 104, § 3, 24 Stat. 380 [U. S. Comp. St. 1901, p. 3155]) had been practiced by defendant railroad company, resulting in injury to plaintiff, for which it was entitled to damages, such discrimination having been applicable to a class of shippers and not to complainant alone, the Interstate Commerce Commission had exclusive original jurisdiction to afford complainant relief, it not being entitled to sue in the first instance in an action for alleged damages sustained thereby, authorized by section 9, and this, though the acts constituting the alleged discrimination had ceased prior to the commencement of the suit.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 95; Dec. Dig. § 36.*]

Duties and liabilities of carriers as to furnishing facilities for transportation, see note to Harp v. Choctaw, O. & G. R. Co., 61 C. C. A. 414.]

Action by the Morrisdale Coal Company against the Pennsylvania Railroad Company to recover damages for alleged discrimination in the distribution of coal cars in violation of the interstate commerce act. On motion to dismiss for want of jurisdiction. Granted.

Chester N. Farr, Jr., and Wm. A. Glasgow, Jr., for plaintiff.
Francis I. Gowen and John G. Johnson, for defendant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

J. B. McPHERSON, District Judge. This suit was brought to recover damages from the Pennsylvania Railroad Company for a practice that is alleged to be in violation of the act to regulate commerce. Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]. The plaintiff's coal mine is in the Clearfield region of this state, and the defendant carries much of the product in commerce between the states. The practice complained of was a method of distributing coal cars among the mines of the region at times when the supply of cars fell short. The plaintiff averred that an undue preference was given thereby to other miners and shippers in the same region, while it was obliged to bear an unreasonable burden. This being forbidden by section 3, the plaintiff sued to enforce the liability referred to in section 8, and claims the right to recover, in spite of the conceded fact that no complaint was made in the first instance to the Interstate Commerce Commission. The suit is said to be brought under the permission given by section 9, a trial was had before a jury, and a special verdict was rendered in favor of the plaintiff. The right to judgment, however, was still undetermined when the present motion was made; and this right was believed at the trial to depend upon the decision of certain questions that are referred to in the verdict. Among these, it was a vital question whether the method that was followed by the railroad company during the years 1902-1905 for distributing its available supply of cars during periods of shortage imposed unreasonable disadvantage upon the plaintiff, or gave unreasonable preference to its competitors in the Clearfield region. Briefly, the method was this: The railroad company determined the capacity of the various mines in the region by a computation that is not complained of, and thus arrived at the proportion of cars to which the plaintiff and other miners would be entitled when cars were too few to meet the demand completely. This proportion was applied to the deficient car supply in the following manner: Each day the total number of cars available for the whole region was ascertained by the railroad company, and a distribution sheet was then made up, allotting to the plaintiff and the other miners the cars to which the defendant's method of distribution showed them to be entitled. The total available cars consisted of four classes: Those that belonged to private individuals or corporations; those that were to be filled with coal that the railroad company had bought for its own use as fuel; those that belonged to foreign railroad companies, and were also to be filled with coal that these companies had bought for their own use as fuel; and system, or company, cars—meaning such cars as did not belong to either of the first three classes but were available generally for the carriage of coal. If the railroad company had distributed the total number of these four classes ratably among the mines according to capacity, the plaintiff would not be now complaining. But a different method was pursued. From the total number of available cars the defendant deducted the aggregate of the first three classes—assigning the private cars to the individuals or corporations who owned them or were entitled to use them, and assigning its own fuel cars and the fuel cars of foreign railroads to the mines from which the supply was to come—

and distributed the fourth class alone in proportion to capacity. The result was that the owners or users of private cars received these cars, and also their ratable proportion of the fourth class; and the miners who had contracted to fill the fuel cars, either of the defendant or of foreign railroad companies, received these cars, and also their ratable proportion of the fourth class; while the plaintiff received only its ratable proportion of the fourth class, and was thus confined to a supply that was necessarily smaller than if its proportion had been allotted out of the total of the four classes. Averring injury by this method of distribution, and asserting that the total number of the four classes without any deduction should have been divided among the mines of the region in proportion to their ascertained capacity, the plaintiff sought to recover damages in this action for unlawful discrimination.

It will at once be observed that the suit requires a court and jury to decide whether the defendant's method of distribution offended against the act. The questions are (1) whether this method gave a preference to any particular person, company, firm, or corporation, or subjected the plaintiff to any prejudice or disadvantage; and (2) if such preference or disadvantage existed, whether it was undue or unreasonable. These are questions of fact, and manifestly cannot be decided merely by considering what methods may have been held to be lawful, when adopted and applied by other railroads under other circumstances. There is no "rule of law" that requires the aggregate of available cars always and everywhere to be divided ratably in times of shortage. Even if it be conceded that, whenever a dispute upon the subject has been presented to a court or to the Commission, this method of distribution has usually been decided to be the fairest, it does not follow necessarily that the method is to be applied in the next dispute that arises. It is perhaps more nearly correct to speak of the "rule" as similar to a working hypothesis. It may do to start with, if—or since—it represents a fairly general opinion concerning what is just and equitable; but the circumstances of a given case may require the rule to be modified, and would certainly require it to be modified, if, instead of avoiding, it would cause, an undue preference or disadvantage. What is undue or unreasonable is ordinarily a pure question of fact; and, where such a question is presented, it is necessary to be cautious in applying a rule that may have been properly used to decide a similar question, but under different circumstances. And, since the question is of fact, there will always be the danger that different courts and juries may reach different conclusions, even when the evidence and the facts are essentially the same. Different minds occupy different points of view, and may therefore see the same question from opposite angles with varying results. Moreover, as a question of fact can only be resolved by evidence, it may easily happen that the quantity or quality of evidence may differ in one trial from another, so that recovery by one plaintiff and failure by another may both be just—one having evidence enough, while the other has too little, to support a verdict.

These remarks may perhaps serve as a preface to the examination of two or three recent decisions of the Supreme Court, which deal

with some of the difficulties that beset the effort to apply section 3 by the piecemeal procedure of unconnected trials before a court and jury. Facing these difficulties, and influenced no doubt by other considerations as well, the court has, I think, announced important conclusions upon the construction of the act; and it is therefore necessary to examine carefully the decisions referred to, and to note the course of reasoning by which they have been reached. The first is *Texas & Pacific Railway Company v. Abilene Cotton Oil Co.*, 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553. This has to do with an unreasonable rate, but much that is said by the court is also applicable to a dispute like this, where the injury is charged to an unreasonable practice. The oil company was compelled to pay a rate which it believed to be more than was reasonable, and the suit was brought to recover the excess. The action was at common law in a court of the state, and the railway defended, *inter alia*, by averring, and afterwards proving, that the shipment was interstate, and that the rate complained of had been established and posted as required by the act to regulate commerce. Nevertheless, the Texas Court of Civil Appeals decided that, as the rate had been found by the trial court to be unreasonable, the oil company had a right to recover under the principles of the common law, although the rate had been established by the carrier under the federal statute. In other words, the state court entertained a suit, the purpose of which was to pronounce a rate unreasonable, in spite of the fact that the rate had been established and posted under the provisions of the act, and in spite, also, of the fact that the reasonableness of the rate had not been passed upon by the Commission. A question was thus presented which the Supreme Court states in the following language (page 436 of 204 U. S., page 353 of 27 Sup. Ct. [51 L. Ed. 553]):

The fundamental question is "the scope and effect of the act to regulate commerce upon the right of a shipper to maintain an action at law against a common carrier to recover damages because of the exaction of an alleged unreasonable rate, although the rate collected and complained of was the rate stated in the schedule filed with the Interstate Commerce Commission and published according to the requirements of the act to regulate commerce, and which it was the duty of the carrier, under the law, to enforce as against shippers."

The court conceded that a shipper might recover damages at common law if the carrier charged an unreasonable rate, and that such damages might properly be measured by the excess above a proper rate. And it is further conceded that the oil company was clearly suing upon a right that was valid at common law, and that the act to regulate commerce had not expressly taken the right away. But it was held that the right was nevertheless taken away impliedly, although the court agreed that repeals by implication are not favored, and that a statute should not be construed to take away a common-law right unless such a result is imperatively required. This ruling in favor of the implied repeal is supported by showing that the act provides complete machinery for the protection of shippers, and has substituted its own remedies for the remedies of the common law. To sustain this position, the court summarizes the statute as follows:

"The act made it the duty of carriers subject to its provisions to charge only just and reasonable rates. To that end the duty was imposed of establishing and publishing schedules of such rates. It forbade all unjust preferences and discriminations, made it unlawful to depart from the rates in the established schedules until the same were changed as authorized by the act, and such departure was made an offense punishable by fine or imprisonment, or both, and the prohibitions of the act and the punishments which it imposed were directed not only against carriers, but against shippers, or any persons who, directly or indirectly, by any machination or device, in any manner whatever, accomplished the result of producing the wrongful discriminations or preferences which the act forbade. It was made the duty of carriers subject to the act to file with the Interstate Commerce Commission created by that act copies of established schedules, and power was conferred upon that body to provide as to the form of the schedules, and penalties were imposed for not establishing and filing the required schedules. The Commission was endowed with plenary administrative power to supervise the conduct of carriers, to investigate their affairs, their accounts, and their methods of dealing, and generally to enforce the provisions of the act. To that end it was made the duty of the district attorneys of the United States, under the direction of the Attorney General, to prosecute proceedings commenced by the Commission to enforce compliance with the act. The act specially provided that whenever any common carrier subject to its provisions 'shall do, cause to be done, or permit to be done, any act, matter or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter or thing in this act required to be done, such common carrier shall be liable to the person or persons thereby injured for the full amount of damages sustained in consequence of any such violation of the provisions of this act. * * *' Power was conferred upon the Commission to hear complaints concerning violations of the act, to investigate the same, and, if the complaints were well founded, to direct, not only the making of reparation to the injured persons, but to order the carrier to desist from such violation in the future. In the event of the failure of a carrier to obey the order of the Commission, that body, or the party in whose favor an award of reparation was made, was empowered to compel compliance by invoking the authority of the courts of the United States in the manner pointed out in the statute, prima facie effect in such courts being given to the findings of fact made by the Commission."

Pointing out that the act was undoubtedly intended to redress the wrongs resulting from unjust discrimination and undue preference in regard to rates, and that this object was to be accomplished by compelling the carrier to establish schedules of reasonable rates that should apply uniformly to all, and should not be departed from until the schedule was changed in the manner provided by the act, the court goes on to say:

"When the general scope of the act is enlightened by the considerations just stated it becomes manifest that there is not only a relation, but an indissoluble unity, between the provision for the establishment and maintenance of rates until corrected in accordance with the statute, and the prohibitions against preferences and discrimination. This follows, because, unless the requirement of a uniform standard of rates be complied with, it would result that violations of the statute as to preferences and discrimination would inevitably follow. This is clearly so, for if it be that the standard of rates fixed in the mode provided by the statute could be treated on the complaint of a shipper by a court and jury as unreasonable, without reference to prior action by the Commission, finding the established rate to be unreasonable, and ordering the carrier to desist in the future from violating the act, it would come to pass that a shipper might obtain relief upon the basis that the established rate was unreasonable, in the opinion of a court and jury, and thus such shipper would receive a preference or discrimination not enjoyed by those against whom the schedule of rates was continued to be enforced. This can only be met by the suggestion that the judgment of a court, when based upon a complaint made by a shipper without previous action by the Commission, would

give rise to a change of the schedule rate, and thus cause the new rate resulting from the action of the court to be applicable in future as to all. This suggestion, however, is manifestly without merit, and only serves to illustrate the absolute destruction of the act and the remedial provisions which it created, which would arise from a recognition of the right asserted. For if, without previous action by the Commission, power might be exerted by courts and juries generally to determine the reasonableness of an established rate, it would follow that, unless all courts reached an identical conclusion, a uniform standard of rates in the future would be impossible, as the standard would fluctuate and vary, dependent upon the divergent conclusions reached as to reasonableness by the various courts called upon to consider the subject as an original question. Indeed, the recognition of such a right is wholly inconsistent with the administrative power conferred upon the Commission, and with the duty which the statute casts upon that body, of seeing to it that the statutory requirement as to uniformity and equality of rates is observed. Equally obvious is it that the existence of such a power in the courts, independent of prior action by the Commission, would lead to favoritism, to the enforcement of one rate in one jurisdiction and a different one in another, would destroy the prohibitions against preferences and discriminations and afford, moreover, a ready means by which, through collusive proceedings, the wrongs which the statute was intended to remedy could be successfully inflicted. Indeed, no reason can be perceived for the enactment of the provision endowing the administrative tribunal which the act created with power, on due proof, not only to reward reparation to a particular shipper, but to command the carrier to desist from violation of the act in the future, thus compelling the alteration of the old or the filing of a new schedule, conformably to the action of the Commission, if the power was left in the courts to grant relief on complaint of any shipper, upon the theory that the established rate could be disregarded and be treated as unreasonable, without reference to previous action by the Commission in the premises. This must be, because, if the power existed in both courts and the Commission to originally hear complaints on this subject, there might be a divergence between the action of the Commission and the decision of a court. In other words, the established schedule might be found reasonable by the Commission in the first instance and unreasonable by a court acting originally, and thus a conflict would arise which would render the enforcement of the act impossible."

But, as the argument had been made that section 9 permits an injured shipper either to complain to the Commission, or to sue at law, merely compelling him to elect which remedy he will adopt, and that the suit under review had been brought in the exercise of such election, the court replied to this contention in the following significant language:

"Nor is there merit in the contention that section 9 of the act compels to the conclusion that it was the purpose of Congress to confer power upon courts primarily to relieve from the duty of enforcing the established rate by finding that the same as to a particular person or corporation was so unreasonable as to justify an award of damages. True it is that the general terms of the section, when taken alone, might sanction such a conclusion, but, when the provision of that section is read in connection with the context of the act, and in the light of the considerations which we have enumerated, we think the broad construction contended for is not admissible. And this becomes particularly cogent when it is observed that the power of the courts to award damages to those claiming to have been injured, as provided in the section, contemplates only a decree in favor of the individual complainant, redressing the particular wrong asserted to have been done, and does not embrace the power to direct the carrier to abstain in the future from similar violations of the act; in other words, to command a correction of the established schedules, which power, as we have shown, is conferred by the act upon the Commission in express terms. In other words, we think that it inevitably follows from the context of the act that the independent right of an individual originally to maintain actions in courts to obtain pecuniary redress for violations of the

act, conferred by the ninth section, must be confined to redress of such wrongs as can, consistently with the context of the act, be redressed by courts without previous action by the Commission, and therefore does not imply the power in a court to primarily hear complaints concerning wrongs of the character of the one here complained of. Although an established schedule of rates may have been altered by a carrier voluntarily, or as the result of the enforcement of an order of the Commission to desist from violating the law, rendered in accordance with the provisions of the statute, it may not be doubted that the power of the Commission would nevertheless extend to hearing legal complaints of, and awarding reparation to, individuals for wrongs unlawfully suffered from the application of the unreasonable schedule during the period when such schedule was in force."

Several decisions are then reviewed, especially *Railway v. Hefley*, 158 U. S. 98, 15 Sup. Ct. 802, 39 L. Ed. 910, and *Railway v. Mügg*, 202 U. S. 242, 26 Sup. Ct. 628, 50 L. Ed. 1011, and the court continues (page 445 of 204 U. S., page 357 of 27 Sup. Ct. [51 L. Ed. 553]):

"In view of the blinding effect of the established rates upon both the carrier and shipper, as expounded by the two decisions of this court just referred to, the contention now made, if adopted, would necessitate the holding that a cause of action in favor of a shipper arose from the failure of the carrier to make an agreement"—that is, as I understand it, an agreement to charge a rate different from the rate contained in its published schedule—"when, if the agreement had been made, both the carrier and the shipper would have been guilty of a criminal offense and the agreement would have been so absolutely void as to be impossible of enforcement. Nor is there force in the suggestion that a like dilemma arises from the recognition of power in the Commission to award reparation in favor of an individual because of a finding by that body that a rate in an established schedule was unreasonable. As we have shown, there is a wide distinction between the two cases. When the Commission is called upon, on the complaint of an individual, to consider the reasonableness of an established rate, its power is invoked not merely to authorize a departure from such rate in favor of the complainant alone, but to exert the authority conferred upon it by the act, if the complaint is found to be just, to compel the establishment of a new schedule of rates applicable to all. And like reasoning would be applicable to the granting of reparation to an individual after the establishment of a new schedule because of a wrong endured during the period when the unreasonable schedule was enforced by the carrier and before its change and the establishment of a new one. In other words, the difference between the two is that which, on the one hand, would arise from destroying the uniformity of rates which it was the object of the statute to secure, and, on the other, from enforcing that equality which the statute commands."

It is then declared that section 22, which preserves the "remedies now existing at common law or by statute," cannot in reason be construed as preserving to a shipper a common-law right which would be absolutely inconsistent with the statute:

"In other words, the act cannot be held to destroy itself. The clause is concerned alone with rights recognized in or duties imposed by the act, and the manifest purpose of the provision in question was to make plain the intention that any specific remedy given by the act should be regarded as cumulative, when other appropriate common-law or statutory remedies existed for the redress of the particular grievance or wrong dealt with in the act."

And the conclusion of the whole matter is thus stated on page 448 of 204 U. S., on page 358 of 27 Sup. Ct. (51 L. Ed. 553):

"* * * A shipper seeking reparation predicated upon the unreasonableness of the established rate must, under the act to regulate commerce, primarily invoke redress through the Interstate Commerce Commission, which body alone is vested with power originally to entertain proceedings for the altera-

tion of an established schedule because the rates fixed therein are unreasonable. * * *

This decision deals specifically with the subject of rates, but Baltimore & Ohio Railroad Company v. United States ex rel. Pitcairn Coal Co., 30 Sup. Ct. 164, 54 L. Ed. —, has to do with the subject now in hand—the distribution of coal cars in time of shortage. The decision was rendered on January 10, 1910, and the opinion is written by Mr. Justice White, who also spoke for the court in the case of the Abilene Oil Company. The suit was begun in the United States Circuit Court for the District of Maryland by a petition for a mandamus. The writ was asked for by the Pitcairn Coal Company (apparently joined afterwards by other petitioners), in order to compel the Baltimore & Ohio Railroad Company to change its method of distributing coal cars among certain mines that were served by the railroad. It is unnecessary to describe the method in detail. It differed in several particulars from the method now complained of, but it was alleged to produce a similar effect, namely, an undue preference in favor of certain miners and shippers, and an undue discrimination against others. The railroad company denied the averments of preference and discrimination, and asserted the validity of its method and rules of distribution. The issue thus formed required an elaborate and prolonged inquiry into the facts, and in the end the circuit court made an order sustaining the railroad's method except in one particular—the company was decided to be wrong in deducting private cars before the pro rata distribution was made. The Court of Appeals went further and decided that the railroad company's method was also wrong in several other particulars, inter alia, in deducting its own fuel cars and the fuel cars of foreign railroads before making pro rata distribution to the mines in the district. The grievance of the Pitcairn Company had not been laid before the Commission, and the situation presented to the Supreme Court by all these facts is referred to in the following paragraphs from the opinion:

"One of the assignments of error assails the correctness of the conclusion of the court below to the effect that, compatibly with the act to regulate commerce, there was power under the circumstances disclosed by the record to consider the subject-matters which were complained of, and to award the relief concerning them which was prayed. Indeed, the nature of the controversy and the relief which it requires is such that, even without the assigned error to which we have referred, the question at the very threshold necessarily arises and commands our attention as to whether there was power in the courts, under the circumstances disclosed by the record, to grant the relief prayed consistently with the provisions of the act to regulate commerce, and to that subject we therefore at once come.

"To a consideration of this question it is essential to at once summarily and accurately fix the subject-matter of the alleged grievances and the precise character of the relief required in order to remedy the evils complained of upon the assumption of their existence. As to the first, it is patent that the grievances involve acts of the Baltimore & Ohio Railroad, regulations adopted by that company and alleged dealings by the other corporations, all of which, it is asserted, concern interstate commerce, and all of which, it is alleged, are in direct violation of the duty imposed upon the railroad company by the provisions of the act to regulate commerce. As to the second, in view of the nature and character of the acts assailed, of the prayer for relief which we have previously excerpted and of the relief which the court below directed to be awarded, it is equally clear that a prohibition, by way of mandamus, against

the act is sought and an order, by way of mandamus, was invoked, and was allowed which must operate, by judicial decree, upon all the numerous parties and various interests as a rule or regulation as to the matters complained of for the conduct of interstate commerce in the future."

This being the situation and these being the questions, the court goes on to say:

"When the situation is thus defined, we see no escape from the conclusion that the grievances complained of were primarily within the administrative competency of the Interstate Commerce Commission, and not subject to be judicially enforced, at least until that body, clothed by the statute with authority on the subject, had been afforded, by a complaint made to it, the opportunity to exert its administrative functions."

The court declares that the controversy is controlled by the considerations that governed the decision in the case of the Abilene Oil Company; and points out that the relief there prayed for was denied because it was inconsistent with the act to regulate commerce; the inconsistency being found in the fact that the act made the rate then in controversy of controlling force until it should be pronounced unreasonable by the Commission itself, on a complaint made to that body. Therefore the rate could not be declared unreasonable, either directly or inferentially, in a proceeding before another tribunal. Any other view would give rise to inextricable confusion, would create unjust preferences and undue discriminations, would frustrate the purposes of the act, and in effect cause the act to destroy itself.

But the Baltimore & Ohio Company Case arose in January, 1907, after the amendments of 1906 had been passed, and the court therefore proceeds to the consideration of these amendments, saying:

"The ruling there made (in the Abilene Case) dealt with the provisions of the act as they existed prior to the amendments adopted in 1906, and when those amendments are considered they render, if possible, more imperative the construction given to the act by that ruling; since, by section 15, as enacted by the amendment of June 29, 1906 [34 Stat. 589, c. 104, § 4 (U. S. Comp. St. Supp. 1909, p. 1158)], the Commission is empowered, indeed, it is made its duty, in disposing of a complaint, not only to determine the legality of the practice alleged to give rise to an unjust preference or undue discrimination, and to forbid the same, but, moreover, to direct the practice to be followed as to such subject for a future period, not exceeding two years, with power in the Commission, if it finds reason to do so, to suspend, modify, or set aside the same, the order, however, to become operative without judicial action. In considering section 15 in the case of Illinois Central Railroad Co. v. Interstate Commerce Commission (just decided) [C. C., 173 Fed. 930], it was pointed out that the effect of the section was to cause it to come to pass that courts, in determining whether an order of the Commission should be suspended or enjoined, were without power to invade the administrative functions vested in the Commission, and therefore could not set aside an order duly made on a mere exercise of judgment as to its wisdom or expediency. Under these circumstances it is apparent, as we have said, that these amendments add to the cogency of the reasoning which led to the conclusion in the Abilene Case, that the primary interference of the courts with the administrative functions of the Commission was wholly incompatible with the act to regulate commerce. This result is easily illustrated. A particular regulation of a carrier in interstate commerce is assailed in the courts as unjustly preferential and discriminatory. Upon the facts found the complaint is declared to be well founded. The administrative powers of the Commission are invoked concerning a regulation of like character upon a similar complaint. The Commission finds from the evidence before it, that the regulation is not unjustly discriminatory. Which would prevail? If both, then discrimination

and preference would result from the very prevalence of the two methods of procedure. If, on the contrary, the Commission was bound to follow the previous action of the courts, then it is apparent that its power to perform its administrative functions would be curtailed, if not destroyed. On the other hand, if the action of the Commission was to prevail, then the function exercised by the court would not have been judicial in character, since its final conclusion would be susceptible of being set aside by the action of a mere administrative body."

Illustrations of actual confusion growing out of rulings by the courts and rulings by the Commission upon the same subject are then given, and the opinion passes on to consider the effect of section 10 of Act March 2, 1889, c. 382, 25 Stat. 855 (U. S. Comp. St. 1901, p. 3172), which provides for the remedy by mandamus. This is the section that had been invoked by the Pitcairn Company, and at first blush its language certainly seems to give the courts primary jurisdiction to issue the writ whenever a carrier violates the act by preferential rates or practices. But the Supreme Court declared that the apparent scope of the section must obviously be restricted so that it may harmonize with the rest of the act and not destroy one of its main purposes. Thus restricted, it does not give the remedy by mandamus primarily, but only (when the remedy is available at all) after the Commission has acted upon the complaint. To use the court's own language:

"As it was settled in the *Ablene Case* that the right to question in the courts the rates established in accordance with the act to regulate commerce, without previous resort by complaint to the Commission in order to determine their unreasonableness, would be destructive of the act, and therefore was not permissible, that ruling is equally applicable to the provision as to furnishing cars contained in section 10, which is here relied upon. But as we are required, for the determination of the case now before us, to consider the scope of the act to regulate commerce as now existing, as a result of the amendments of 1906, we shall not rest our conclusion alone upon the persuasive force of the reasoning which constrained to the conclusion announced in the *Ablene Case*. Speaking generally, it is true to say that, prior to 1889, although the prohibitions of the act to regulate commerce as to preferences and discriminations were far-reaching, the mechanism provided by the statute for the enforcement of orders of the Commission on the subject, as well as those concerning a finding as to unreasonable rates, were deemed to be in many respects ineffective, or at least tardy in operation or unsatisfactory in prompt remedial results, and this because immediate effect was not given to the orders of the Commission, but the aid of judicial authority was required as a prerequisite for such result. Section 10, here relied upon, was not part of the original act, but, as we have said, was added thereto on March 2, 1889, for the obvious purpose of making the remedial processes of the act more speedy and efficacious. Now, it cannot in reason be questioned that among the purposes contemplated by the amendments adopted in 1906 was the curing of the presumed remedial inefficiency of the act by supplying efficient means for giving effect to the orders of the Commission made in the exertion of the authority conferred upon that body. To that end one of the amendments—section 15—gives operative effect to the orders of the Commission without the sanction of previous judicial authority, and endows that body with the power, not only as to unreasonable rates, but as to practices found upon complaint to be unduly prejudicial and unjustly discriminatory, to correct the same by its order, which order should have effect within the period fixed in the statute, and, to enforce these provisions, penalties and forfeitures are provided. Section 16. It being demonstrable, as we have seen, that to give to section 10 the broad meaning which the court below affixed to it would be to destroy or render inefficacious the remedial purposes of the amendments enacted in 1906, it must follow that such construction cannot be adopted, since to do so

would compel us to hold that the wide and far-reaching remedies created by the amendments of 1906 were, in effect, destroyed by the narrower remedial processes which had been previously enacted in 1889. This conclusion being in reason impossible, it must follow that, construing the provisions of section 10 in the light of and in harmony with the amendments adopted in 1906, the remedy afforded by that section, in the cases which it embraces, must be limited either to the performance of duties which are so plain and so independent of previous administrative action of the Commission as not to require a prerequisite exertion of power by that body, or to compelling the performance of duties which plainly arise from the obligatory force which the statute attaches to orders of the Commission, rendered within the lawful scope of its authority, until such orders are set aside by the Commission or enjoined by the courts."

And the rulings in the Baltimore & Ohio Company Case are emphasized by another decision that was announced on the same day in an opinion written by the same justice—Illinois Central Railroad Co. v. Interstate Commerce Commission. In that case a miner and shipper of coal complained to the Commission that the railroad's method of distributing cars when the supply was short resulted in preference and discrimination—especially because the company deducted private cars and foreign railway fuel cars before making distribution to the mines along its road. The Commission was asked by the company to consider in the same proceeding the further question whether its own fuel cars might be deducted before distribution was made, and accordingly the Commission dealt with all of these three classes. Its order directed the company to give up the practice of deducting any of these classes before making distribution, and (in the exercise of the power given by the amendments of 1906) directed the carrier to include all the available cars in a total for ratable distribution, and to include them for a period of two years. The railroad company sought to enjoin the order, and the case was heard by three circuit judges of the Seventh circuit. They decided (173 Fed. 930) that the Commission was right in directing the company to include private cars and foreign railway fuel cars in the total that were to be distributed ratably to the mines, but was wrong in directing it to include its own fuel cars in that number. The Commission appealed, and the Supreme Court sustained the appeal, deciding that the circuit court should not have interfered with the order, so far as the company's own fuel cars were concerned. (The railroad did not appeal, and the other two classes of cars were therefore not specifically considered.) The point that should now be observed is this: The Supreme Court distinctly puts the decision upon the single ground that the Commission had power to make the order in question; and refuses to rest it in any degree upon the ground that the order was either wise or expedient. This appears clearly in the following paragraphs:

"In consequence of one of the comprehensive amendments to the act to regulate commerce, adopted in 1906 (section 4, Act June 29, 1906, 34 Stat. 589) it is now provided that 'all orders of the Commission, except orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force for such period of time not exceeding two years, as shall be prescribed in the order of the Commission, unless the same shall be suspended or set aside by a court of competent jurisdiction.' The statute endowing the Commission with large administrative functions, and generally giving effect to its orders concerning complaints before it with-

out exacting that they be previously submitted to judicial authority for sanction, it becomes necessary to determine the extent of the powers which courts may exert on the subject.

"Beyond controversy, in determining whether an order of the Commission shall be suspended or set aside, we must consider (a) all relevant questions of constitutional power or right; (b) all pertinent questions as to whether the administrative order is within the scope of the delegated authority under which it purports to have been made; and (c) a proposition which we state independently, although in its essence it may be contained in the previous one, viz., whether, even although the order be in form within the delegated power, nevertheless it must be treated as not embraced therein, because the exertion of authority which is questioned has been manifested in such an unreasonable manner as to cause it, in truth, to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power. *Postal Telegraph Company v. Adams*, 155 U. S. 688, 698 [15 Sup. Ct. 268, 360, 39 L. Ed. 311]. Plain as it is that the powers just stated are of the essence of judicial authority, and which, therefore, may not be curtailed, and whose discharge may not be by us in a proper case avoided, it is equally plain that such perennial powers lend no support whatever to the proposition that we may, under the guise of exerting judicial power, usurp merely administrative functions by setting aside a lawful administrative order under our conception as to whether the administrative power has been wisely exercised.

"Power to make the order and not the mere expediency or wisdom of having made it, is the question."

The court thereupon considered and sustained two propositions: (1) The act gave the Commission authority to regulate the distribution of company fuel cars in times of shortage as a means of preventing undue preference or undue discrimination; and (2) the order complained of was within the authority thus given. But the expediency of the order was not passed upon at all, the court saying, *inter alia*:

"The insistence that the necessary effect of an order, compelling the counting of company fuel cars in fixing, in case of shortage, the share of cars a mine from which coal has been purchased will be entitled to, will be to bring about a discrimination against the mine from which the company buys its coal and a preference in favor of other mines, but inveighs against the expediency of the order. And this is true, also, of a statement in another form of the same proposition—that is, that if, when coal is bought from a mine by a railroad, the road is compelled to count the cars in which the coal is moved in case of car shortage, a preference will result in favor of the mine selling coal and making delivery thereof at the tippie of the mine to a person who is able to consume it without the necessity of transporting it by rail. At best, these arguments but suggest the complexity of the subject, and the difficulty involved in making any order which may not be amenable to the criticism that it leads to or may beget some inequality. Indeed, the arguments just stated, and others of a like character which we do not deem it essential to specially refer to, but assail the wisdom of Congress in conferring upon the Commission the power which has been lodged in that body to consider complaints as to violation of the statute and to correct them if found to exist, attack as crude or inexpedient the action of the Commission in performance of the administrative functions vested in it, and upon such assumption invoke the exercise of unwarranted judicial power to correct the assumed evils."

If this decision be read, as it must be read, in connection with the case of the *Baltimore & Ohio Railroad Company* and with the *Texas & Pacific Railway Company v. Abilene Oil Company*, the conclusion seems to be unavoidable that complaints of unreasonable rates and of unreasonable practices (at least when such rates and practices are gen-

eral, and apply to whole classes of shippers) must alike be heard in the first instance by the Commission; and that the courts have no power to entertain such complaints until the Commission's order thereon is brought before them for appropriate action. And when such an order is finally brought before a judicial tribunal, the inquiry whether the order should be suspended or set aside must be limited to considering—

"(a) all relevant questions of constitutional power or right; (b) all pertinent questions as to whether the administrative order is within the scope of the delegated authority under which it purports to have been made; and (c) * * * whether, even although the order be in form within the delegated power, nevertheless it must be treated as not embraced therein, because the exertion of authority which is questioned has been manifested in such an unreasonable manner as to cause it, in truth, to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power."

The inquiry is not to be answered by deciding that in the judgment of the court the order is, or is not, either wise or expedient; if the act to regulate commerce has given the Commission power to deal with the subject, and if the order complained of is within the power, the action of the Commission is to stand.

But the foregoing cases were all concerned with rates or practices that existed when the proceedings were begun, while it is conceded that the present defendant changed the method in controversy on or about January 1, 1906, more than a year before the suit was brought. The action, therefore, being solely for damages, and for damages growing out of a practice that has ceased, the plaintiff insists that the decisions of the Supreme Court do not apply, and that section 9 of the act gives the right to sue in the courts at the election of the injured party. Evidently, this, also, is a question of great importance, and the judgment of this court is not likely to have much effect upon its solution. It can only be determined satisfactorily by the Supreme Court, and I should not feel that I were evading my duty if I merely entered a judgment and speeded the cause on its way to an ultimate decision. But I may perhaps indicate very briefly why I think that the reasoning of these cases leads to the conclusion that the circuit court does not possess primary jurisdiction of the present case.

It can no longer be doubted, as a general proposition, that the Commission is charged primarily with the jurisdiction and the duty to examine rates and practices, and to determine whether they conform to the act. And it is probably safe to say, also, that because of the diversity of situations and circumstances that inevitably affect rates and practices the Commission is likely to find it impossible to lay down general rules that will apply without modification to every possible dispute in a given class. Hence—to speak now only of the question in hand—the lawfulness of the defendant's practice during 1902 to 1905 must be determined by considering the situation and the circumstances that prevailed in the Clearfield region during the years in question. The situation being thus considered, if the practice was preferential or discriminating it violated the act. But what tribunal is to decide whether an offense has been committed? Clearly, if the practice were now in force, the Commission; and it is I think con-

ceded that the Commission might then not only forbid the practice in the future, but might award reparation for the injury done in the past. The basis of both these orders, however, would necessarily be a finding of fact—that the practice was preferential or discriminating—and this is an administrative finding which the Commission alone seems to have the power to make in the first instance. The right to inquire into this subject has not been confided primarily to the courts, and such power of reviewing the Commission's order as the courts may possess does not extend to its wisdom or discretion.

Since, therefore, the Commission alone has the power to decide primarily whether a particular method of distributing coal cars in case of shortage is preferential, I do not believe that the power is automatically transferred to the courts as soon as the carrier substitutes another method, and merely for the reason that the substitution has been made. The procedure of submitting the question of discrimination to different courts and juries has been authoritatively declared to be objectionable; but if it must nevertheless be followed in every case where the damages claimed were caused by a practice that has been changed, the uncertainty of results to which the Supreme Court has referred will bring about the very discrimination which the act seeks to avoid. If one injured shipper recovers a verdict and another fails, or if one recovers a sum calculated according to a particular rule, and the sum awarded to his neighbor is calculated according to a different rule, an obvious discrimination among the claimants must result, for the theory of all the verdicts must be that the sums recovered fully repair the damages suffered, while it is evident that reparation is in fact partial or unequal. Inequality in recovery would necessarily produce discrimination. If, on the other hand, such claims must be submitted in the first instance to the Commission, they will be acted upon uniformly, will be adjusted according to the same rule—a rule that will presumably be adopted after a full and comprehensive view of the whole situation and of all the relevant circumstances—and the damages will be awarded, not arbitrarily or capriciously, but by the application of the same standard. In a word, and without repeating the language of the Supreme Court that seems to me to justify the conclusion, I hold that the Commission has the primary jurisdiction to award reparation for such damages as may have been caused by a preferential practice in distributing coal cars in case of shortage; and that the circuit court has not the primary power to award such damages, even although they may have been caused by a practice that did not prevail at the time when the suit was brought. If the plaintiff's contention is sound it follows that two irreconcilable results may come to pass. If section 9 applies to a situation like this—where the practice complained of has ceased—a shipper who elects to sue at law is thus turning to a tribunal upon which his election may be said to confer exclusive jurisdiction of his complaint. But if another shipper has previously been obliged to go before the Commission—the obnoxious practice being then in force—it is clear that this shipper (who is seeking redress for the same wrong) has addressed the proper tribunal, for in that event it is conceded that the Commission had exclusive primary jurisdiction of the subject-matter. Whose decision

is to prevail? It might easily happen that after one shipper had appealed to the Commission a carrier might give up the practice, either before or after the Commission had passed upon its validity, and that other shippers might thereupon bring suits at law to recover damages, as the present plaintiff has done. If the Commission has no power to entertain the complaints of these shippers because the practice has ceased—and this is the plaintiff's position—the courts must have complete jurisdiction, and must therefore be able to decide whether the practice complained of is preferential. But, as the Commission had undoubted primary jurisdiction of the complaint that was first made, does the ruling of the Commission govern in case the practice should be sustained in whole or in part? Or does the ruling of the court govern, in case the practice should be condemned, either in whole or in part? Under the Illinois Central's Case the decision of the Commission upon such a subject is declared to be final; the wisdom or discretion of the order is not to be reviewed by the courts; and yet a ruling that is thus adjudged to be final would nevertheless be practically subject to review at the hands of a jury or of several juries, and might be wholly set at naught.

If it be asked, What then becomes of the power to sue for damages that is given by section 9 of the act? the answer is apparently to be found in the following language from the Abilene Oil Company Case (page 442 of 204 U. S., page 356 of 27 Sup. Ct. [51 L. Ed. 553]):

"In other words, we think it inevitably follows from the context of the act that the independent right of an individual originally to maintain actions in courts to obtain pecuniary redress for violations of the act, conferred by the ninth section, must be confined to redress of such wrongs as can, consistently with the context of the act, be redressed by courts without previous action by the Commission. * * *

There are wrongs to which a shipper may be subjected that do not need previous action by the Commission. For example—to give a single illustration—isolated acts of oppression or extortion, directed against individuals, might in all probability be redressed by suit at the election of the injured shipper. But where a practice that is applied alike to all shippers, or to all of a class, is complained of because its effect is nevertheless averred to be preferential, a different situation is presented. There the act has given to the Commission a primary jurisdiction over the subject-matter in order that redress may be intelligent, complete, and uniform; and this I believe to be true whether redress is sought before, or after, the practice has been given up.

The defendant's motion to dismiss the suit for want of jurisdiction must be granted.

UNITED STATES v. MINIDOKA & S. W. R. CO. et al.

(Circuit Court, D. Idaho, C. D. February 8, 1910.)

1. PUBLIC LANDS (§ 50½, * New, Vol. 9, Key No. Series)—RAILROAD RIGHT OF WAY—LANDS SUBJECT.

Lands within a reservation withdrawn under the reclamation act (Act June 17, 1902, c. 1093, 32 Stat. 388 [U. S. Comp. St. Supp. 1909, p. 596]) for the furtherance of an irrigation project and resting under valid, subsisting homestead filings are no longer "public lands," and are therefore

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

exempt from the operation of the railroad right of way act (Act March 3, 1875, c. 152, 18 Stat. 482 [U. S. Comp. St. 1901, p. 1508]), granting to railroad companies rights of way through the public lands of the United States.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 6, pp. 5793-5795; vol. 8, p. 7772.]

2. PUBLIC LANDS (§ 7*)—IRRIGATION—RECLAMATION PROJECT—RAILROAD RIGHT OF WAY—INJUNCTION.

Rev. St. § 2288, amended by Act March 3, 1905, c. 1424, 33 Stat. 991 (U. S. Comp. St. Supp. 1909, p. 537), provides that a bona fide settler under the pre-emption, homestead, or other settlement law may transfer by warranty against his own acts any portion of his claim for a railroad right of way, which transfer shall not vitiate his right to complete and perfect title to his claim. *Held* that, where homestead claimants within land withdrawn for a reclamation project transferred land to a railroad company for a right of way, the fact that the entryman might forfeit or abandon his entry did not constitute such an interest in the land as to entitle the government to an injunction restraining the railroad company from constructing its railroad across the lands and canals embraced in the reclamation project.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 7; Dec. Dig. § 7.*]

3. PUBLIC LANDS (§ 135*)—RAILROAD RIGHT OF WAY—HOMESTEAD ENTRIES—RECLAMATION PROJECT.

The right to transfer land for a railroad right of way conferred on a bona fide settler under the pre-emption, homestead, or other settlement law by Rev. St. § 2288, amended by Act March 3, 1905, c. 1424, 33 Stat. 991 (U. S. Comp. St. Supp. 1909, p. 537), applies to homestead land within a reclamation district, and hence the United States, after such transfer, is only entitled to have the railroad so constructed as not to interfere with the irrigation, reservoirs, ditches, and canals.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 354; Dec. Dig. § 135.*]

4. PUBLIC LANDS (§ 135*)—HOMESTEAD ENTRY—RAILROAD RIGHT OF WAY—CONVEYANCE BY ENTRYMAN.

That the United States may in the future reasonably require rights of way for ditches, in furthering a reclamation project, in addition to those now occupied by existing canals, and that it may be entitled to reserve land therefor under General Appropriation Act Aug. 30, 1890, c. 837, 26 Stat. 391 (U. S. Comp. St. 1901, p. 1570), providing that, in all patents for land thereafter taken up under the United States land laws on entries west of the one hundredth meridian, land shall be expressly reserved for a right of way for ditches and canals constructed by the authority of the United States, did not prevent a railroad company from occupying lands in present legally conveyed to it within a reclamation reservation by a homestead entryman.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 354; Dec. Dig. § 135.*]

In Equity. Suit by the United States against the Minidoka & Southwestern Railway Company and another. Application for temporary injunction. Granted in part.

C. H. Lingenfelter, U. S. Atty., and B. E. Stoutemyer, for the United States.

P. L. Williams and D. Worth Clark, for defendants.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

DIETRICH, District Judge. This is an application for a temporary injunction restraining the defendant from completing the construction of its railroad across certain lands and canals embraced in the Minidoka reclamation project, in Cassia county, Idaho. The substantial facts are not in dispute, and the questions of law arise upon the construction and application of the general railroad right of way act of March 3, 1875 (Act March 3, 1875, c. 152, 18 Stat. 482 [U. S. Comp. St. 1901, p. 1568]), granting to railroad corporations rights of way through "the public lands of the United States," a paragraph of the general appropriation act, approved August 30, 1890 (Act Aug. 30, 1890, c. 837, 26 Stat. 391 [U. S. Comp. St. 1901, p. 1570]), providing "that in all patents for lands hereinafter taken up under any of the land laws of the United States or on entries or claims validated by this act west of the one hundredth meridian, it shall be expressed that there is reserved from the lands in said patent described, a right of way thereon for ditches or canals constructed by the authority of the United States," an act amending section 2288 of the Revised Statutes of the United States, approved March 3, 1905 (Act March 3, 1905, c. 1424, 33 Stat. 991 [U. S. Comp. St. Supp. 1909, p. 537]) which is as follows: "Any bona fide settler under the pre-emption, homestead, or other settlement law shall have the right to transfer, by warranty against his own acts, any portion of his claim for church, cemetery, or school purposes, or for the right of way of railroads, telegraph, telephones, canals, reservoirs, or ditches for irrigation or drainage across it; and the transfer for such public purposes shall in no way vitiate the right to complete and perfect the title to his claim"—and the reclamation act, approved June 17, 1902 (Act June 17, 1902, c. 1093, 32 Stat. 388 [U. S. Comp. St. Supp. p. 596]).

The reclamation act, appropriating for the irrigation of arid lands in certain states and territories the proceeds of the sales of public lands situate therein, directs the Secretary of the Interior to cause examinations and surveys to be made for the purpose of determining the feasibility of any given project, and authorizes him to "withdraw from public entry the lands required for any irrigation works contemplated" under its provisions; and it further authorizes him, "at or immediately prior to the time of beginning the surveys for any contemplated irrigation works, to withdraw from entry, except under the homestead laws, any public lands believed to be susceptible of irrigation from said works." It is also provided that public lands which it is proposed to irrigate "shall be subject to entry only under the provisions of the homestead laws, in tracts of not less than forty nor more than one hundred and sixty acres, and shall be subject to the limitations, charges, terms, and conditions" in the act prescribed. These terms and limitations are that the Secretary of the Interior may confine the entry of any one person to such an area, not less than 40 nor more than 160 acres, as in his opinion may be reasonably required for the support of a family; that the commutation provisions of the general homestead laws shall not apply; that the entryman shall pay in the manner and at the times prescribed by the Secretary of the Interior a ratable proportion of the cost of the irrigation works; and that he shall pay the

charges for construction of the irrigation works apportioned against his tract, and reclaim at least one-half of the total irrigable area of his entry for agricultural purposes before receiving patent. It will be observed that the act provides for two different "withdrawals" or "reservations," to be made by the Secretary of the Interior. As is said in *United States v. Hanson*, 167 Fed. 881, 93 C. C. A. 371:

"It provides, first, that the Secretary may withdraw from public entry such lands as are required for the actual occupation of the reclamation service. This is for such purposes as reservoirs, canals, pumping works, etc. No exception whatever is expressed as to the lands which are to be withdrawn for these purposes. It provides, second, for the withdrawal of any other public lands 'believed to be susceptible of irrigation from said works.' Such lands are to be withdrawn from entry, 'except under the homestead laws.'"

Briefly, and omitting the recital of dates and details, the facts are that prior to the organization of the defendant railroad company the Secretary of the Interior, acting under authority of the reclamation act, established the Minidoka project, and entered upon the construction of the works for the irrigation of the lands embraced therein. Certain lands were withdrawn or reserved for the use of the government, for its dams, pumping plant, canals, and other structures; but none of the lands so reserved are here involved. There were also withdrawn from entry, "except under the homestead laws," other public lands, aggregating a large area, "believed to be susceptible of irrigation" from the contemplated works. Soon thereafter all the lands of the latter class were entered by qualified persons under the provisions of the general homestead law, modified and limited, as hereinbefore stated, by the reclamation act. These entries were made at various dates, some of them several years prior to the commencement of this action, but none of them have as yet progressed to final proof or patent. The defendant railroad company projected a branch road, connecting with an existing line at the town of Burley, and traversing in its course for a distance of approximately six miles lands thus covered by homestead entries, and in the possession of the several entrymen, and also intersecting three of the project canals constructed and controlled by the reclamation service. Apparently for the purpose of claiming some benefit under the railroad right of way act of March 3, 1875, prior to the commencement of this suit and after the definite location of its line of road, the railroad company filed with the Secretary of the Interior a copy of its articles of incorporation and proofs of its organization under the same. It has not, however, filed any profile map with the register of the local land office. Recognizing the possession and rights of the homestead entrymen, the defendant, before it commenced to grade its roadbed, much work upon which has now been done, negotiated with the entrymen, and, by purchase, secured from them, so far as lay within their power to grant, the desired right of way. There are two or three entrymen with whom negotiations are still pending, but that fact is unimportant, for the entrymen are not complaining, and the defendant fully concedes the necessity of extinguishing their claims, either by purchase or by proceedings in eminent domain. There has been no interference by the defendant with the complainant's canals, and there is a disavowal of any purpose

or intent to make or to claim the right to make any crossing which will diminish their capacity or impair their safety, or materially restrict the complainant's management and control thereof.

From this brief statement it is apparent that complainant's application for injunctive relief rests upon two classes of property rights which, it is alleged, the defendant is threatening to invade—its interest in the lands which are in the possession of the several entrymen, but to which it holds the legal title, and its rights in the canals which it has constructed across these lands, and of which it has the exclusive possession. First, as to the lands.

At the argument there was considerable discussion touching the question whether or not lands withdrawn under the reclamation act from entry, "except under the homestead laws," are subject to the operation of the railroad right of way act of March 3, 1875, the plaintiff affirming, and the defendant denying, that such lands are within the exception of section 5, which provides that the act shall not apply to "lands especially reserved from sale." But the question does not seem to be pertinent at the present juncture; for whatever may be the legal status of the lands so withdrawn under the reclamation act, after withdrawal and prior to entry, all of the lands here involved rest under valid subsisting homestead filings, and being, therefore, no longer "public lands," they are exempt from the operation of the right of way act, which, by its express terms, is made applicable only to "public lands of the United States." *Bardon v. Northern Pacific Railroad Co.*, 145 U. S. 535, 12 Sup. Ct. 856, 36 L. Ed. 806. And whether we take the one view or the other of the ensuing rights of the parties, when and in the contingency that a present entryman shall forfeit or abandon his entry covering lands traversed by the defendant's railroad, the anticipation of such a possible occurrence furnishes no substantial basis for present injunctive relief. In either view, the rights of the railroad company upon the happening of such a contingency would be measured by the law. They will not be enlarged by the possession of the railroad company, however long continued, for, as against the government, neither acquiescence nor lapse of time may be pleaded in bar. It follows that if the right of way act does not become applicable upon the cancellation of an existing entry, and, if the railroad company holds under no other pertinent provision of law, the plaintiff may, as soon as the land is released from entry, without prejudice assert all the rights of an owner against one who, without right, holds possession of its property. If, upon the other hand, the right of way act will in such a contingency operate to effect a grant of the right of way to the defendant, a court of equity, without other reason for so doing, cannot at this time properly enjoin the defendant from putting itself in a position where it may without wrongdoing secure the benefits of a valid law.

The primary inquiry, therefore, relates to the present, rather than the future, rights of the several parties in interest—such rights as are created and defined by the acts hereinbefore referred to, exclusive of the railroad right of way act. I say the several parties in interest, because, while the controversy is in form between the government and

the railroad company, its adjudication necessarily involves a consideration of the rights of the homestead settlers, who have entered the lands and assumed certain obligations, and who, in turn, are entitled to receive such reciprocal benefits and to exercise such valuable privileges as are provided for by law; and, as will presently appear, between an entry subject to legal limitations, such as are implied by the complainant's contention, and an entry measuring up to the defendant's view of the law, there is a distinction which the entryman may not unreasonably regard as highly material. The original homestead law was enacted for the purpose of encouraging settlement upon the public domain, the essential conditions to the acquisition of title being that the entryman should make his home upon the land, and improve and cultivate it. Right of possession and the duty of occupation follow the initiation of the entry, and from that time until the title is fully earned the entryman may make such uses of the land as are within the spirit and general purpose of the homestead law, all the time with due regard to the rights of the government, still the owner of the principal estate. The entryman may not commit waste or use the resources of the land except in so far as may be reasonably necessary to effect the lawful object of his possession, nor may he occupy the land or permit its occupancy for a purpose inconsistent with the general purpose of tillage and home making. By strict requirement the entry can be made only for the use and benefit of the entryman, and is nontransferable; nor may any part of the entry be alienated, either by voluntary contract or by judicial sale. It follows that under the law as originally enacted the entryman could not legally use or permit another to use any part of his entry for railroad purposes, nor could he make a conveyance for such purpose. The practical necessity for making certain exceptions to these rigid restrictions upon the power of the entryman must have soon become apparent, and was doubtless brought to the attention of Congress, for we find that by the act of March 3, 1873 (Rev. St. U. S. § 2288), the entryman was authorized to transfer by warranty against his own acts any portion of his entry for church, cemetery, or school purposes, and for the right of way of railroads, all of which, as appears from the statute, were deemed to be "public purposes," and later, by the amendatory act of March 3, 1895, authority to transfer was extended to rights of way for telegraph and telephone lines, and for irrigation canals and reservoirs, which are also declared to be public purposes. And, if we will but for a moment contemplate the plight of a community made up of settlers upon public lands entered under the homestead laws, where no one has the power to convey or to acquire a site for a school house or a church or a cemetery, or a right of way for a railroad or a telegraph or telephone line, or, in an arid region, for an irrigating ditch, both the reasons for this legislation and the objects and purposes thereof will clearly appear.

By its express terms the act confers upon "any bona fide settler under the pre-emption, homestead, or other settlement law" the right to transfer for a railroad right of way, and, while its application to an entry under the homestead law, as modified by the reclamation act, is here apparently denied by the government, no good reason is offered, and, as I view it, no substantial reason can be brought forward for

refusing such an entryman the benefit thereof. In terms the act is all inclusive, for even were the suggestion of counsel for the government to be adopted, that the entries under consideration are not, strictly speaking, to be deemed homestead entries, we still have the express provision that "any bona fide settler under * * * (any) other settlement law" may make a transfer, and this declaration is, beyond all peradventure, broad enough to include the entrymen of the lands in question. Moreover, if by reason of any ambiguity the language of the act were subject to construction, no reason is to be found in the general policies of the government, or in the scope and purpose of the reclamation act, for narrowly construing this law, to the exclusion of entries within reclamation projects. The purpose of the reclamation act is identical with that of the original homestead act. It is but an adaptation of the original act to conditions not in contemplation at the time of the earlier legislation. It encourages and makes possible the settlement and tillage of large tracts of public lands, and, to say the least, it is quite as important that settlers upon such lands, as that settlers upon lands more easily reclaimed and improved, have schools, churches, cemeteries, telephones, telegraphs, and convenient means of transportation. Yet it was practically conceded at the argument by counsel for the government that, if the settlers here cannot by their consent authorize the construction of a railroad across their several entries, then there is no way provided by law by which such right may be granted; for if, as is contended on behalf of the government, and as is here held, the general right of way act of March 3, 1875, is not applicable under the existing conditions, and if the act now under consideration is likewise inapplicable, then, so far as I am advised, there is no law either granting a right of way or vesting in any officer or department the authority or discretion to make a grant of such a right of way, or legally to consent to occupancy for such purpose. And it follows that, if the settlers have not the power to grant such right of way for railroad purposes, neither have they the power to convey sites for school houses or churches or cemeteries, or rights of way for ditches or for telegraph or telephone lines.

If, then, as I think must be held, the entrymen here are entitled to the full benefit of this legislation, it is proper next to consider the nature and effect of an authorized conveyance for one of the public purposes specified in the law. It is, of course, possible so literally to construe the law as to confine the operation of the conveyance therein provided for strictly to the entryman's estate. Such a construction would, however, necessarily imply that the entryman is simply authorized to execute a worthless instrument, for the grantee could not obtain any benefits thereunder without first extinguishing the rights and divesting the title of the government, conditions with which it is admittedly impossible to comply. The entryman could convey a site for a schoolhouse, but actual use of such site for school purposes would constitute a trespass against the United States; and settlers might convey a right of way for a railroad, but it would be unlawful for the grantee to construct a roadbed and lay a railroad track thereon.

Is it to be supposed that Congress intended thus to "keep the wor"

of promise to the ear and break it to the hope"? The law must receive a sensible construction, to the end that its underlying purpose may be given practical effect and its general objects accomplished. As has already been stated, this legislation was first enacted in 1873; and soon thereafter, in 1875, Congress passed the general right of way act, providing for the acquisition of rights of way across public lands and over possessory claims upon public lands. Appreciating the desirability, if not the necessity, of having railroads penetrate and traverse the public domain upon which settlement was being encouraged, Congress doubtless purposed, by these acts, to make ample provision for the acquisition of rights of way across all lands (excepting those reserved for special purposes) in which it had any interest, and which would be encountered in making the desired extensions of railroad lines. It is reasonable to assume that the two acts were deemed to be sufficient to accomplish this purpose. By the act of March 3, 1875, it expressed its willingness freely to grant such rights of way over lands where the government was the owner of the entire interest, and there is no reasonable ground to suppose that it was unwilling to grant similar rights of way over lands in which the interest of the government was limited. And it is further to be remarked that if at the time of the passage of the act of 1875 it was understood that the act of 1873, together with conveyances made in pursuance thereof, was insufficient to authorize the grantee to occupy and use the right of way for the purposes specified in the grant, it is strange that Congress, while granting, without charge, rights of way over lands which were exclusively public, did not also include lands, similarly situated, in which the public had only a reversionary interest. From these considerations the conclusion is unavoidable that, subject to the entryman's conveyance, the act of 1905, if it does not operate as a grant of the government's interest, at least authorizes occupancy and use for the purposes specified in the conveyance during the life of the entry. What rights the railroad company may have in case its grantor, an entryman, abandons his entry, need not at this time be determined. That may be a matter of future concern to the defendant, but it is of no present interest to the plaintiff; for, if we adopt the view least favorable to it, and hold that it is not a grantee, but only a licensee, still as a licensee merely, the defendant's present occupancy and use are fully authorized by law, and the plaintiff's contention that it is a trespasser must therefore fail.

It is suggested that, if this view prevails, it will be entirely possible for an entryman to impair the security of the government for the repayment to it of the cost of the irrigation works by granting rights of way to such an extent that the land will be rendered valueless for agricultural purposes. But such a peril is more fanciful than real. The danger from a possible epidemic of competitive railroad building may, it is thought, be treated as a negligible consideration, and as for a road or two, as was said by the Supreme Court in *Railroad Company v. Baldwin*, 103 U. S. 426, 26 L. Ed. 578, the "lands would not be less valuable for settlement by a road running through them. On the contrary, their value would be greatly enhanced thereby."

It is further suggested that in carrying to completion its projected

irrigation system the government may in the future reasonably require rights of way for ditches in addition to those now occupied by existing canals, and that these lands, being west of the one hundredth meridian, are subject to the reservation in the act of August 30, 1890, the material provision in which is hereinbefore set forth, requiring that there be expressed in patents for lands lying west of the one hundredth meridian a reservation of rights of way for ditches and canals "constructed by authority of the United States." But the rights of the United States by virtue of this provision are no greater before than after patent, and it may well be doubted whether the contention would be made that a railroad company holding a deed from the patentee, for a right of way across lands the patent to which contains such a reservation should, at the instance of the government, and solely because of such reserved easement, be enjoined from using its right of way. Assuming for present purposes the correctness of the construction heretofore placed upon the law by this court, in *Green v. Willhite* (October 31, 1906) 160 Fed. 755, and by the Supreme Court of Idaho, in *Green v. Wilhite*, 14 Idaho, 238, 93 Pac. 971, it does not follow that because of the reservation in favor of the government the patentee and his grantee must refrain from occupying or using the land pending the selection and location by the government of needful rights of way. The reservation is sufficiently onerous if it be limited to the purposes for which it was intended, and those purposes require only that the absolute possession and dominion of the owner yield to the needs of the government when and to the extent that they actually arise. There is no reason why in the meantime the land should lie idle, or that either the entryman or his grantee should be prohibited from making any legitimate use thereof. It is, of course, assumed that the reservation loses none of its force by reason of a transfer by the entryman or patentee; and, that being the case, is there any more reason for enjoining the defendant from laying its track across the land than for restraining the entryman from building his fences or planting his crops, or digging his ditches? In either case, unless some other statute intervenes, the rights of the government by reason of the reservation, whatever they may be, must, as the public needs arise, necessarily prevail; and the peril of occupancy for railroad purposes would therefore appear to be to the defendant rather than to the plaintiff.

Passing to the second branch of the case, the crossing of the plaintiff's canals, it is found that the controversy involves not so much the general principles of law by which the rights and obligations of the parties are to be measured as the practical application of these principles to the particular facts. The government, having rightfully located and constructed its canals, is, like any other proprietor, entitled to be protected against any unlawful interference with their maintenance and use; and this general right the defendant in terms concedes. Upon the other hand, it is taken for granted that the Secretary of the Interior, at whose instance presumably the suit was commenced, is actuated only by the motives of a fair-minded and prudent owner, and is seeking, not to obstruct the building of the railroad, but only to be protected against loss and peril by reason of its construction. In a

large sense the Secretary of the Interior in building and operating these canals acts as the trustee for the settlers, upon whom primarily rests the burden of their cost, and into whose hands their control will ultimately pass; and it will therefore be assumed that he desires to encourage and not to impede the execution of a work which admittedly is of general interest, and will be of general benefit to the entrymen; provided that and so long as the work is carried forward in such manner as not to injure or imperil the project and property which it is his specific duty to protect. These canals extend through the country at great length, and obviously intolerable inconvenience would be entailed, not only upon the entrymen whose lands are crossed, but upon the public at large, if bridges should be denied for the passage of ways either public or private. Such crossings, whether of wagon roads or of railroads, should, of course, be made without expense or loss to the owner of the canals, and in such manner as not to impair or imperil their efficiency, or increase the burden of their maintenance. Precautions for safety should be taken with a full appreciation of the irreparable loss which may ensue upon the occurrence of a break in the banks of a large canal, especially when such break happens during the height of the irrigating season; and in case of a railroad crossing there is the additional important consideration of the peril to life and property in case the roadbed should be washed out or weakened by the escaping waters.

If, then, such are the general principles by which the rights and obligations of the parties are to be measured, it would appear to be the duty of the court at the present time not absolutely to prohibit the defendant from extending its railroad across the plaintiff's canals, but only to restrain it from making the crossings in such a manner as to infringe upon the plaintiff's rights by diminishing the capacity or impairing the safety of the canals, or unnecessarily increasing the burden of their maintenance, and that is the course which will be pursued. At the present time, however, the record does not furnish sufficient data to enable the court intelligently to formulate an order properly specifying the manner of making the crossings, and, upon the statement of counsel for the railroad company in open court that no work will be done affecting the canals until further order, the hearing will be continued a reasonable length of time to enable the parties to reach an agreement, covering the conditions which should be imposed upon the defendant, failing in which a further hearing will be had for the purpose of enabling the court intelligently to prescribe such conditions.

LAUGHLIN v. NORTH WISCONSIN LUMBER CO. et al. SAVAGE v.**LAUGHLIN. LAUGHLIN v. SAVAGE.**

(Circuit Court, W. D. Wisconsin. February 25, 1910.)

Nos. 13 D, 17 D.

1. VENDOR AND PURCHASER (§ 54*)—RELATION OF PARTIES.

Under the Wisconsin law, pursuant to a contract for the sale of land the vendee is the equitable owner in fee, and the vendor holds the legal title as security for the unpaid balance of the price as a quasi mortgagee entitled to strict foreclosure on default.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 85; Dec. Dig. § 54.*]

2. VENDOR AND PURCHASER (§ 193*)—RIGHT TO POSSESSION.

The vendee, or his assignee, under a contract for the sale of land has the right to possession and the right to sell standing timber on the land, subject to the vendor's right to restrain the cutting of the timber if his security would be thereby impaired.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 401; Dec. Dig. § 193.*]

3. VENDOR AND PURCHASER (§ 101*)—CONTRACT—ASSIGNMENT—FORFEITURE—NOTICE—FORECLOSURE.

Where a vendee of certain timber land under a contract providing for future payments in installments assigned the contract to complainant, and, while still interested in the purchase price to the extent of \$600 commissions, confederated with a prospective purchaser of the timber, and, ascertaining that complainant was in default, paid the balance of the price with money obtained from such prospective purchaser and obtained a deed from the vendor, and then, by an ambiguous notice of forfeiture to complainant, deprived him of nearly half of the 30 days to which he was entitled after notice in which to make payment and save his rights, such vendee was not entitled to forfeit complainant's interest under such notice, but, complainant not having been substantially injured thereby, the vendee was entitled to enforce a strict foreclosure of the contract.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 171, 173; Dec. Dig. § 101.*]

4. VENDOR AND PURCHASER (§ 212*) — RIGHTS OF VENDOR — CONVEYANCE OF TITLE.

A vendor, by having executed a contract of sale, does not deprive himself of the right to convey the fee, entitling his grantee to all the vendor's rights in the land subject to the contract.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 436; Dec. Dig. § 212.*]

5. VENDOR AND PURCHASER (§ 212*) — CONVEYANCE TO THIRD PERSON — PAYMENTS BY VENDEE.

Where an owner of land, after having executed a contract of sale, conveyed it to a third person, the contract holder should pay subsequent installments of the price to the grantee.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 436, 439; Dec. Dig. § 212.*]

In Equity. Bill by Henry D. Laughlin against the North Wisconsin Lumber Company and John H. Savage to restrain defendant Savage from forfeiting complainant's contract of sale, consolidated with a bill by Savage against Laughlin to quiet title, and with a cross-bill by

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Laughlin against Savage for similar relief. Decree for complainant on his original bill, and decreeing a strict foreclosure of complainant's contract of sale, on terms.

Randolph Laughlin and Defrees, Brace & Ritter, for Laughlin.
Clapp & Macartney, for Lumber Company.
Stiles W. Burr and Harold Harris, for Savage.

SANBORN, District Judge. Complainant is the equitable owner of 1,023.41 acres of land in Bayfield county, Wis., and the defendant Savage is the owner of the legal title, all subject to a certain easement of flowage and highway servitudes, and excluding certain mineral and oil rights. The original bill was brought to restrain Savage from forfeiting complainant's contract of sale, and Savage's bill (filed in the state court, and removed to this court) was to quiet the title to the same lands. It alleged legal title in Savage, that the possession was vacant, and that Laughlin made some claim which should be held void. The cross-bill in the removal suit to quiet title set up the same matters as alleged in the original bill. The supplemental bill alleged that part of the timber on the lands had burned up pending suit, and that Savage was liable for the value of the burned timber by reason of his wrongful intermeddling shown in the original and cross-bills, through which complainant's right to pay up and obtain title was defeated.

The North Wisconsin Lumber Company was the original owner of the lands, with its general office at Hayward, Wis., afterwards moved to Chippewa Falls. January 15, 1904, it sold the lands by written indenture, sealed by both parties, to Savage for \$9,210.69, of which \$2,046.82 was paid down, the balance due in five annual installments of \$1,430 each, January 15th of each year from 1905 to 1909, with interest at 6 per cent. If the deferred payments should be made punctually, one-sixth of the interest was to be abated. Savage covenanted to pay the deferred sums and taxes imposed after January 1, 1904; and he also had an interest in the deferred payments by way of rebate for about \$600 on account of commissions. The vendor covenanted to convey by warranty deed upon full performance, to Savage, his heirs and assigns. In case of any default (the times of payment, and payment of taxes, being declared as of the essence of the contract), the vendor should have the right to declare the contract null and void on 30 days' notice to Savage or his assignees. If default continued after the 30 days, Savage's interest should utterly cease and determine, without any right of Savage, his heirs or assigns, to reclaim or redeem, with the vendor's right to convey, with all improvements, free and clear from any claim of Savage, his heirs or assigns. The notice was to be served personally or by mailing it at Hayward, directed to Savage at his address in St. Paul. Assignments were provided for; no assignment should be valid unless indorsed, and countersigned by the vendor's secretary. There was no express transfer of the right of possession, but it was contemplated that the vendee or his assignees might make improvements; and complainant, the assignee and present owner of the contract interest, had some 12 years

before taken possession of a small island in a large lake situated near the land, not actually described in the contract, but being part of the contracted lands by reason of not being surveyed or meandered, and built a summer home thereon, at a considerable expense. He claims title to this island also by an independent title by estoppel, through the payment by him of the expense of certain improvements of the shore made by the vendor. Complainant is a lawyer, though for some years not in actual practice, and was formerly a judge in Missouri. He is a man of ability and considerable estate.

Savage assigned the contract May 12, 1904, to C. H. Norton and H. P. Norton, who assigned to Laughlin April 7, 1905. The vendor consented to both assignments, without exempting Savage from any of his covenants. The stipulated payments were made except for 1907, 1908, and 1909, and except taxes for 1906 and 1907. By inadvertence Laughlin failed to pay the installment falling due January 15, 1907; but on January 14, 1908, he sent his check for the 1908 installment to the vendor, which was returned to him because a deed of the land had been made to Savage. In the letter sending the check Laughlin offered to pay the 1907 installment and the taxes.

Under the Wisconsin law the relations of the parties to the contract were as follows: Laughlin was the equitable owner in fee, and the vendor held the legal title as security for the unpaid balance of the purchase price, being a quasi mortgagee, entitled to strict foreclosure on default. *Church v. Smith*, 39 Wis. 492. The vendor also had the right to forfeit on 30 days' notice. The contract having by necessary implication given the *jus possessionis*, the vendee or his assignee was the equitable owner. *Martin v. Scofield*, 41 Wis. 167. Such ownership includes the standing timber. Judge Laughlin had the right to sell this timber and give a good title to it. *Northrup v. Trask*, 39 Wis. 515; *Krakow v. Wille*, 125 Wis. 284, 103 N. W. 1121. But the vendor might restrain the cutting of the timber if its security would be thereby impaired; its rights being analogous to those of a mortgagee.

In the fall of 1907, Judge Laughlin had negotiations with John E. Glover, representing the Willow River Lumber Company of New Richmond, Wis., and with Paul Vogt & Co. of Milwaukee, looking to the sale of the timber. Glover offered \$10,000 for the timber, by letter to Laughlin written December 2, 1907; but Laughlin did not accept because the offer did not agree with previous negotiations between them, and because he became suspicious of Glover's good faith in the matter. But the timber was not sold, though Laughlin claims it would have been but for Savage's wrongful interference, set out later in detail. In October, 1908, a considerable part of the timber was destroyed by forest fire. By the supplemental bill, filed May 4, 1909, Laughlin seeks to hold Savage liable for the value of the timber, by reason of such alleged wrongful interference; but it was announced by Laughlin's solicitor during the taking of the testimony in Chicago, April 30, 1909, before the supplemental bill was filed, that complainant did not expect to obtain a judgment against Savage or any one else for damages for the loss of the timber; and that the only claim or contention in that regard was that the loss was an equity which the court should consider as against Savage, in connection with whatever equities he

might urge against Laughlin. This statement was made as part of a stipulation in lieu of proof, in respect to the value of the timber destroyed by the fire, fixed in the stipulation at \$5,200.

In regard to the negotiations with Vogt for the sale of the timber, Vogt made a conditional verbal offer for it, and he and Judge Laughlin were to look it over later; but nothing came of it because Laughlin called the matter off, telling Vogt, after Savage had obtained his deed from the North Wisconsin Company (as stated later), that Glover had stolen the land, and he could do nothing further about the sale until the title could be straightened out.

Complainant's equities depend wholly on Savage's conduct in his purchase of the land from the North Wisconsin Company, and it therefore becomes necessary to make a careful examination of his acts. Savage was the original vendee in the land contract, as well as in two others of a like nature. He had covenanted to pay the purchase price, and was interested in the money still due to the extent of \$600. In the fall of 1907 he learned that Laughlin and Glover had been negotiating for the sale of the timber, and also that Laughlin had not made the 1907 payment on the contract. He had been for several years the attorney for Glover as to a railroad owned by the latter in the vicinity of the lands. Presumably he knew what the value of the timber was, as he often visited that section of country. The financial "slump" of 1907 was then getting to an acute stage, so that it may have occurred to him that Laughlin might be unable to raise the \$3,000 necessary to make the payments of 1907 and 1908. While there is no direct testimony that he entered into a conspiracy with Glover to get a deed for the land, and then forfeit the contract if Laughlin could not pay up in 30 days, after which he would sell the timber to Glover and thus realize a good profit—while the evidence does not expressly show such a scheme—there are some circumstances which lend considerable probability to this theory. Savage did not have the ready money to pay the balance due the North Wisconsin Company, but Glover had it through his control of the Willow River Lumber Company. So it was arranged between them that the company should furnish Savage the money, some \$4,200, and, if he should obtain full title to the timber, Glover was to buy it at a price to be agreed on. If the price was \$10,000, Savage would thus gain nearly \$6,000 by the venture. Nothing was said between them as to what should happen if they were unable to agree on the price of the timber, nor was any note or other evidence of debt taken, except a check drawn by the company and payable to Savage. No charge was made on the company books against Savage for the money when it was later advanced; but it was entered as a debit item in the "Stumpage and Land" account, apparently in the same manner as a cash purchase of stumpage would have been. Other circumstances bearing on Savage's intent are that he was under covenant to pay the purchase price to the North Wisconsin Company, and had a \$600 interest in that price, which would be two reasons why he might properly be desirous of getting the title. But these reasons are somewhat weakened by the fact that there were two other outstanding contracts, each presenting the same situation, but he made no attempt to acquire the legal title to either of these. Moreover, on Oc-

tober 4, 1907, two months before Glover made Judge Laughlin the offer of \$10,000 for the timber, Savage wrote the attorney of the North Wisconsin Company that Laughlin had sold the timber to Glover, which representation was untrue and evidently made to induce the company to deed the land to Savage, and thus put an end to further trouble and annoyance. The company wrote Glover October 24, 1907, notifying him that until the contract should be fully paid up the purchaser had no right to sell the timber, and that if it were sold they would look to the purchaser for its value. Glover did not answer this letter. Under all these circumstances, it may fairly be inferred that the purchase of the land by Savage was a scheme between him and Glover to forfeit Laughlin's interest, and thus make a good thing between the two of them. But whether there was anything fraudulent or injurious to Laughlin in this is another question.

Savage having in October proposed to the North Wisconsin Company to convey the land to him on payment of the balance remaining due, this was, after considerable correspondence, carried out, and a warranty deed, drawn in conformity with the contract, was delivered to Savage December 23, 1907; the consideration of \$4,261.43 being paid with the Willow River Company's check above mentioned. Shortly after, and on January 4, 1908, Savage gave written notice to Laughlin that if he failed to pay up in 30 days his contract rights would become forfeited. He did not recite in the notice that he had purchased the lands from the North Wisconsin Company, nor did the body of the notice show any reason why he should be giving it. The only clue furnished was the signature, in which Savage was described as grantee, with the words "North Wisconsin Lumber Company" immediately below, thus leaving it in doubt whether it was Savage's notice, or one given by him and the company jointly. Nor did Savage's letter accompanying the notice throw any further light upon the matter. Laughlin did not know what was intended, as his letter of January 10, 1908, shows. His later letter to the North Wisconsin Company, inclosing check for the January installment, calls for information on this point; but the reply did not give the facts, simply stating that they had assigned the contract to Savage. Savage wrote Laughlin again on January 18, 1908, finally stating that he holds a warranty deed of the lands from the North Wisconsin Company. Thus Laughlin was at last informed how it happened that he got the notice from Savage. Half of the 30 days had thus been lost through Savage's lack of frankness and evident purpose to enforce a forfeiture without allowing the stipulated time. Judge Laughlin made a request for further time, but it was denied. For some reason, which Savage testifies was inadvertence, the deed was not filed for record until February 4, 1908, shortly after this suit was brought. Laughlin suspected that the whole performance was a scheme of Glover's to forfeit the contract and prevent his paying for the lands, and upon this theory he brought suit. He examined in the register of deeds' office at Washburn to learn if any deed had been lodged for record, but could find none. He even arranged to have a telegram sent to him at Madison (where he went to begin suit) up to 4 p. m. of January 31, 1908, if any deed should be recorded. There is no doubt that Judge Laughlin

strongly suspected fraud, and that he and his able counsel felt amply justified in bringing suit to restrain the recording of the deed, and to prevent the threatened forfeiture. Nor is there any question that Savage's course was most ill advised, and clearly adapted to induce Laughlin's belief that there was on foot a plan to injure him. Such conduct unfairly cut down the stipulated 30-day period, to the whole of which Laughlin was justly entitled, and operated to waive that clause altogether.

The real question, however, is whether Judge Laughlin was injured, or his equitable ownership in any way substantially impaired, by Savage's inequitable conduct. Was his right to pay up made doubtful or confused to such a degree as to render payment unsafe? Did Savage or Glover through Savage take anything away from his ownership of the timber, or prevent the sale of it? Savage's arbitrary action in respect to the attempted forfeiture diminished the period of redemption from 30 days to 14, and for that he has been obliged to defend this suit, and should perhaps be charged with costs; but did such action really affect Laughlin's right, or do more than destroy Savage's technical power of forfeiture?

In respect to the contract right of payment, Laughlin was informed by the letter of January 16, 1908, from the North Wisconsin Company, that he was to pay Savage, and two days later he was told by Savage's letter that Savage held a warranty deed of the land. Was not Judge Laughlin thus sufficiently protected in his right of payment? Every purchaser of land by executory contract knows that the vendor has the *ius disponendi*. The land is not made inalienable merely by contracting to sell it. In case of a transfer the vendor has no right to receive the money if the vendee knows of the conveyance. If he pays the vendor, he may have to pay again. Judge Laughlin had the erroneous notion that his contract authorized him to pay the North Wisconsin Company, after the deed was given, and that he was also entitled to a warranty deed directly from it when he should pay up. But they had warranted the title in the deed to Savage, and this warranty would run with the land to Laughlin when Savage should convey to him, so that Laughlin would get the covenants of both. Another mistake was Laughlin's idea that the reservation of an undivided half of mineral and oil rights in the deed to Savage, added to a like reservation in Savage's proposed deed to him, would reserve the whole of such rights. These illusions had some influence in the bringing of the suit. Moreover, Savage had the lawful right to buy the land, and to get the purchase money from Glover. The North Wisconsin Company had the lawful right to sell the land, and convey it to Savage or anybody else. Suppose Savage did act with the hope and purpose of crowding Laughlin to give up his interest, where is the real injury? It is a clear case of *damnum absque injuria*.

Like considerations apply to the right to sell the timber. No real injury was inflicted. Judge Laughlin had this right just as fully after Glover "stole the land" as before. The deed to Savage in no way affected any legal or equitable right or interest previously existing. Laughlin's calling off the Vogt sale because Glover had stolen the land was simply a feat of imagination, for his real right and interest were

exactly as before. He had the theoretical right to sell the timber, but might be hampered by the legal owner, who might think his security would be impaired by the sale; but it was of no consequence who such owner might be. That Laughlin was justified in bringing suit seems reasonably clear, because Savage by his lack of fairness had practically limited the 30 days to 14, and Laughlin might well fear that he could not protect himself in the short time given. But that he was really damaged in any way is very difficult to understand. Savage clearly forfeited his forfeiture by so unfairly limiting the short term fixed by the contract as to destroy it. But this is all, and this was surely not an unmixed injury, as it got the forfeiture clause entirely out of Laughlin's way.

What if Savage and Glover did conspire to crowd the redemption period? Their acts took nothing from Laughlin. They simply took advantage of his own defaults. Why did he not keep up the contract payments, and see to it that all the taxes were paid? He took evidence showing that he is a rich man. Being abundantly able, he should have used a reasonable amount of diligence. It is true that Savage made an unfounded claim in respect to the 1906 payment, and was disposed to shut him out if he could; but Laughlin by his negligence placed this weapon in Savage's hands, whose action took nothing from Laughlin's right, but simply made the assertion of that right more difficult—justifying the aid of the court to prevent forfeiture, but nothing more. Savage should pay costs because his inequitable conduct made the suit necessary. Nor had he any standing to file a bill to quiet title before Laughlin's interest had been disposed of.

There should be a decree providing for a strict foreclosure of complainant's right and interest unless he pays the balance of the purchase price in full and \$77.25 taxes paid by Savage to the North Wisconsin Company, with 6 per cent. from December 23, 1907, within four months, less the costs of this suit, which are to be taxed against the defendant. In case of appeal, and in the event of affirmance, such payments are to be made within four months from the filing of the mandate in this court. If defendant has paid any further taxes, complainant shall also repay the amount, with 6 per cent. interest, within the four months' period. Upon such final payment, defendant shall execute to complainant a warranty deed in the terms provided in the contract of sale.

UNITED STATES v. OHESBROUGH.

(District Court, D. New Jersey. February 14, 1910.)

1. CUSTOMS DUTIES (§ 129*)—VIOLATIONS OF CUSTOMS LAWS—STATUTORY PROVISIONS—"MERCHANDISE."

In Rev. St. § 3082 (U. S. Comp. St. 1901, p. 2014), prescribing a penalty for importing or bringing into the United States any merchandise contrary to law, the term "merchandise" is not restricted to general merchandise as distinguished from personal baggage, especially in view of section 2766 (page 1861), declaring that the word "merchandise" may include goods, wares, and chattels of every description capable of being imported,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and sections 2799 and 2802 (pages 1872, 1873), showing that wearing apparel and other personal baggage are embraced within the term.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 129.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4478-4482; vol. 8, p. 7721.

Interpretation of commercial and trade terms in tariff laws, see note to *Dennison Mfg. Co. v. United States*, 18 C. C. A. 545.]

2. STATUTES (§ 188*)—CONSTRUCTION—GENERAL RULE.

In the construction of statutes, words of common use are not to be given any but their natural, plain, and ordinary signification, unless the context shows an intention to use them in a different sense.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 266; Dec. Dig. § 188.*]

3. CUSTOMS DUTIES (§ 125*)—VIOLATIONS OF CUSTOMS LAWS—STATUTORY PROVISIONS—"IMPORT OR BRING."

Rev. St. § 3082 (U. S. Comp. St. 1901, p. 2014), imposes a penalty on any person who shall fraudulently or knowingly import or bring into the United States any merchandise contrary to law. Section 2802 (page 1873) imposes a penalty whenever any article subject to duty is found in the baggage of a person arriving within the United States which was not at the time of making entry therefor mentioned to the collector. *Held*, that the term "import or bring" does not require that the offense designated in section 3082 should be complete before the merchandise is landed, so as to exclude cases within section 2802, where the entry is not made till after the baggage is landed, but includes the whole act of bringing dutiable articles into the United States.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 125.*]

For other definitions, see Words and Phrases, vol. 4, p. 3438; vol. 1, p. 877.]

4. CUSTOMS DUTIES (§ 125*)—VIOLATION OF CUSTOMS LAWS—STATUTORY PROVISIONS—"CONTRARY TO LAW."

A violation of Rev. St. § 2802 (U. S. Comp. St. 1901, p. 1873), imposing a penalty where any dutiable article is found in the baggage of a person arriving within the United States, which was not at the time of making entry therefor mentioned to the collector, becomes the misdemeanor denounced by section 3082 (page 2014), when done fraudulently or knowingly.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 125.*]

5. CUSTOMS DUTIES (§ 125*)—VIOLATIONS OF CUSTOMS LAWS—STATUTORY PROVISIONS.

That Rev. St. § 2802 (U. S. Comp. St. 1901, p. 1873), provides for a forfeiture and penalty of treble the value of an article subject to duty found in the baggage of a person arriving within the United States, which was not mentioned to the collector, does not indicate that the offense is not within section 3082 (page 2014), imposing a penalty of fine or imprisonment for fraudulently or knowingly importing any merchandise contrary to law, the latter section making the act a crime and imposing a severer penalty for the act done fraudulently and knowingly.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 125.*]

Indictment against Matilda H. Chesbrough for violation of the customs duties law. Demurrer to indictment overruled.

John B. Vreeland, U. S. Dist. Atty.

Carver, Wardner & Goodwin and F. C. Lowthorp, for defendant.

RELLSTAB, District Judge. The indictment in this case is based on section 3082, Rev. St. U. S. (U. S. Comp. St. 1901, p. 2014). The

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

demurrer is to the first three counts. On the argument the United States abandoned the first and third counts. The demurrant alleges that the second count does not charge a crime.

Section 3082, which furnishes the basis for all the counts, reads as follows:

"If any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any merchandise, contrary to law, or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported contrary to law, such merchandise shall be forfeited and the offender shall be fined in any sum not exceeding five thousand dollars, nor less than fifty dollars, or be imprisoned for any time not exceeding two years, or both. Whenever, on trial for a violation of this section, the defendant is shown to have or to have had possession of such goods, such possession shall be deemed evidence sufficient to authorize conviction, unless the defendant shall explain the possession to the satisfaction of the jury."

The phrase "contrary to law" clearly relates to legal provisions not found in such section. *Keck v. United States*, 172 U. S. 434, 19 Sup. Ct. 254, 43 L. Ed. 505. And the second count unmistakably indicates that section 2802, Rev. St. U. S. (U. S. Comp. St. 1901, p. 1873), is relied upon as embodying the prohibited act which section 3082 denounces as a crime, if done fraudulently or knowingly.

Section 2802 reads as follows:

"Whenever any article subject to duty is found in the baggage of any person arriving within the United States, which was not, at the time of making entry for such baggage mentioned to the collector before whom such entry was made, by the person making entry, such article shall be forfeited, and the person in whose baggage it is found shall be liable to a penalty of treble the value of such article."

The second count reads as follows:

"Second Count: And the grand jurors aforesaid, upon their oath aforesaid, do further present that on the 25th day of May, in the year 1900, at Hoboken, in the county of Hudson, in the district of New Jersey, and within the jurisdiction of this court, the said Matilda M. Chesbrough did fraudulently, unlawfully, and knowingly import and bring into the United States, and did fraudulently, unlawfully, and knowingly assist in importing and bringing into the United States, certain other merchandise, to wit, package needles and silk, one pair cuff buttons, three strings beads, one pocketknife, two scarf pins, two coral pins, three empty jewel boxes, two fur muffs, two fur coats, four pairs kid gloves, one piece silk embroidery, one pongee skirt, one underskirt, 86 doilies, two lithographs, two imitation pearls, one charm, one cross, one spoon, four brooches, three necklaces, two pipes, two fur boas, two pairs silk gloves, three princess gowns, twenty-one handkerchiefs, one wool costume, two pieces, one waist, one silk pad, which said merchandise then and there upon such importation and bringing into the United States was subject to the payment of duties to the said United States, contrary to law; that is to say, the said merchandise then and there having been found and contained in the baggage of her, the said Matilda M. Chesbrough, who then lately before arrived with the said baggage at the port of New York, within the United States, from a foreign country, and which merchandise was not at the time of making entry for such baggage mentioned by the said Matilda M. Chesbrough to the collector of customs of the said port of New York before whom such entry was made, she, the said Matilda M. Chesbrough, at the time of so importing and bringing into the United States, and assisting in importing and bringing into the United States, the said merchandise, then and there well knowing the said merchandise to be subject to the payment of duties to the said United States, and then and there intending to import and bring into the said United States, and assist in importing and bringing into the said United States, the

said merchandise, contrary to law in the manner aforesaid, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States."

Succinctly stated, the contention of the demurrant is that the words "import or bring" and "merchandise," as used in section 3082, exclude articles brought in as baggage, and that the penalties denounced by that section do not embrace any act violative of section 2802, regardless of the presence or absence of a fraudulent intent.

The contention in relation to the word "merchandise" is couched by the demurrant in the language following:

"The importation of merchandise contrary to law, which is penalized by section 3082, is the importation of general merchandise as distinguished from baggage and the importation of baggage contrary to law is therefore not penalized by section 3082."

This limitation sought to be placed on the word "merchandise," viz., to the general merchandise requiring invoices, bills of lading, consular certificates, etc., is entirely too restricted. It is a primary rule in the construction of statutes that words of common use are not to be given any but their natural, plain, and ordinary signification, unless the context shows an intention to use them in a different sense. The word "merchandise" is no doubt used in different senses in different parts of the legislation on customs duties (21 Op. Attys. Gen. 92), in some instances very broadly, as authorized by section 2766, and in others more restricted. There is nothing in section 3082, where this word occurs, nor in Act July 18, 1866, c. 201, 14 Stat. 178, from the fourth section of which such section is derived, nor in the Revised Statutes pertaining to customs duties, that suggests a legislative purpose to restrict such word to less than its ordinary meaning. On the contrary, in several sections contained in the fifth division of the Revised Statutes, relating to customs duties, and entitled, "Entry of Merchandise," Congress has clearly evinced that the word "merchandise" is not to have the restricted meaning contended for. Section 2766 (page 1861) declares that "the word 'merchandise' as used in this title may include goods, wares, and chattels of every description capable of being imported"; and sections 2799 and 2802 (pages 1872, 1873) show that wearing apparel and other personal baggage are embraced within the term "merchandise."

As to the restricted meaning of the word "import," the contention of the demurrant is as follows:

"Even if the importation of merchandise contrary to law which is penalized by section 3082 includes the importation of baggage contrary to law, still this count shows no violation of section 3082 because by the very terms of the statute the illegality must exist at the same time with the importation, and, inasmuch as the importation is complete when the ship arrives at her destination with intent to unload, and inasmuch as the obligation to mention dutiable articles contained in baggage does not arise until the act of importation is completed, the allegation that the defendant imported dutiable merchandise in her baggage without mentioning the same to the collector is clearly insufficient."

A technical, rather than the ordinary, meaning of the word "import" in section 3082 is here insisted upon. The argument in support of such contention proceeds thus: That the importation of goods is complete

when the vessel voluntarily arrives at her port of destination with intent to unload (*Keck v. United States*, supra), that the illegality penalized by section 3082 must exist at the same time with the importation, and, as the offense denounced by section 2802 cannot take effect until after such importation, it cannot be made the basis for the crime contemplated by section 3082. This argument assumes that this definition of "importation" must be applied wherever the word "import" occurs in the customs duties legislation. But this is not so. This definition is undoubtedly correct in the class of cases to which it has been applied by the courts, and, in the case of some of the importations contemplated by section 3082, such definition would control; but it does not control in the case of dutiable merchandise brought in as, in, or with personal baggage. In such a case the importation of such merchandise is not complete as soon as the vessel is moored, but when the dutiable articles are landed and the time for making the baggage declaration and entry has passed.

Section 3082 uses the phrase "import or bring." The demurrant contends that these words are synonymous. They may or may not be, according to the legislative purpose for which they are used. But assuming, for argument's sake, that they are synonymous, what authority has the demurrant for her insistence that the word "bring" must yield to the technical meaning attributed to "import"? Why may not the word "bring" modify the word "import"? The Legislature has used both. There is no need to hold that either is surplusage. There are prohibitions contained in the customs duties laws which come within the phrase "contrary to law" in section 3082, to some of which the word "import" and to others the word "bring" would be the more appropriate. In *United States v. Merriam*, Cas. No. 15,759, 26 Fed. Cas. 1237, Judge Longyear, in discussing whether section 4, Act July 18, 1866 (section 3082, Rev. St.), repealed section 3, Act March 3, 1863, c. 76, 12 Stat. 739, which latter act furnished the basis of the counts then under consideration, said on page 1239 of 26 Fed. Cas., with reference to the contention that the words "import or bring" were to be given a restricted meaning:

"Now, 'to import,' in its general signification, means to bring into the United States. Why, then, are these additional words 'or bring' into the United States, used? They are either mere surplusage, or they mean something more than what is included in the words 'to import,' according to their ordinary signification. To import goods, wares, and merchandise into the United States, in the connection in which the words are here used, evidently means an importation in the ordinary manner, so far as the means and manner of importation are concerned, but contrary to law. 'To bring' goods, etc., into the United States, in the connection in which the words are used, means the introduction of goods, etc., into the United States by any other means or in any other manner than that of importation proper, contrary to law; and in this sense will not those words cover any smuggling or clandestine introduction into the United States of any goods, wares, or merchandise, subject to duty by law, without attempting to effect an entry at all, and without paying or accounting for the duty? Such was the view of this section taken in the case of *Landsberg*, Fed. Cas. No. 8,041, decided by this court, in March term, 1870."

If the technical meaning ascribed to the word "importation" by some of the cases should be adopted as controlling the word "import" used

in said section, the logic of the argument would not be the elimination of the word "bring," or to make it synonymous with "import," but rather to take it as having a different meaning, and that by the use of both terms Congress intended that this section should have the larger scope and effect. To give the words "merchandise" and "import or bring" the restricted meaning contended for by the demurrant would be not only to disregard their plain, ordinary signification, but the evident purpose of the customs duties laws to make it difficult for evil intentioned persons to evade its provisions. These words in my opinion have a plain meaning, and call for no interpretation. They comprehend the bringing into this country of dutiable articles.

The remaining question is whether a violation of section 2802 falls within the phrase "contrary to law" found in section 3082, and becomes the misdemeanor therein denounced when done fraudulently and knowingly. The demurrant contends:

"That the unlawful importation of baggage or what, under the customs laws, is treated as baggage, is not a violation of section 3082, because that section applies only to goods the importation of which is regulated by sections 2785, 2872, 2874, and 2963 (pages 1867, 1910, 1946), and does not apply to goods, the importation of which as baggage is regulated by sections 2799, 2801, and 2802."

If this contention embodies a true construction of these provisions of the customs duties laws, no distinction will exist in the penalties prescribed between the prohibited introduction in baggage of dutiable articles by the innocent and that of those having a criminal intent. An immunity from imprisonment to the latter can have but a disastrous effect upon the administration of those laws. The criminal will play the role of the innocent, and baggage will become the favorite means in the attempt to defraud the government revenues.

In *United States v. Five Packages of Tapestry* (D. C.) 114 Fed. 496, this matter was considered and decided adversely to this contention; it being there held that "the provisions of Rev. St. § 3082, apply to dutiable merchandise brought into the United States in the baggage of a passenger."

The demurrant contends that this case is in conflict with that of *United States v. One Pearl Necklace* (Dodge, Claimant), 111 Fed. 164, 49 C. C. A. 287, 56 L. R. A. 130. But this is not so. In the latter case there is an illuminating and instructive discussion of the relative effect of the sections referred to by the demurrant, but there is nothing in the opinion of that case that in any way raises a doubt as to section 3082 being applicable to dutiable articles found in personal baggage. There is nothing in that case that required a decision of that question, but the same court (C. C. A., Second Circuit), in *One Pearl Chain* (Dulles, Claimant) v. *United States*, 123 Fed. 371, 59 C. C. A. 499, was required to pass thereon, as the only count to which the evidence related was based on that section. The chain alleged to have been forfeited in that case was held to be baggage within the meaning of section 2802, though it was on the person of claimant at the time of its seizure. *United States v. Nine Trunks*, Cas. No. 15,885, 27 Fed. Cas. 161, is also a case adverse to the contention of demurrant on this point. In the court below it was held that the merchandise contained in the trunks

which were brought in as baggage were not embraced within section 3082. This was held to be error; Justice Strong saying:

"With this construction of the act of 1866 I find myself unable to concur. I agree that the act is to be construed in view of other acts relating to the same subject-matter; and, so far as possible, in harmony with them. But, if a new provision is introduced into a statute, effect must be given to it, though it changes the prior existing law. It is true the act of 1863, which required triplicate invoices, with a consular certificate, did not prescribe a forfeiture for neglecting to obtain them. It only declared that without them the goods should not be admitted to entry. Forfeiture was prescribed for making entries by means of false invoices or certificates. But all this is not inconsistent with the power of Congress to provide other penalties for importing goods without pursuing the prescribed forms of law. The manifest purpose of the act of 1863 was to protect the revenues against smuggling and other frauds. Hence the requisition of triplicate invoices and of the consular certificate, which could not be given without a minute and particular declaration, specifying facts very material to be known by the revenue officers. The act of 1866 professes by its title to be an act further to prevent smuggling. It is practically a remedial act, therefore, in a very just sense, though some of its provisions are penal. It is to be construed with reference to the mischiefs it was intended to remedy. Now, it is plain the mischiefs in view were not only the introduction into the country of goods, the importation of which was prohibited, but illegal importation of dutiable articles. That dutiable goods were in contemplation of Congress is made manifest by the provisions of the third section, which authorizes a search for goods 'subject to duty,' or 'which have been introduced into the United States in any manner contrary to law,' and in case they are found authorizes a seizure of them and a forfeiture. Then follows the fourth section (section 3082), containing a more general provision, which prescribed forfeiture of any goods imported contrary to law, and imposes a penalty upon the importer. Goods imported in the manner in which the goods now in controversy were imported are in my judgment imported contrary to law as much as if they had been goods which could not legally be imported at all. And I find no warrant for restraining the language used by Congress beneath its natural meaning. If it be restrained, as it was in the District Court, the act ceases to be what it professes to be, an act to prevent smuggling."

See, also, *Cotzhausen v. Nazro*, 107 U. S. 215, 2 Sup. Ct. 503, 27 L. Ed. 540, that the method employed in introducing dutiable articles is immaterial, if such introduction is contrary to law. In my opinion this contention of the demurrant is unsound, and section 3082 does apply to dutiable articles introduced into this country in personal baggage.

The demurrant also contends that section 2802 provides a penalty for the act therein prohibited, and that it cannot be supposed that Congress intended another and severer penalty for the same violation, such as is imposed in section 3082. To this it is only needful to say that, before the penalties denounced by section 3082 can be imposed, a higher grade of culpability must be established than is required to constitute an offense under section 2802. The penalties denounced by the latter section apply where any article subject to duty is found in the baggage, and not mentioned at the time of making entry thereof; and this whether the person bringing in such baggage knew that such articles were dutiable or not, and though he was free from any intent to defraud the government revenues. *United States v. One Pearl Necklace* (Dodge, Claimant), supra. Whereas in section 3082 it is only when such act is done fraudulently or knowingly that the crime therein penalized is committed. Under the count demurred to, the govern-

ment must not only show that section 2802 was violated by the defendant, but that she knew she was violating it or that she violated it fraudulently. This fraudulent and guilty knowledge relates mainly to the punishment of the offender. The seizure directed under section 2802 relates to the property imported contrary to law. *Cotzhausen v. Nazro*, *supra*, page 219 of 107 U. S. (2 Sup. Ct. 503, 27 L. Ed. 540).

An information under section 2802 for the forfeiture of goods is a civil action. The proceedings contemplated by section 3082 are criminal. *Friedenstein v. United States*, 125 U. S. 224, 8 Sup. Ct. 838, 31 L. Ed. 736. An acquittal of the crime charged under section 3082 would be no bar to the proceedings in rem authorized under section 2802. 23 Op. Attys. Gen. 63.

The insistence of the demurrant that the mere bringing of dutiable articles into this country is not the offense denounced by section 2802, but that the offense is only complete when the person making entry fails to mention such dutiable articles, has no place in the present discussion. The count demurred to clearly and distinctly alleges that certain dutiable articles were found in the baggage of the defendant; that she had lately before arrived with such baggage from a foreign country; that she made no mention of such articles at the time of making her baggage entry; that she knew that such articles were subject to the payment of duties; and that she fraudulently, unlawfully, and knowingly brought them into the United States contrary to law.

On a demurrer, all well-pleaded material and relevant facts are admitted as true, and the court is only concerned with the legal effect of the charges and allegations of fact contained in the pleading. These in this count in my judgment sufficiently charge the crime denounced by section 3082 to put the defendant on her defense.

The demurrer is overruled.

In re DUQUESNE INCANDESCENT LIGHT CO.

(District Court, W. D. Pennsylvania. March 8, 1910.)

No. 4,253.

1. BANKRUPTCY (§ 322*)—CLAIMS AGAINST ESTATE—CONTRACT—BREACH—BANKRUPTCY—MEASURE OF DAMAGES.

For a buyer's breach of a contract for the manufacture and sale of burners the measure of the seller's damage on the allowance of his claim against the bankrupt estate of the buyer is the difference between the cost of manufacture and the contract price, notwithstanding the entire lot of goods were not manufactured or ready for delivery.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 508; Dec. Dig. § 322.*]

2. BANKRUPTCY (§ 340*)—CLAIMS—BREACH OF CONTRACT—OBJECTION TO CLAIM—BURDEN OF PROOF.

Where a buyer's bankruptcy constituted a breach of a contract to purchase a quantity of burners to be manufactured by the seller, and, after the bankruptcy, the seller was compelled to purchase mantles, boxes, cases, glasses, and excelsior to complete the burners manufactured and prepare them for market, and also to furnish a market for them, which it was

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 176 F.—50

not required to do under the contract, the seller, in order to establish its claim for the difference between the cost of manufacture and the contract price, was not bound to show what amount was obtained for the burners so manufactured and sold to others; the burden of proving such sales in mitigation of damages being on the objectors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 527; Dec. Dig. § 340.*]

3. BANKRUPTCY (§ 318*)—CLAIMS—CONTRACT OF SALE—BREACH—"PROVABLE CLAIM."

Where a buyer's bankruptcy resulted in its breach of an express written contract for the sale of burners, the seller's damages were unliquidated and constituted a "provable claim" against the bankrupt's estate, under Bankr. Act July 1, 1898, c. 541, § 63a, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3447), providing that debts of the bankrupt may be proved and allowed against his estate which are founded on a contract, express or implied.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 482; Dec. Dig. § 318.*]

For other definitions, see Words and Phrases, vol. 6, p. 5746.]

4. BANKRUPTCY (§ 320*)—CLAIMS—DAMAGES—LIQUIDATION.

Where a bankrupt was liable for unliquidated damages for breach of contract of sale, and no application was made to the court for a liquidation, and there was no standing order or rule providing a method of procedure for a jury trial on issues framed, or by adjudication on evidence before the referee or judge, the parties having submitted the matter to the determination of the referee, his determination constituted an appropriate method of liquidating the damages, under Bankr. Act July 1, 1898, c. 541, § 63b, 30 Stat. 563 (U. S. Comp. St. 1901, p. 3447), providing that damages may be liquidated on application to the court in such manner as it shall direct.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 479, 490; Dec. Dig. § 320.*]

5. BANKRUPTCY (§ 318*)—CLAIMS—CONTRACT OF SALE—BREACH—TENDER OF DELIVERY.

Where a contract for the sale of burners was broken by the buyer's bankruptcy, so that it was impossible for the buyer to accept a delivery and make payment, the contract was broken on the filing of the petition, and the seller was relieved from tendering the goods as a condition to claiming damages against the bankrupt's estate.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 481, 482; Dec. Dig. § 318.*]

In the matter of the bankruptcy of the Duquesne Incandescent Light Company. On certificate of the referee to review certain questions with reference to the disallowance of the claim of the Iron City Stamping Company. Referee's report reversed, and claim allowed.

Charles T. Moore, for claimants.

Alex. Gilfillan and C. F. Patterson, for trustee.

YOUNG, District Judge. This case comes before us upon the report of Wm. R. Blair, referee in bankruptcy, and his certificate presenting for our review certain questions. As all these questions except the fourth are questions of fact, we do not find, after a careful consideration of the evidence, that the referee erred in his decision allowing or disallowing the claims. His findings are abundantly sustained by the evidence, and, were the case before us originally, we

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

should have decided as he has. This leaves only the fourth question to be considered. That question is stated as follows:

"Fourth. Whether, under the facts set forth in the report and opinion of the referee filed herewith, the claim of the Iron City Stamping Company for damages for breach of contract to manufacture certain burners should be allowed against said estate."

The claim was disallowed by the referee. In his report upon this claim the referee says:

"The claimant in this case claims the sum of \$11,659.33, which it says is due to it by reason of the breach of a certain contract by the bankruptcy of the Duquesne Incandescent Light Company.

"It appears that on February 15, 1908, Messrs. J. H. Lytle and Charles T. Moore, on the one part, and the bankrupt, on the other, entered into a contract, in writing, whereby the bankrupt ordered 250,000 brass burners of a certain type known as the 'Venus Burners,' at \$145 per thousand (1,000), the burners to be manufactured and delivered at the rate of 35,000 per month from June 15th until November 15th and the final delivery of 40,000 in December, 1908. The bankrupt was to furnish certain material used in the manufacture of the burner, and the contract further provided for certain terms of payment, etc. Subsequently to entering into this contract, Messrs. Moore & Lytle incorporated the Iron City Stamping Company, the claimant in this case, and certain property of Messrs. Moore & Lytle, including this contract, was turned over to the Iron City Stamping Company.

"It appears in the testimony that Moore & Lytle or the Iron City Stamping Company provided themselves with the necessary dies and other appliances proper for the fulfillment of the contract, and did actually manufacture a number of the burners substantially as called for in the contract. It further appears, as the witness Hellquist, an employé of the claimant company, testifies, that the number manufactured was 5,000, but he refuses to say that the number reached 10,000. On the other hand, H. L. Schueck, who was formerly president of the Duquesne Incandescent Light Company, but who between the date of the contract and the manufacture of the burners became the manager of the claimant company, says that no burners of the kind called for by the contract were ever manufactured. Schueck testifies that the burners which were manufactured of the parts assembled for carrying out the contract with the bankrupt were sold by the claimant for more than they cost. It does not appear for what they were sold. Hellquist testifies that the cost of manufacturing the burners, as called for by the contract, was \$90 per thousand (1,000). Schueck says the cost was from \$88 to \$92 per thousand (1,000). The claim as made is for \$11,659.33, which is arrived at as follows:

250,000 brass burners @ \$145 per 1,000, as per contract.....	\$36,250 00
Less 250,000 burners, cost at factory \$90 per 1,000..	\$22,500 00
And the value of material advanced by the bankrupt company	2,090 67
Total	24,590 67
Balance due claimant.....	\$11,659 33

"The claim in this case, therefore, is for the difference between the contract price and the alleged cost of the manufacture of the entire 250,000 burners; the learned counsel for the claimant arguing that such is the proper measure of damages in this case.

"The referee is of opinion that this claim cannot be allowed. While it is true that in certain cases on the refusal of the purchaser to receive or pay for articles manufactured of a special or peculiar type the measure of damage is held to be the difference between the contract price and the cost of manufacture, the referee is of the opinion that this is not the measure of damages to be applied in this case.

"In the first place, this is not the case of an actual refusal to accept and pay for the articles; and, in the second place, the vital defect in the claim as

presented is that the cost of the manufacture is not sufficiently proved. While the referee does not hold that in case of the bankruptcy of the person ordering the goods, as in this case, the other party is bound to go on and manufacture and tender the same in order to recover the difference between the cost of manufacture and the contract price, yet the rule allowing the recovery of such damages is always based upon a theoretical tender, and the referee knows of no case in which upon the insolvency of the purchaser the manufacturer is permitted upon the mere estimated cost of production to recover the difference between such estimated cost and the contract price. In such cases the referee is of opinion that the measure of damages is the actual loss rather than the speculative difference between the estimated cost of production and the contract price. It must not be forgotten that in this case the testimony is clear that the burners alleged to have been manufactured, under the contract, sold for more than the estimated cost of manufacture, although the witnesses do not inform us of the price at which they were sold. "The referee is of opinion that this claim, as made, cannot be allowed, nor does the evidence show the actual loss to the claimant by reason of the breach of its contract."

The evidence in this case fully establishes that the contract was entered into between the claimant and the bankrupt by which the stamping company was to furnish 250,000 inverted brass burners, as per sample submitted, for \$145 per thousand, of a special design, and that there was no open or general market where the burners could be readily sold, and that the claimant made all the preparations necessary to perform the contract at considerable expense.

The evidence shows that the cost of production was about \$90 per 1,000. Mr. Schueck testifies on page 26:

"Q. What is the cost of the manufacture of that burner? A. Between \$88 and \$92. It varies on account of brass going up and down."

Mr. Hellquist, on page 20, testifies:

"Q. What is the cost of material for manufacturing that burner? A. \$90 a thousand.

"Q. How do you arrive at that? A. The tubing at \$22 a thousand and the shadeholder at \$14 a thousand, the spud at \$18, the shutter at \$4.

"Q. What about the labor? A. About \$10 approximately.

"Q. All the overhead expense? A. That was partly included. Then there were screws, mantle holders. We would figure at \$90."

There was no testimony offered to contradict this evidence. There was sufficient evidence, therefore, to warrant the conclusion that the cost price was at least \$90, and the referee's finding that there was not, we think, was wrong.

Under the facts of this case, we are also of the opinion that the true measure of damage is the difference between the cost of manufacture and the contract price, and this although the entire lot of goods were not manufactured and ready for delivery. The rule in Pennsylvania, the place of the contract, is well settled. In *Dynamo & Engine Co. v. Cement Co.*, 221 Pa. 160, 70 Atl. 557, 18 L. R. A. (N. S.) 613, the rule is thus laid down:

"The first question raised by the assignments of error is as to the measure of damages. The trial judge charged the jury that, if they were satisfied from the evidence that the engines were manufactured from special designs for a special purpose and had no fixed market value, the plaintiff would be entitled to recover the difference between the actual cost of manufacturing and delivering the engines and the contract price. The learned trial judge correctly stated the rule applicable to such a state of facts as this, where from the na-

ture of the article there is no market in which it can readily be sold. In such case the great weight of authority is to the effect that the measure of damages is the difference between what it would cost to make and deliver the article and the price which the purchaser has agreed to pay for it. The principle is thus stated in 2 Sedgwick on Damages (8th Ed.) § 618, p. 269: 'Where one engaged in the performance of a contract is wrongfully prevented by the employer from completing it, the measure of damages is the difference between the price agreed to be paid for the work and what it would have cost the plaintiff to complete it. Differently stated, the rule in such case is recompense to the plaintiff for the part performance, and indemnity for his loss in respect to the part unexecuted. The plaintiff is to be placed in the same condition he would have been in if he had been allowed to proceed without interference.' This rule gives to the party who has complied with the agreement the value of his bargain. In the present instance the amount which was lost to the plaintiff by reason of the breach of the contract was capable of being ascertained with reasonable certainty, and was therefore properly adopted as the measure of the damages to be recovered by it as the injured party from the one in default."

In *Imperial Coal Co. v. Port Royal Coal Co.*, 138 Pa. 45, 20 Atl. 937, it is said:

"While it is undoubtedly true that mere speculative profits cannot be recovered in an action for breach of contract, a careful examination of the assignment shows that the profits in question were not within this rule. The jury have found the contract to be as plaintiff alleged; that it was an entire contract; that the defendant was to furnish plaintiff with enough coal to keep its 60 ovens in operation for 6 months, and that the price was to be \$1 per ton. The profits in such case were not speculative. They did not depend upon the fluctuations of the market, or the demand for coke, and they could be ascertained with mathematical accuracy."

This language was quoted with approval in *Puritan Coke Co. v. Clark*, 204 Pa. 556, 54 Atl. 350. In that case the court further said:

"In *Unexcelled Fireworks Co. v. Polites*, 130 Pa. 536 [18 Atl. 1058, 17 Am. St. Rep. 788], Clark, J., discussing the same question, says: 'The manifest tendency of the cases in the American courts now is to the doctrine that, when the vendor stands in the position of a complete performance on his part, he is entitled to recover the contract price as his measure of damages.' To the same effect is *Gallagher v. Whitney*, 147 Pa. 184 [23 Atl. 560], and *Hinckley v. Pittsburg Bessemer Steel Co.*, 121 U. S. 264. [7 Sup. Ct. 875, 30 L. Ed. 967]."

In considering the application of this rule to coke not manufactured the court said:

"But it is argued by appellant, while such a rule, if adopted, might apply to the 7,300 tons manufactured and ready for delivery on the wharf, it ought not to apply to the almost 14,000 tons not yet manufactured. The application of the rule does not depend on the exact state of manufacture of the thing sold at the date of the breach, but on the uncertainty incident to the adoption of any other than the contract price as the measure of damages. Plaintiff was bound to make a sale of the coke on the wharf, and did make a sale at the best price it could get for it and credited defendants with that price; but it was not bound to go on and manufacture 14,000 more tons and also sell that at a greatly reduced price, perhaps less than the cost of manufacturing it, as it actually did sell a part of the 7,300 tons."

The same rule obtains in the United States court. The rule as laid down in *United States v. Behan*, 110 U. S. 338, 4 Sup. Ct. 81, 28 L. Ed. 168, is as follows:

"The prima facie measure of damages for the breach of a contract is the amount of the loss which the injured party has sustained thereby. If the

breach consists in preventing the performance of the contract, without the fault of the other party, who is willing to perform it, the loss of the latter will consist of two distinct items or grounds of damage, namely, first, what he has already expended towards performance (less the value of materials on hand); secondly, the profits that he would realize by performing the whole contract. The second item, profits, cannot always be recovered. They may be too remote and speculative in their character, and therefore incapable of that clear and direct proof which the law requires. But when in the language of Chief Justice Nelson, in the case of *Masterton v. Mayor of Brooklyn*, 7 Hill [N. Y.] 69 [42 Am. Dec. 38], they are 'the direct and immediate fruits of the contract'; they are free from this objection; they are then 'part and parcel of the contract itself, entering into and constituting a portion of its very elements; something stipulated for, the right to the enjoyment of which is just as clear and plain as to the fulfillment of any other stipulation.' Still, in order to furnish a ground of recovery in damages, they must be proved. If not proved, or if they are of such a remote and speculative character that they cannot be legally proved, the party is confined to his loss of actual outlay and expense. This loss, however, he is clearly entitled to recover in all cases, unless the other party, who has voluntarily stopped the performance of the contract, can show the contrary."

See, also, *Hinckley v. Pittsburg Steel Co.*, 121 U. S. 264, 7 Sup. Ct. 875, 30 L. Ed. 967.

We quote from the syllabus:

"The defendant agreed in writing to purchase from the plaintiff rails to be rolled by the latter, 'and to be drilled as may be directed,' and to pay for them \$58 per ton. He refused to give directions for drilling, and, at his request, the plaintiff delayed rolling any of the rails until after the time prescribed for their delivery, and then the defendant advised the plaintiff that he should decline to take any rails under the contract. Held, (1) the defendant was liable in damages for the breach of the contract; (2) the plaintiff was not bound to roll the rails and tender them to the defendant; (3) the proper rule of damages was the difference between the cost per ton of making and delivering the rails and the \$58."

In discussing the question Mr. Justice Blatchford, on page 274 of 121 U. S., on page 879 of 7 Sup. Ct. (30 L. Ed. 967), says:

"Under these circumstances, the defendant is estopped from insisting that the plaintiff should have undertaken the risk and expense of actually making and selling the rails. These considerations also show that the rule of damages adopted by the Circuit Court was the proper one. It was in accordance with the rule laid down by this court in *Philadelphia, Wilmington & Baltimore Railroad Company v. Howard*, 13 How. 307 [14 L. Ed. 157]. In that case a contractor for the building of a railroad sued the company for its breach. On the question of damages this court said (page 344 of 13 How. [14 L. Ed. 157]): 'It must be admitted that actual damages were all that could lawfully be given in an action of covenant, even if the company had been guilty of fraud. But it by no means follows that profits are not to be allowed, understanding, as we must, the term "profits" in this instruction, as meaning the gain which the plaintiff would have made if he had been permitted to complete his contract. Actual damages clearly include the direct and actual loss which the plaintiff sustains proper rem ipsam non habitam. And, in case of a contract like this, that loss is, among other things, the difference between the cost of doing the work and the price to be paid for it. This difference is the inducement and real consideration which causes the contractor to enter into the contract. For this he spends his time, exerts his skill, uses his capital, and assumes the risks which attend the enterprise. And, to deprive him of it, when the party has broken the contract and unlawfully put an end to the work, would be unjust. There is no rule of law which requires us to inflict this injustice. Whenever profits are spoken of as not a subject of damages, it will be found that something contingent upon future bargains or speculations or states of the market are referred to, and not the difference between the agreed price of something

contracted for and its ascertainable value or cost. See *Masterton v. Mayor of Brooklyn*, 7 Hill [N. Y.] 61 [42 Am. Dec. 38], and cases there referred to. We hold it to be a clear rule that the gain or profit of which the contractor was deprived by the refusal of the company to allow him to proceed with and complete the work was a proper subject of damages.' "

Measured by this rule, and applying the facts of this case, we are of opinion that the measure of damages was the difference between the cost of manufacture and the contract price, and they were in no sense speculative as ruled by the referee. Nor does the fact that the evidence shows that the claimant sold some of the burners to others, but does not show the amount obtained for them, alter the claimant's right to recover the difference between the cost and the contract price. The evidence does not show how many burners were manufactured by the claimant, either before or after the filing of the petition in bankruptcy and the consequent breach of the contract, nor how many were disposed of by the claimant nor the price therefor, but the evidence does show that the claimant after the breach was required to buy "mantels, boxes, cases, glassware, and excelsior" to complete the burners for sale and prepare them for the market, and also to furnish a market for them. None of these things was the claimant required to do under the contract with the bankrupt, and, if the trustee or the creditors wished to show these sales in mitigation of damages, they had an opportunity to do so when the case was being heard. The burden was on the objectors to show anything they wished in mitigation of damages and the opportunity was at hand when the witnesses were on the stand testifying to the damages suffered by the claimant. If the objectors chose to pass by their opportunity, they cannot now complain, and the referee erred in using this evidence to weaken claimant's proof of cost.

The only question that remains is whether the claimant is entitled to recover these damages against the bankrupt; the breach having been occasioned by the filing of the petition in bankruptcy. We are of the opinion that he is. Section 63a of the bankrupt act (Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3447]) provides:

"Debts of the bankrupt may be proved and allowed against his estate which are * * * (4) founded upon an open account, or upon a contract express or implied."

The claim under consideration was founded upon an express contract in writing, the damages for the breach of which were unliquidated. The claim was therefore a provable claim, and under section 63b could be liquidated upon application to the court in such manner as it should direct. As no application was made to the court, and as there is no standing order or rule providing a method of procedure by jury trial upon issue framed or by an adjudication upon evidence before the referee or judge, and as the parties submitted themselves to the referee, who after a full hearing and careful consideration of all the evidence adjudicated the claim, which in our opinion was a most satisfactory and appropriate method for the proper liquidation of the damages, we see no reason why the claim is not to be considered as having been proved and liquidated in accordance with sections 63 a and b of the act. In *Re Swift*, 112 Fed. 315, 50 C. C. A. 264, in the Circuit Court of Appeals for the First Circuit, it is said:

"Under some bankruptcy statutes, provision was made for liquidating the present values of contingent debts and contingent liabilities for provable purposes. Rev. St. § 5068. But the present statute does not expressly provide any machinery for that purpose. It provides without apparent restriction for proof of debts founded on contracts, express or implied, and also, in a general way, for liquidating unliquidated claims; but, in the absence of any express provision for contingent engagements including those for property to be delivered on demand and payment of purchase money, there seems to be some difficulty in applying the statute. However, we need not go into the troublesome questions that are raised by this omission, because we have already seen that in the case at bar the proceedings in bankruptcy rendered unnecessary a demand and tender, and, like the great mass of matters affected by such proceedings, we must hold that this proof of debt relates to the time when they were commenced. From that time the stocks in question were put beyond the power of the stockbrokers to deliver effectually. The contract ripened simultaneously with the beginning of the proceedings in bankruptcy, as the consequence thereof in connection with the adjudication which followed. Of course, as everything related back to the filing of the petition, the ripening of the claim did not occur before it was filed, nor afterwards, but simultaneously with it, as already said. Consequently, by necessary effect, there was created and existed when the proceedings commenced a provable claim."

So in the case at bar upon the filing of the petition in bankruptcy and the adjudication thereon it was impossible for the bankrupt to accept a delivery of the goods and make payment for them. A breach of the contract therefore occurred upon the filing of the petition, and the claimant was relieved from making tender of the goods.

Under all the facts and the law of this case, we are satisfied that the referee erred in disallowing this claim. The report of the referee must therefore be reversed as to the claim of the Iron City Stamping Company, and the claim must be allowed, and the report of the referee affirmed as to the other findings allowing and disallowing claims.

In re AUTOMOBILE LIVERY SERVICE CO.

(District Court, N. D. Alabama, S. D. February 8, 1910.)

No. 9,483.

1. SUBROGATION (§ 23*)—ADVANCES BY PLEDGEE—DISCHARGE OF INCUMBRANCE.

Where, at the time certain automobiles were pledged to a bank for a loan to pay the purchase price, the title was in the seller as security for the price, the bank's money having been used to satisfy the seller's claim, the bank was subrogated to the seller's rights as against the buyer's trustee in bankruptcy, though the pledge may have been invalid because made by the buyer's officers without authority from its board of directors.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. §§ 60, 62, 64; Dec. Dig. § 23.*]

2. SUBROGATION (§ 23*)—FORM OF TRANSACTION.

Where a loan was made by a bank to a buyer of certain automobiles, and the proceeds were availed of to release them from the seller's lien for the purchase price to the buyer, it was no objection to the bank's right of subrogation to such lien that the note was in form made by the buyer to its president and immediately indorsed by him to the bank to secure the president's individual liability.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. §§ 60, 62, 64; Dec. Dig. § 23.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. PLEDGES (§ 11*)—ELEMENTS—DELIVERY TO PLEDGEE.

A pledge unaccompanied by delivery of the pledged property to the pledgee is invalid.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. § 29; Dec. Dig. § 11.*]

4. BANKRUPTCY (§ 161*)—PLEDGES—POSSESSION—PREFERENCES.

Where a pledge of property by a bankrupt was invalid in its inception because of nondelivery to the pledgee, but in accordance with a prior agreement the property was surrendered to the pledgee on the pledgor's default, but within four months prior to bankruptcy, such possession related back to the time of the agreement, so that the pledge did not constitute an illegal preference except as against intervening claimants who had perfected liens on the pledged property in the meantime.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 261, 263; Dec. Dig. § 161.*]

In the matter of the bankruptcy of the Automobile Livery Service Company. On petition to review findings of a referee denying the claim of the Jefferson County Savings Bank and the Harris Transfer & Warehouse Company. Petition granted, and claims allowed.

L. J. Haley, Jr., for claimant.

Tomlinson & McCullough, for petitioning creditors.

George Huddleston, for trustee.

GRUBB, District Judge. The Jefferson County Savings Bank and the Harris Transfer & Warehouse Company propounded their claim before the referee in bankruptcy for two automobiles, which were in the possession of the latter, as warehouseman for the former, when the petition was filed, and which were surrendered by the latter to the receiver in bankruptcy. The automobiles were shipped to the bankrupt by the makers, with draft and bill of lading attached, and the president and secretary of the bankrupt, in order to raise the money to take up the drafts and secure the bills of lading, executed its notes, payable to its president, and indorsed by him to the claimant, the Jefferson County Savings Bank, the proceeds of which, when discounted, were credited to the bankrupt and used by it to take up the drafts and secure the bills of lading for the two automobiles, which were then delivered to it by the railroad company. Each of the notes recited that the automobile, the release of which it secured, was pledged for the payment of the note and all subsequent indebtedness to the bank, but possession of each automobile remained in the bankrupt until the maturity and default of the first note falling due, whereupon the claimant, with consent of the bankrupt, took possession of the automobiles under its contract for pledge, and stored them with the warehousing company, in whose possession they were when the petition was filed, and by whom they were surrendered to the receiver of the bankrupt estate. The transaction constituted a pledge as distinguished from a mortgage. The bankrupt was insolvent when the claimant took possession of the automobiles.

The trustee asserts title to be in the bankrupt upon the grounds: (1) That the pledge was made by the officers of the bankrupt, without authority from its board of directors; (2) that the note, to secure which the pledge was given, was executed to the president of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the bankrupt, and not to the claimant; and (3) that there was no delivery of the articles pledged to the pledgee at the time of the creation of the pledge. The referee denied the claimant's petition, and to review his order this petition is filed by the claimant.

I. The first objection to the validity of the pledge is that the pledge was executed by the officers of the bankrupt, without authority from its board of directors. At the time the pledge was given, the title to the pledged property was in the maker for his security for the purchase price. The pledge was given to secure, and did secure, money, which was used by the bankrupt to pay the purchase price and relieve the property from the lien upon it, created by the retention of title in the maker. Conceding the want of authority in the officers of the bankrupt, in the absence of a resolution of its directors, to give the pledge, the trustee cannot claim the title to the pledged property, the purchase money lien upon which was relieved by the loan, secured by the pledge, and at the same time repudiate the loan and pledge. His rights in that event would be those of the bankrupt only, and would consist of an election to repudiate the loan and pledge, surrendering possession of and title to the pledged property to the claimant, or electing to retain the pledged property to ratify the loan and pledge by which the bankrupt secured possession of and title to it. The bankrupt or his trustee can only take the pledged property cum onere, and the claimant is subrogated to the lien of the maker of the automobiles, to satisfy which the proceeds of the loan were used. In the case of *Bolman v. Lohman*, 74 Ala. 511, the Supreme Court of Alabama said:

"But the rule is settled that where money is expressly advanced in order to extinguish a prior incumbrance, and is used for this purpose, with the just expectation on the part of the lender of obtaining a valid security, or where its payment is secured by mortgage, which for any reason is adjudged to be defective, the lender or mortgagee may be subrogated to the rights of the prior incumbrancer, whose claim he has satisfied; there being no intervening equity to prevent." *Scott v. Land Co.*, 127 Ala. 161, 28 South. 709; *Bigelow v. Scott*, 135 Ala. 236, 33 South. 546.

It is consequently unnecessary to consider the question of the authority of the president and secretary to borrow the money and give the pledge. The cases of *Jordan & Co. v. Collins*, 107 Ala. 572, 18 South. 137, and *Goodyear Rubber Co. v. Scott*, 96 Ala. 439, 11 South. 370, involve the authority of an officer of a corporation, without action of its directors, to make a transfer of all its property for the payment of existing debts, constituting a general assignment, and are to be distinguished from the transaction in this case, which was had in the due course of the bankrupt's business as a going concern, and did not have the effect of terminating its existence as such, as in the cases mentioned.

2. The note was payable to the president of the bankrupt, but was immediately indorsed by him to the claimant bank, which placed the proceeds to the credit of the bankrupt, by whom they were used to take up the drafts and secure the automobiles. This form of the transaction was doubtless to secure to the claimant the individual liability of the president of the bankrupt, as indorser of the note, in addition to the pledge of the property described therein. The loan was made

to the bankrupt, and the proceeds availed to release the pledged property to the bankrupt, and the claimant should be subrogated to the lien on the automobiles, which its money so advanced satisfied, regardless of the form which the transaction took.

3. The agreement to pledge the automobiles was not accompanied by their delivery to the pledgee, and was invalid as a pledge, for that reason, in its inception. Upon the maturity of the first note which fell due and the dishonor of it by the bankrupt, the claimant took possession of the automobiles and stored them for its account with the warehouse company. This was done before bankruptcy proceedings were instituted, but within four months thereof, and while the bankrupt was insolvent; and from the default in payment of the note, the insolvency of the bankrupt and an intent to prefer, if a preference was created by the transaction, was reasonably to have been inferred by the claimant. In the absence of the prior agreement to give the pledge, the subsequent surrender of the property would without doubt have constituted a voidable preference. If possession had accompanied the agreement to give the pledge, the pledge would equally without doubt have been valid, though given within four months of the filing of the petition, because of the contemporaneous consideration moving to the bankrupt for the agreement to give the pledge. The pertinent inquiry then is as to whether the subsequent delivery of possession of the pledged property to the pledgee, though without a new consideration, relates back to the original agreement and is rescued from the infirmity it would otherwise be subject to by reason thereof. Subsequent delivery of property agreed to be pledged has been held by the Supreme Court of Alabama to validate the pledge, except as against intervening liens which have attached in the interim. *Nobles v. Christian & Craft Grocery Co.*, 113 Ala. 220, 20 South. 961; *American Pig Iron Storage Warrant Co. v. German*, 126 Ala. 239, 28 South. 603, 85 Am. St. Rep. 21.

If the decisions of the state court hold valid transactions to create liens in cases in which delivery is made subsequent to the agreement to give the lien but before the right of intervening creditors has been fastened upon the property, the delivery of the property, under such circumstances, will not constitute an illegal and voidable preference under the bankruptcy law. *Thompson v. Fairbanks*, 196 U. S. 516, 25 Sup. Ct. 306, 49 L. Ed. 577; *Humphrey v. Tatman*, 198 U. S. 91, 25 Sup. Ct. 567, 49 L. Ed. 956.

In the case of *Sabin v. Camp* (C. C.) 98 Fed. 974, the court held that a transaction which was so consummated within the four months was not a preference, because it had originated before, and used this language:

"What was done was in pursuance of the pre-existing contract, to which no objection was made. Camp furnished the money out of which the property, which is the subject of the sale to him, was created. He had good right, in equity and in law, to make provision for the security of the money so advanced, and the property purchased by his money is a legitimate security and one frequently employed. There is always a strong equity in favor of a lien by one who advances money upon the property which is the product of the money so advanced. This was what the parties intended at the time, and to this, as already stated, there is and can be no objection in law or in morals. And when,

at a later date, but still prior to the filing of the petition in bankruptcy, Camp exercised his rights under this valid and equitable arrangement to possess himself of the property and make sale of it in pursuance of his contract, he was not guilty of securing a preference under the bankruptcy law."

The Supreme Court of the United States approved the case last cited in the case of *Thompson v. Fairbanks*, supra, and, in that case, said:

"The principle that the taking possession may sometimes be held to relate back to the time when the right to do so was created is recognized in the above case. So in this case, although there was no actual existing lien upon this after-acquired property until the taking of possession, yet there was a positive agreement, as contained in the mortgage and existing of record, under which the inchoate lien might be asserted and enforced, and when enforced by the taking of possession that possession under the facts in this case related back to the time of the execution of the mortgage of April, 1891, as it was only by virtue of that mortgage that possession could be taken. The Supreme Court of Vermont has held that such a mortgage gives an existing lien by contract, which may be enforced by the actual taking of possession, and such lien can only be avoided by an execution or attachment creditor whose lien actually attaches before the taking of possession by the mortgagee. Although this after-acquired property was subject to the lien of an attaching or an execution creditor if perfected before the mortgagee took possession under his mortgage, yet, if there was no such creditor, the enforcement of the lien by taking possession would be legal, even if within the four months provided in the act. There is a distinction between the bald creation of a lien within the four months and the enforcement of one provided for in a mortgage executed years before the passage of the act, by virtue of which mortgage and because of the condition broken title to the property becomes vested in the mortgagee, and the subsequent taking possession becomes valid, except as above stated."

In the case of *Sexton v. Kessler & Co.* (C. C. A.) 172 Fed. 535, 544, 21 Am. Bankr. Rep. 807, 820, the opinion of the court, rendered by Judge Noyes, says of the last-mentioned case and that of *Humphrey v. Tatman*, supra:

"While the Supreme Court in the cases referred to treats the validity of the mortgages and the rights of the mortgagees thereunder to be matters of local law, in my opinion it also states this underlying and controlling distinction: The exercise of a pre-existing right well founded in equity is not a preference, although occurring within the prescribed period; 'the bald creation of a lien within four months' is a preference."

In view of the principle asserted by these cases, it seems to me that the exercise of the right to take possession of the pledged property, within the four months, did not constitute an illegal preference, because it was done pursuant to a valid agreement to pledge for which a present consideration had moved to the bankrupt, and therefore related back to such agreement, except as against intervening claimants who had perfected liens on the pledged property in the interim, of whom there were none. The trustee represented no class of creditors who could successfully attack the transaction.

The petition for review is granted, and an order will be made by the court granting the prayer of the original petition and directing the two automobiles to be turned over to the petitioners in the original petition filed with the referee; and the trustee is taxed with the costs of this proceeding.

SPAETH v. SELLS et al.

(Circuit Court, S. D. Ohio, E. D. September 30, 1909.)

1. ABATEMENT AND REVIVAL (§ 71*)—DEATH OF PARTY—REVIVAL OF ACTION—STATUTORY PROVISIONS.

The remedy given by Rev. St. Ohio, § 5150 et seq., for the revivor of an action on the death of a party, is, if there be a strict compliance with its provisions within the time limited by statute, a matter of right and not of discretion.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. § 358; Dec. Dig. § 71.*]

2. COURTS (§ 343*)—DEATH OF PARTY—REVIVAL OF ACTION—STATUTORY PROVISIONS.

Under Rev. St. U. S. § 955 (U. S. Comp. St. 1901, p. 697), providing that, when either of the parties in any suit in any court of the United States dies before final judgment, his executor or administrator may, if the cause of action survive, prosecute or defend to final judgment, does not determine the plaintiff's right of revivor on death of defendant; that being governed by the law of the state where the suit is brought and prosecuted.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 915-920; Dec. Dig. § 343.*]

3. WORDS AND PHRASES—"ORDER TO SHOW CAUSE."

An order to show cause is an order requiring a party to appear and show cause why a certain thing should not be done or permitted.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 6, p. 5024.]

4. ABATEMENT AND REVIVAL (§ 74*)—DEATH OF PARTY—PROCEEDINGS FOR REVIVAL—LIMITATIONS.

Under Rev. St. Ohio, § 5144, specifying the cases in which a cause of action survives the death of a party, section 5150, providing that a revivor may be effected by a conditional order, if the action be revived in the name of a representative of the party who died, and section 5157, providing that an order to revive an action against a representative of a defendant shall not be made without his consent unless within one year from the time it could have been first made, the conditional order being equivalent to a substitute for a notice of motion to show cause, the procuring of such an order is not a sufficient compliance with section 5157, and the right of revivor is barred unless the final order of revivor is made within the time prescribed.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 429, 434; Dec. Dig. § 74.*]

Action by W. T. Spaeth against Lewis Sells and another. Heard on demurrer to the answer. Overruled.

Arnold, Morton & Irvine and Jones & James, for plaintiff.

Vorys, Sater, Seymour & Pease, for defendant Karb.

W. O. Henderson and W. H. Jones, for executrix.

SATER, District Judge. The petition was filed on May 10, 1907, against Lewis Sells and George J. Karb, sheriff. The plaintiff claims that it states three causes of action, viz., for assault, false imprisonment, and malicious prosecution. The defendant executrix asserts that the action is for malicious prosecution only, and that all else alleged is merely incidental thereto. Sells died September 5, and his executrix qualified November 5. On December 3 the plaintiff took a conditional order of revivor, which recites that, unless the executrix "shall within ten days after the service of this order show cause against the revivor of the same, said cause shall stand revived." She

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Index

was served December 5, and on December 14, 1907, filed an answer assigning reasons why the action should not be revived. The case remained dormant as to both parties until April 17, 1909, a period of more than 16 months. On that day an amended and supplemental answer was filed by the executrix, reciting the date of the death of Sells, and of her appointment, and that the action could have been revived at any time subsequent to that date, but that no such order had in fact been made, and that more than one year had elapsed from the time the action could have been first revived, and that she does not consent to a revivor. To this answer the plaintiff interposed a general demurrer.

Plaintiff insists that he is entitled, under sections 5149 and 5150, Rev. St. Ohio, to an order of revivor. Section 5149 is as follows:

"A revivor may be effected by the allowance by the court, or a judge thereof in vacation, of a motion of the representative or successor in interest to become a party to the action, or by supplemental pleading alleging the death of the party, and naming his representative or successor in interest upon whom service may be made as in the commencement of an action; but the limitations contained in subsequent sections of this chapter do not apply to this section."

We are not concerned with that section, the remedy given by it being discretionary with the court and not a matter of right (1 Bates, Pl. & Pr. 633), nor with such cases as *Carter v. Jennings*, 24 Ohio St. 182, *Black v. Hill*, 29 Ohio St. 86, *Pavey v. Pavey*, 30 Ohio St. 600, *Foresman v. Haag*, 37 Ohio St. 143, and *Eagle Paper Co. v. Bragg*, 4 Ohio Dec. 194, 7 Ohio N. P. 165, because they were decided under section 5149, Rev. St., while this proceeding was instituted under section 5150. It is manifest, from an examination of the above cases, that the provisions of section 5157, Rev. St., hereinafter set forth, do not apply to either mode of revivor authorized by section 5149, and this is the view expressed by Whittaker in his *Annotated Code* (6th Ed.) 406, and 3 Bates' *Complete Dig.* 1315. The remedy given by sections 5150 et seq. is, if there be strict compliance with statutory provisions, a matter of right and not of discretion. 1 Bates, Pl. & Pr. 635. The plaintiff elected to proceed under section 5150, Rev. St., and took the conditional order therein provided for.

Section 955, Rev. St. U. S. (U. S. Comp. St. 1901, p. 697), provides:

"When either of the parties, whether plaintiff or petitioner, or defendant, in any suit in any court of the United States, dies before final judgment, the executor or administrator of such deceased party may, in case the cause of action survive by law, prosecute or defend any such action to final judgment."

That section, however, does not aid in the determination of the question presented, for the reason that revivor is governed by the law of the state where the suit is brought and prosecuted. *Great Western Min. & Mfg. Co. v. Harris* (C. C.) 111 Fed. 38, 44; *Green v. Barrett* (C. C.) 123 Fed. 349.

The law which controls in this case is found in sections 5144, 5150, and 5157, Rev. St., which sections are as follows:

"Sec. 5144. Except as otherwise provided, no action or proceeding pending in any court shall abate by the death of either or both of the parties thereto, except an action for libel, slander, malicious prosecution, for a nuisance, or

against a justice of the peace for misconduct in office, which shall abate by the death of either party."

"Sec. 5150. A revivor may also be effected by a conditional order of the court, if made in term, or by a judge thereof, if in vacation, that the action be revived in the name of the representative or successor of the party who died, or whose powers ceased, and proceed in favor of or against him."

"Sec. 5157. An order to revive an action against the representative or successor of a defendant shall not be made without the consent of such representative or successor, unless within one year from the time it could have been first made."

The action for malicious prosecution, by the express language of section 5144, Rev. St., abated on the death of Sells.

Assuming, without deciding, that there was an action pending either for assault or for false imprisonment, or, for that matter, for both, and without deciding what effect shall be given to *Baltimore & Ohio Ry. v. Joy*, 173 U. S. 226, 19 Sup. Ct. 387, 43 L. Ed. 677 (which case counsel appear to have overlooked), is the plaintiff entitled to an order of revivor against the executrix by virtue of the proceedings inaugurated on December 3, 1907?

The plaintiff claims that he made a well-defined attempt within the period prescribed by law to procure a revivor by taking and serving on the executrix a conditional order authorized by section 5150, Rev. St., and thereby so preserved his rights that he may now have an order of revivor, notwithstanding he remained inactive thereafter for a period of more than 16 months. To sustain his contention he relies on *Steinbach v. Murphy*, 70 Kan. 487, 78 Pac. 823, in which it is said:

"The fact that a district court, eight months after the time an order reviving an action against the representatives or successor of a deceased defendant first could have been made, erroneously decided that it had no jurisdiction of the cause, will not excuse a failure to revive within one year, when no attempt was made to procure an order of revivor before the jurisdiction question was determined."

Keyser v. Fendall, 5 Mackey (D. C.) 47, and *Dick v. Kendall*, 6 Or. 166, are also cited.

What is the nature of a conditional order, and the correct interpretation of the Ohio statute?

In 18 Enc. Pl. & Pr. 1137, it is said:

"A conditional order of revivor is in its nature an order to show cause, and, as is usually the case with such orders, is used as a method of shortening the notice of motion, and is equivalent to, and a substitute for, a notice of motion."

In 15 Enc. Pl. & Pr. 362, it is announced that:

"An order to show cause is an order requiring a party to appear and show cause why a certain thing should not be done or permitted."

The conditional order, therefore, was equivalent to, and a substitute for, a notice of motion to show cause why a certain thing, which had not been done, should not be permitted. The thing that had not been done was the making of the final order of revivor. Section 5150, Rev. St., contemplates a hearing to be had within a specified time, and, if sufficient cause be not shown against a revivor, the conditional order is then made final, and the action stands revived. 18 Enc. Pl. & Pr. 1139. Section 5157, Rev. St., fixes the time of hearing within one

year from the time in which it could first have been made. A right to revivor is a matter of right only under the conditions and within the time limited by statute. 18 Enc. Pl. & Pr. 1141.

From *Tefft v. Bank*, 36 Kan. 457, 13 Pac. 783, it appears that the Kansas Code on the subject of revivor is the same as that of Ohio, and that section 433 of that Code is the same as section 5157, Rev. St. Ohio. The mode of reviving dormant judgments in that state (section 440) is the same as that prescribed for reviving actions before judgment. Three days prior to the end of the year after which a judgment would become dormant, a motion of revivor was filed, and notice was given on the same day by one of the judgment creditors that an application to revive the judgment would be presented to the court, 27 days after the year had elapsed. The district court, against the objection of the notified debtor, ordered a revivor. This was held error. In the opinion it is said:

"The filing of the motion and the giving of the notice is not sufficient to bring the case within the limitation. The point of limitation prescribed by the statute is the making of the order, and not the commencement of the proceedings to obtain the order. One year is given within which the judgment may be revived. * * * The party should at least commence proceedings in sufficient time to give the required notice to the adverse party of the hearing within the year, and the time fixed in the notice when the application is to be made should be within that period. It is unnecessary to consider what would be the result if the case had been noticed for hearing within the time, and by action of the court or through no fault of the applicant it was continued and extended beyond the year."

In *Berkley v. Tootle*, 62 Kan. 701, 703, 64 Pac. 620, it was held that:

"In the matter of revivor there is no right to an order; nor is there power within the court or judge to make one, unless it is made within one year after it could have been first made."

In *Reaves v. Long*, 63 Kan. 700, 66 Pac. 1030, it was held:

"A judgment can only be revived without the consent of the judgment debtor when the order of revivor is made within a year after the judgment becomes dormant, and when it has become dormant for more than a year there is no power in the judge or court to revive it, although a proceeding to revive was begun before the year of dormancy had expired."

After reciting that the mode of procedure for the revivor of a judgment is substantially the same as that for the revivor of pending actions, the opinion continues as follows:

"As revivor is surely statutory in its origin, it can only be accomplished in the mode and on the condition prescribed by statute. As will be seen, the statute explicitly provides that an order of revivor shall not be made without consent unless within one year from the time it could have been first made. This is not a limitation upon the commencement of proceedings, nor upon the time within which to make application for an order, but it is a limitation upon the granting of the order itself."

Steinbach v. Murphy, 70 Kan. 487, 489, 78 Pac. 823, considered as an entirety, not only fails to sustain, but refutes, the plaintiff's contention. In speaking of the statute of revivor, it is said in the opinion of that case that:

"It imposes an absolute prohibition upon the granting of an order after the lapse of a year from the time when it first could have been made. The right, by the terms of its creation, can endure but a year. The time element is an

essential constituent of the right. When the year has expired, there is no longer any right, and the status of the case is then the same as if there were no revivor statute. Analogies from the statute of limitations are not pertinent. That statute imposes limitations upon remedies; the revivor statute conditions the right. * * * A party seeking its benefit must bring himself strictly within its terms."

In another part of the opinion it is stated that:

"It is true that, some eight months beyond the time when the action could have been revived, the judge of the district court declined to acknowledge jurisdiction; but the plaintiff did nothing within those eight months to protect his right to revive. Had he profitably employed his time, and moved to revive instead of to reinstate, he could have secured himself against the unpropitious disposition of his case. Having failed to improve his opportunities, the erroneous decision of the court upon the question of jurisdiction amounted to no more than any other perverse fact working delay. The case was pending in a duly constituted court, whose action was not adversely dominated by any paramount power, and the plaintiff neglected available measures, whereby he might have fortified himself against a destruction of his right by lapse of time. All statutes prescribing time limits for the institution or completion of proceedings are necessarily arbitrary; but that relating to revivor is especially unforbearing, and parties must so order their conduct that, notwithstanding disastrous circumstances, and moving accidents by flood and field, they may comply with it. Interruptions of the flow of the allotted time cannot be permitted from reasons based on apparent hardship or inconvenience, but must rest upon some practical impossibility to sue. They are limited in their character, and are to be admitted with great caution, and only in cases of strict necessity." 19 Am. & Eng. Enc. Law (2d Ed.) 216."

That the proceedings to revive cannot be completed after one year from the time revivor could have been first made, although they may have been commenced prior to the expiration of such year, is the view adopted in 1 Bates, Pl. & Pr. 638.

Another substantial reason for exacting strict compliance with the statute is found in the policy to speed the trial of causes and not permit them to remain, at the discretion of the court or the election of parties, in a state of suspension. The all-pervading policy of the statutes in reference to decedents' estates is to terminate administration at the expiration of 18 months from the grant of letters, if it be practicable so to do. The purpose of section 5157 is to provide rest for and facilitate the settlement of estates, and revivor proceedings against personal representatives must not be procrastinated. That section is in the nature of a statute of limitations, and bars the right to revive if the right be not exercised in the mode and within the time prescribed. *Green v. Barrett*, supra; *Pope v. Irby*, 57 Ala. 105.

Keyser v. Fendall, supra, is so readily distinguishable from the case at bar as to render a discussion of it unnecessary.

In *Dick v. Kendall*, supra, there is no statement of the facts and circumstances involved, nor is any reason assigned for the conclusion reached beyond a mere reference to section 37 of the Code, under which the case was decided. Even if that case were analogous to the case at bar, I must decline to follow the Oregon rule, because the better reasoning is against it.

The demurrer is overruled, and an order may be drawn accordingly.

Lewis Sells and his executrix, prior to my assumption of judicial duties, had been clients of mine for a long period. This action was

not instituted, however, until some time after I had left the practice. However, to avoid all possible embarrassment to myself and counsel, I consented to hear this case on condition only that the conclusion reached should bear the approval of my associate, Judge A. C. THOMPSON.

THOMPSON, District Judge. I concur in the above ruling.

THE CIUDAD DE REUS.

(District Court, E. D. New York. November 9, 1909.)

SALVAGE (§ 8*) — NATURE OF SERVICE — ASSISTING VESSEL AFTER COLLISION — "SALVAGE SERVICE."

The services of three tugs in freeing a steamship whose anchor chain, while anchored off Staten Island, had become fouled with that of another anchored vessel after a collision between them during a high wind, which still continued, held "salvage service," and entitled to be compensated as such; also, after such tugs and others had towed the steamship across the bay to a dock, which was an ordinary towage service, their further service in rescuing her, when she had been broken loose from her moorings by the gale, and in protecting her from further injury by striking against the wharf, was a "salvage service."

[Ed. Note.—For other cases, see Salvage, Dec. Dig. § 8.*

For other definitions, see Words and Phrases, vol. 7, pp. 6316-6318.]

In Admiralty. Suit by the McCaldin Bros. Company and others against the steamship Ciudad de Reus. Decree for libelants.

Robinson, Fishel & Robinson, for McCaldin Bros. Co.

Wing, Putnam & Burlingham, for the Timmins.

Curtis, Mallet-Provost & Colt, for claimant.

CHATFIELD, District Judge (orally). I think I will take the last question first. If a vessel should be rescued, and subsequently totally destroyed, the fact that there was no vessel left, of itself, would not be the only consideration in determining what was salvage. The present case involves, not one claim of salvage, but at least three separate situations, perhaps divided among five boats. The claim for salvage in reference to the occurrence over by Staten Island cannot be viewed by what happened after Capt. Roche took charge and the vessel came to Brooklyn. Nor can the services that are claimed to have been rendered by the boats in preventing the steamer from smashing into the dock be judged by the services alone that had taken place at Staten Island. I do not think that the case cited by counsel for claimants, *The Steers*, has anything to do with this case. The question here is whether any of these services were salvage services, and, if they were, who is entitled to the benefit of them, and, perhaps, who shares in the responsibility for any of the situations of danger.

The situation arose originally from a collision, which has been passed upon in another court. Both the opinion of the court in that case and the testimony offered here indicate that the steamship Mara-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

val came to anchor in such a position that under the influence of a northwest wind and an ebb tide, and under some movement which has not been explained in this court, her bow came in collision with the side of the Ciudad de Reus. The finding has been that that was the fault of the Maraval. That finding, and the record as it stands here, indicate that the Ciudad de Reus had been anchored in a position without moving. There is no evidence that she drifted. The other boat came up and came into collision with her, and as the tide changed to flood the boats moved to starboard, so that the tide and the wind were opposing one another, and the Ciudad de Reus, which was nearer to Staten Island and had a longer anchor chain, swung into such position that her chain was afoul of the chain of the Maraval, an independent situation from that which originally caused the collision. While the vessels were in that position the wind had moderated somewhat, but between 7 and 8 in the morning, as is shown by the report of the Weather Bureau, its velocity was about 20 miles an hour—estimated to be somewhat more than that by the men down the bay, but such estimates are usually greater than the official record. Under this strong wind the vessels were lying in a position where discreet seamanship would indicate that they ought to be separated.

The Maraval, either because she was confident she was not in fault, or because of the appearance of changing her position, refused to move. The Ciudad de Reus apprehended sufficient trouble to cause her to want to move, and she signaled for a tug and a pilot. Those signals and the conduct of the officers would indicate that at that time they were not calling for salvage service; but I think they were in a position where the tugs going to their assistance might reasonably be expected to be recompensed for more than mere towing services. The McCaldin Brothers spent an hour and a half trying to keep the vessel from getting into a worse position, or, rather, in improving her position; and the William J. McCaldin, then coming along, took up the same work, with a hawser from the bow of the steamer. The wind at that time must have been considerable, inasmuch as the two tugs did not extricate the Ciudad de Reus from her situation. The tug Mutual was called in to help, and with their combined efforts the vessels proceeded towards Staten Island. The anchor of the Ciudad de Reus was slipped, which was not done on the authority of the tugs alone, but by the agreement of every one, and they proceeded towards the Staten Island shore. The evidence shows that Capt. Gully, captain of the McCaldin Brothers, at least assumed that the Ciudad de Reus was in a situation from which she should be removed, and that the services which the situation called for were to take her to the nearest dock, which he attempted to do. When Capt. Roche intervened, and the original proposition of taking the Ciudad de Reus to some place where she could be surveyed for repairs had developed into a question whether she should go to Morse's Dock or to some other place, Capt. Roche took charge.

Up to that point I think that the services were worthy of more recompense than the compensation for mere towage, and up to that point the McCaldin Brothers and the William J. McCaldin, and, to a certain extent, the Mutual, had participated. The Maraval's con-

nection with the matter ended right there, and when they started to cross the bay with the Ciudad de Reus Capt. Roche was responsible. While the evidence seems to indicate that the wind was increasing, still the rate of the wind was probably not more than between 30 and 40 miles an hour, or in that neighborhood, and there is nothing to show that crossing the bay was a movement that could not be properly undertaken, or that should not be expected to be successful. Nevertheless, it was done by advice of Capt. Roche, and he undertook it as a towing service, at that time, and the Timmins assisted in helping do that. On his own statement there was no reason why he should not tow the boat across there. When engaged in towing her to her destination, the next thing that happened was the hawser parted, and it was the duty of the man who was in charge to endeavor to recover his tow, and Capt. Roche says from that time on it was only an ordinary matter. He could not put the boat in to the dry dock, or in to the Morse Dock; so he eased her up against the wharf, snubbed her around, and backed her up on the mud, and when she cast loose from the wharf let her take a berth broadside, as he would a yacht he was putting up there for the winter. I do not consider that Capt. Roche, in doing that, did any more than his duty in taking care of a vessel that he was towing, and I do not think that the Timmins performed any more services than they owed to the Ciudad de Reus in undertaking to tow her across the bay.

The testimony is that the hawser did not hold on the dock. It is immaterial whether it broke or was cast off. The wind was certainly strong, and a situation arose by the Ciudad de Reus being blown from the dock. The injury to the steamship at that time had nothing to do with the salvage services. The question is whether she would have been injured more if the tugs had not acted as they did. It is apparent that the action of the McCaldin Brothers and of the Mutual, which got around in between the vessel and the dock, prevented the vessel striking on the dock with a great amount of force; and, in that the America and the William J. McCaldin were doing what they could, I think at that time those four boats put themselves in a position of rescuing this steamship, of doing something for which they should be recompensed. I think the accident to the McCaldin Brothers was regrettable; but to a certain extent it was her business to be able to put her nose against a steamer and exert all her force, even in rough weather. It is her business to take chances of having her condenser break under the movements of the vessel. I do not think that the amount of damage she suffered is, of itself, any measure of the value of her services, any more than, if such an accident had occurred in the course of an ordinary towage service, that it would have increased the price of towing. Nor do I think that the captain of the McCaldin Brothers jumping from the deck of the steamship to the top of the pilot house, of itself, makes an item of salvage. But I do think that the action of Capt. Gully at the time, his promptness in waking his crew up and getting his vessel out from between the steamer and the dock, where she would probably be smashed if she did not break a hole in the steamer, was valuable, and should enter into the situation.

The most difficult question is as to the value of these services. At Staten Island there was no risk to the tugs. The risk to the Ciudad de Reus was problematical, rather than certain. Over at Brooklyn, the risk, after the hawser parted, was greater. As I do not consider that the engineer of a tugboat is responsible for her movements, so I do not consider the captain of the William J. McCaldin, who had nothing to do except to obey, was responsible for attempting to take the boat across the harbor. The difficulty is to know how much this whole service was worth. I think it is one of the cases where the compensation cannot be very large. The time we have taken on the case is far more.

It is evident that the tugs were engaged about five hours, and that the America and the McCaldin Brothers did more work than the others. I think I shall start by the award, as a first item, of \$50 to the William J. McCaldin and the Mutual, and of \$75 to the McCaldin Brothers and the America. This is for the towage services. In addition to the \$75 to the America, I allow \$125; in addition to the \$50 to the Mutual, I allow \$200; in addition to the \$50 to the William J. McCaldin, I allow \$100; to the McCaldin Brothers I allow \$375; and to Capt. Gully I allow \$50.

Now, as to the three boats which had something to do with the matter on both sides of the river, I shall simply divide the allowance, one-half to each, so that, if the question arises between the Maraval and the Ciudad de Reus, you have an assessment as to that. This makes the total award to the America \$200; to the Mutual \$250, \$125 on each side of the harbor; to the William J. McCaldin \$150, \$75 each side of the harbor; to the McCaldin Brothers a total of \$500. I think Capt. Gully is entitled to \$50 extra out of the total of \$500, which would make \$275 for Brooklyn and \$225 for New York.

The question of the division amongst the captain and crew of the tugs I leave to the parties. The question is whether they wish to litigate the Timmins' responsibility. I have heard nothing as to whether there is another libel in some other District Court as to the question of the parting of this hawser. For all I know they may refuse to pay towage to the Timmins. If they leave it to me, I will allow the Timmins towage.

Mr. Forrester: On their own proofs the hawser snapped as the fault of the McCaldin.

The Court: The Timmins was commanded by Capt. Roche, and was fastened to the starboard quarter of the Ciudad de Reus, and all it did was to help tow all the way around. It was the duty of Capt. Roche to capture his tow. I think the Timmins is entitled to receive five hours' towage, which is understood to be at \$10 an hour; and I will so allow it.

UNITED STATES v. WILSON.

(Circuit Court, S. D. Florida. February 28, 1910.)

1. BANKS AND BANKING (§ 257*)—NATIONAL BANKS—OFFENSES—FALSE ENTRIES.

In a prosecution of a national bank officer for making alleged false entries, a plea of not guilty places on the government the burden of proving that defendant, within the district and within three years prior to the finding of the indictment, knowingly and intentionally made one or more false entries in the books of the bank with intent to deceive or defraud any agent of the government charged with the duty of supervising the transactions of the bank, or inspecting its books or accounts.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 257.*]

2. CRIMINAL LAW (§ 308*)—PRESUMPTION OF INNOCENCE.

A presumption of innocence accompanies accused throughout the trial until overcome by evidence satisfying the jury of the charge beyond a reasonable doubt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 731; Dec. Dig. § 308.*]

3. BANKS AND BANKING (§ 257*)—NATIONAL BANKS—OFFENSES—FALSE ENTRIES.

Where entries by accused in the books of a national bank were false and capable of deceiving the comptroller's agents, defendant's intent to deceive and defraud may be inferred from the making of the entries, under the rule that every person is presumed to intend the natural and probable result of his acts knowingly done, and that an unlawful act implies an unlawful intent.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 257.*]

4. BANKS AND BANKING (§ 256*)—NATIONAL BANKS—"FALSE ENTRIES."

A false entry within Rev. St. § 5209 (U. S. Comp. St. 1901, p. 3497), making it an offense for a national bank officer to make false entries in its books with intent to deceive, etc., is an entry made in such book by an officer of the bank, that is intentionally and knowingly false when made, and made with intent to deceive the officers of the bank or defraud the association.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 960-961; Dec. Dig. § 256.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2656-2657; vol. 8, p. 7660.]

5. BANKS AND BANKING (§ 256*)—NATIONAL BANKS—OFFENSES—FALSE ENTRIES.

The offense of making a false entry in the books of a national bank by an officer, in violation of Rev. St. § 5209 (U. S. Comp. St. 1901, p. 3497), may be made personally or by direction to another.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 960, 961; Dec. Dig. § 256.*]

6. BANKS AND BANKING (§ 256*)—NATIONAL BANKS—OFFENSES—FALSE ENTRIES.

A simple mistake by an officer of a national bank in making an entry in one of the company's books, growing out of a clerical error, is not a violation of Rev. St. § 5209 (U. S. Comp. St. 1901, p. 3497), punishing the making of false entries by a bank officer with intent to deceive.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 960-961; Dec. Dig. § 256.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

7. CRIMINAL LAW (§ 561*)—"REASONABLE DOUBT."

A "reasonable doubt" is not every doubt that may flit through the minds of the jury in considering a case, but is a doubt for which the jurors can give a reason if called on to do so.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1267; Dec. Dig. § 561.*]

For other definitions, see Words and Phrases, vol. 7, pp. 5958-5972; vol. 8, p. 7779.]

8. CRIMINAL LAW (§ 561*)—WEIGHT OF EVIDENCE.

A jury in a criminal case is required to decide the questions submitted to them from the strong probabilities of the case, and such probabilities need not be so strong as to exclude all possible doubt, but only sufficiently strong to exclude every reasonable doubt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1267; Dec. Dig. § 561.*]

9. CRIMINAL LAW (§ 559*)—WEIGHT OF EVIDENCE.

A jury in arriving at a verdict in a criminal case is not restricted to the palpable facts, but may consider all the inferences which reasonably may be drawn from the facts proven.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1257-1265; Dec. Dig. § 559.*]

10. CRIMINAL LAW (§§ 377, 561*)—CHARACTER—WEIGHT OF EVIDENCE.

Accused may show if possible his previous good character as to the trait involved in the accusation which strengthens the presumption of innocence, and which may in the absence of other evidence raise a reasonable doubt, and entitle him to an acquittal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 836, 837, 840, 1267; Dec. Dig. §§ 377, 561.*]

11. CRIMINAL LAW (§ 878*)—VERDICT—SEVERAL COUNTS.

Where accused is indicted on several counts, he may be convicted on one or more, and acquitted as to the others.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2098-2101; Dec. Dig. § 878.*]

T. K. Wilson was indicted for violating the national bank act (Rev. St. § 5209 [U. S. Comp. St. 1901, p. 3497]).

John M. Cheney, U. S. Atty., and R. P. Marks, Asst. U. S. Atty.
Peter O. Knight, for defendant.

SHEPPARD, District Judge (charging jury). The defendant Wilson is on trial before you charged in an indictment of six counts with having intentionally made sundry false entries in the books of the National Bank of St. Petersburg. The defendant interposed the plea of "not guilty," which raises the issue of his guilt, that now rests solely upon an honest and impartial discharge of your duty under the guidance of the law which now becomes my duty to explain to you.

By the national bank act, any three or more persons who comply with certain requirements therein set out can obtain a charter to set up a national bank. The primary purpose of the law was to provide a means by which the government might carry on its large fiscal operations so as to invite the public confidence in the banks thus chartered to do business throughout the country, but the law subjects them to certain regulations looking to a wise and safe administration of business, as well as the supervision of the head of the government bureau

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

at Washington, the Comptroller of Currency, whose duty it is to keep a diligent watch over the conduct of the affairs of every national bank in the United States.

It is this recognized responsibility and this known supervision of the conduct of such institutions which invite the public confidence and which the law governing their conduct is made a safeguard. The officers of all national banks are wisely held to a rigid observance of the restrictions of the law, and any wrongdoing of such officers is severely denounced by section 5209, Rev. St. (U. S. Comp. St. 1901, p. 3497). This section provides:

"Every president, cashier, director, teller, clerk, or agent of any association who embezzles, abstracts, or willfully misapplies any of the moneys, funds, or credits of the association, * * * or who makes any false entry in any book, report or statement of the association, with intent, in either case to injure or defraud the association, or any other company, body politic or corporate, or any individual person or to deceive any officer of the association, or any agent appointed to examine the affairs of the association; and every person who with like intent, aids or abets any officer, clerk or agent in violation of this section shall be deemed guilty of a misdemeanor. * * *"

The plea of not guilty puts the burden upon the United States to prove beyond a reasonable doubt to your satisfaction every material allegation of the indictment, viz., that T. K. Wilson, as cashier of the National Bank of St. Petersburg, within the Southern district of Florida, within three years before the finding of this indictment, did knowingly and intentionally make a false or false entries in the books of said bank, with the purpose of deceiving or defrauding any agent of the government of the United States charged with the duty of supervising the transactions of said bank or inspecting its books and accounts.

The presumption of innocence is with the defendant, and that presumption accompanies him throughout the trial and until it is overcome by evidence which satisfies your minds of the truth of the charge beyond a reasonable doubt. But when the government by its evidence has satisfied your minds beyond a reasonable doubt that one or more of the alleged false entries were made in the books of said bank, within three years before the finding of the indictment, and you are further satisfied beyond a reasonable doubt that such false entries were made with intent to deceive the agents of the Treasury Department who are authorized to inspect and supervise said books, you should find the defendant guilty. If the alleged entries in the books of the bank were false entries, and were capable of deceiving any agent of the Comptroller of Currency, charged with the duty of supervising the books of the bank, the intent of the defendant to deceive and defraud may be reasonably inferred from the making of such false entries. Every person is presumed to intend the natural and probable consequences of his acts knowingly done, and that an unlawful act implies an unlawful intent. An entry which is intentionally made to represent what is not true or does not exist is a false entry. A false entry made in the books of a bank, denounced by the statute, is an entry made in such book by the cashier or other officer of the bank that is intentionally and knowingly false when made. It must be in-

tentionally made, of what is not true and does not exist, with intent to deceive the officers or defraud the association.

It is not the purpose of the law to punish any officer of a national bank who through mistake makes an entry in the books of the bank which he believes to be true, although in fact it may be false. To warrant a conviction for a false entry on the books of the bank the jury must find, not only that the entry was false on the books of the bank, but was knowingly false; it is necessary that the defendant knew at the time that they were made that the entries were false.

This offense may be committed personally or by direction; by causing another to do it, therefore, if the fact stated in a slip was known to be untrue, it is a false entry, and copying such false entry in the books with intent to deceive would be a violation of the statute.

The circumstance of its not having been done skillfully or that it could be easily detected by inquiry from the examiner of the books of the bank would not render such entry any the less criminal if made to deceive or defraud any agent of the Comptroller of Currency, appointed to inspect the books and accounts of said bank. A simple mistake in making an entry in a book growing out of a clerical error would not make an officer of a bank guilty under this statute. In order to make the act criminal it must be committed with intent to deceive an agent of the Comptroller of the Currency. It is not incumbent on the government to show on trial that the party accused had malice or ill will toward the bank, or its officers, or that there should be any well-planned scheme or design to effect injury to the bank. But a thing is regarded as intended if willfully done. So while this offense must be committed by the accused with intent to deceive some agent of the Comptroller—that is, a national bank examiner—that intent, however, may be conclusively presumed from the doing of a wrongful and illegal act, which necessarily would result in deceiving the bank examiner. Illegal acts, knowingly and wrongfully done, can neither be justified nor excused on the ground of innocent intent. The character of the act—the circumstances surrounding the doing of the act—determine in a large degree the question of intent. The burden of proof is upon the government to prove every material allegation in the indictment beyond a reasonable doubt.

A reasonable doubt does not mean every doubt that may flit through your minds in the consideration of this case, but a doubt for which you can give a reason if called on to do so. If, after a careful consideration and comparison of all the evidence with the law as given you by the court, you find a doubt which leaves your minds unsatisfied, arising from the testimony in the case, or a lack of evidence, that would be a reasonable doubt, a doubt of which you should give the defendant the benefit, and acquit him. A doubt by any consideration outside the evidence, or insufficiency of evidence, or doubt born of merciful inclinations, or one prompted by sympathy for the accused, is not what is meant by a reasonable doubt. Neither can you create sources of doubt by resorting to matters outside the evidence. You are required to decide the questions submitted to you from the strong probabilities of the case, and the probabilities need not be so strong as

to exclude all possible doubt, but must be so strong as to exclude every reasonable doubt.

You are the sole and exclusive judges of fact. When there is a conflict in the testimony, it is your province to reconcile that conflict if you can; but if you are unable to reconcile it, then you are at liberty to discard such parts or so much of it as you may think unworthy of belief, and credit that which you may believe to comport more with reason and common sense in the common affairs of everyday life.

The jury in arriving at a conclusion of what has been proved in a given case are not restricted to the palpable facts brought out on the trial, but may consider all the inferences which reasonably may be drawn from the proven facts; nor is the jury expected to lay aside their common knowledge of men and human nature, their common sense and experience in the affairs of everyday life. In your consideration of the evidence, these attributes should be brought into use and application in weighing the testimony in the endeavor to reach a just and righteous conclusion on the evidence.

It is your duty to arrive at a conclusion from the facts and circumstances of this case the same as you would come to a conclusion upon any other fact in life. There is no technical rule for applying them; you are only expected to apply the same rule that you would apply to any other subject brought to your consideration for determination, about which an oath had been administered. You have had the opportunity of seeing the witnesses and observing their manner of testifying on the stand, as well as any interest or bias they may have shown in the transactions about which they have testified. These are matters for your consideration in weighing the evidence and which aid you in arriving at a fair and just conclusion from all the testimony. It is your province to look to the interest, if any, which any witness may have in the result of the trial in determining the weight to be attached to his testimony.

There has been evidence adduced of the previous good character of the defendant. It is always the right of the defendant to show, if he can show, a previous good character as to the trait involved in the accusation against him, and for which he is being tried. The good character of the defendant strengthens the presumption of innocence which always accompanies the defendant, and may, in the absence of other evidence, raise in the minds of the jury a reasonable doubt as to the truth of the charge which would entitle him to an acquittal. But in determining the weight to be given testimony as to character, the jury should always consider the nature of the offense of which the defendant is charged, for instance, if he is charged with larceny, or perjury, or other offenses which imply moral turpitude, proof that he has been a man of high standing, of character, and unquestioned integrity would of itself raise a doubt whether a man of that character would be guilty of such a charge, but this is not so if the charge is one like assault and battery, for men of the highest character fall victims to passion and ungovernable tempers. So, too, in considering the weight to be given the testimony you must consider the nature, temperament and disposition of the witness testifying to his character, whether they may not be in sympathy with the defendant or whether

they look with particular disfavor on such offense or think any less of the defendant even if he were guilty.

You may find the defendant guilty of all the counts of the indictment or of one or more of such counts, and not guilty as to others; or you may find him not guilty as to all of the counts.

If you find him guilty, the form of your verdict should be: "We, the jury, find the defendant guilty as charged in the indictment;" or "We, the jury, find the defendant guilty as to counts numbers ———;" or "We, the jury, find the defendant not guilty"—and your verdict should be signed by your foreman.

ÆOLIAN CO. v. STANDARD MUSIC ROLL CO. et al.

(Circuit Court, D. New Jersey. February 18, 1910.)

1. WITNESSES (§ 268*)—CROSS-EXAMINATION—EQUITY SUITS IN FEDERAL COURTS.

The rule laid down in *Blease v. Garlington*, 92 U. S. 1, 23 L. Ed. 521 which interprets equity rule 67, requiring all testimony offered to be taken regardless of objection to its competency, materiality, or relevancy, has no application to the question of the proper scope of cross-examination.

[Ed. Note.—For other cases, see *Witnesses*, Dec. Dig. § 268.*]

2. WITNESSES (§ 269*)—CROSS-EXAMINATION—SCOPE.

Cross-examination must be confined to the subjects of the direct examination, and, if the cross-examiner desires to examine as to other matters, the proper practice is to make the witness his own, at the proper time in presenting his own case.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 949-954; Dec. Dig. § 269.*]

3. WITNESSES (§ 268*)—CROSS-EXAMINATION—SCOPE.

A cross-examiner, by asking of the witness questions not within the proper scope of cross-examination, cannot make the testimony thus elicited the basis for further and still more extended cross-examination.

[Ed. Note.—For other cases, see *Witnesses*, Dec. Dig. § 268.*]

In Equity. Suit by the Æolian Company against the Standard Music Roll Company and G. Howlett Davis. On motion to compel witness to answer certain questions. Denied.

Louis M. Sanders, for the motion.

Gifford & Bull, opposed.

RELLSTAB, District Judge. The unanswered questions, 50 in number, were asked of the complainant's witness Joseph Francis Meade, on cross-examination. This witness was called for the purpose of proving the record of sales made by the complainant of an instrument called the "metrostyle" and a statement of the aggregate of sales tabulated therefrom.

The examination in chief of this witness covers less than 4 typewritten pages, embracing but 18 questions, and relates entirely to his identity, business relationship to the complainant, his knowledge and custody of such sales record, the making of such tabulated statement, the method of such tabulation, and the territory covered by such sales.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

His testimony, other than that which directly relates to such record, was but introductory and to lay a foundation for the offering of such record. At the time the cross-examination was interrupted for the purpose of pressing this motion, the cross-examiner had asked 390 questions; covering 84 typewritten pages. The unanswered questions, which form the basis of this motion, are as follows:

"XQ. 61. Are you able to state what the relations of the Æolian Company are with a certain other corporation, known as the Æolian, Weber Piano & Pianola Company?"

"XQ. 65. Are you willing to state whether or not you know of any relations existing between the Æolian Company, on the one hand, and the Æolian, Weber Piano & Pianola Company, on the other?"

"XQ. 66. As assistant treasurer of the Æolian Company, do your duties require you to record any transactions between the Æolian Company, on the one hand, and the Æolian, Weber Piano & Pianola Company on the other?"

"XQ. 77. What is the name of the other company that owns the Universal Music Company?"

"XQ. 79. Is not the Æolian Company also a subsidiary company owned by the same company, which owns the Universal Music Company?"

"XQ. 93. Are the accounts of any other firm or corporation, either kept or supervised by you?"

"XQ. 96. Are you chief clerk in the accounting department of any other firm or corporation than the Æolian Company?"

"XQ. 113. Do the accounts of the Weber Piano Company come in your department?"

"XQ. 118. Is your only reason for declining to answer because complainant's counsel has instructed you not to?"

"XQ. 127. What is the business of the Weber Piano Company, and where is the plant of that company located?"

"XQ. 187. In your answers to Q. 1, XQ. 125, XQ. 130, you have stated that you are assistant secretary of several different companies, secretary of others, and assistant treasurer of still others. Please state whether or not these companies are in any way connected together, either by business relations or as subsidiary companies to a single holding company."

"XQ. 191. And is that other company the Æolian, Weber Piano & Pianola Company?"

"XQ. 197. Who is the owner in fact of the stock of the Universal Music Company?"

"XQ. 200. There was introduced in evidence in connection with the deposition of one of complainant's witnesses an exhibit which comprised the Piano and Organ Purchasers' Guide for 1908. On page 121 of said exhibit, I find a paragraph under the heading 'The Æolian Company.' I ask you to read said paragraph, and then state whether or not the statements set up in said paragraph are true in fact."

"XQ. 204. According to your books of account, as chief accountant for the Æolian Company, is there a surplus in the treasury of the Æolian Company or represented by assets, over \$2,000,000?"

"XQ. 207. You have stated that the Universal Music Company was entirely independent of the Æolian Company, but that the stock of the Universal Music Company is all owned by another company, to which said Universal Music Company is subsidiary. Is any of the stock of the Æolian Company owned or controlled by that other company, and is the Æolian Company also subsidiary to that other company to which the Universal Music Company is subsidiary?"

"XQ. 210. What is the name of that other company to which the Universal Music Company is subsidiary?"

"XQ. 211. Is it not a fact that the Æolian Company is controlled by the Æolian, Weber Piano & Pianola Company, which has a capital of \$10,000,000?"

"XQ. 223. What is the Æolian, Weber Piano & Pianola Company?"

"XQ. 227. Was not the Æolian, Weber Piano & Pianola Company formed to own and control the companies named in your answers to Q. 1, XQ. 125, XQ. 130, and XQ. 215?"

"XQ. 231. I call your attention to a statement occurring on page 121 of defendant's Exhibit No. 10, Piano & Organ Purchasers' Guide for 1908, said statement occurring in the article entitled 'Æolian Company,' and reading in part as follows: 'This concern is controlled by the Æolian, Weber Piano & Pianola Company'— and ask you to state whether or not that is true."

"XQ. 234. I find in defendant's Exhibit No. 10, Piano & Organ Purchasers' Guide for 1908, a statement to the effect that in 1903 the Wheelock Piano Company was absorbed by the Æolian, Weber Piano & Pianola Company, of which company you have stated you are the chief accountant. Is that correct?"

"XQ. 236. What is the nature of the entries which you so supervised."

"XQ. 237. Do you also supervise the reports or the entry of reports made by other companies to the Æolian, Weber Piano & Pianola Company?"

"XQ. 238. Please state whether or not you are in possession of knowledge or information that would enable you to make correct answer to such of the questions put to you on cross-examination as you have been instructed by counsel for complainant not to answer?"

"XQ. 243. When it was organized to become a subsidiary company to the Æolian, Weber Piano & Pianola Company, were you immediately appointed as its chief accountant?"

"XQ. 272. What portion of the business of each of these companies is transacted at their several offices at 362 Fifth avenue, New York?"

"XQ. 302. Then if you had no knowledge of the factory operations of these two companies and should see a label bearing the inscription 'Manufactured by the Universal Music Company,' you would be deceived, would you not, into the belief that such music roll was manufactured by the Universal Music Company?"

"XQ. 306. And if such roll were not in fact manufactured by the Universal Music Company, although it bore the label of that company, you would be deceived, would you not?"

"XQ. 311. If in fact it should prove that such roll was not manufactured by that particular manufacturer, would you not be deceived into purchasing that which you did not desire to purchase?"

"XQ. 329. Did any of these persons—that is, H. B. Tremaine, C. M. Tremaine, E. R. Perkins, and E. S. Votey—own in their right any stock in the Universal Music Company on the 7th day of June, 1909?"

"XQ. 330. You have stated that the Universal Music Company is owned by another company. Do you mean by that that that other company is the owner of all of the stock of the Universal Music Company?"

"XQ. 335. Have you ever voted in opposition to the policies dictated by the four persons whom you have mentioned?"

"XQ. 336. Do the three persons you have mentioned as dictating the policies of the Æolian Company and with C. M. Tremaine dictate the policy of the Universal Music Company ever dictate a policy for either of these companies which is not in perfect harmony with the policy of the other company?"

"XQ. 337. Is it not a fact that the business policy of one of these companies is always in perfect harmony with the business policy of the other company?"

"XQ. 338. Do you deny that there is any inharmony between the business policy of the Æolian Company and the Universal Music Company?"

"XQ. 342. So that the policies of these several companies are made to harmonize with each other by being formulated by these four persons, are they?"

"XQ. 343. As chief accountant of the Æolian, Weber Piano & Pianola Company, do you have any accounts to enter other than the account of that company, with the companies mentioned in your answers to Q. 1, XQ. 125, XQ. 130, XQ. 215?"

"XQ. 354. Are they all independent of the Æolian, Weber Piano & Pianola Company?"

"XQ. 357. Have you knowledge of the facts which would enable you to make correct answers to each of the questions which have been put to you and which you have refused to answer under instructions of counsel for complainant?"

"XQ. 389. And these relations are all governed by the Æolian, Weber Piano & Pianola Company, are they not?"

"XQ. 393. Defendant's Exhibit No. 10, Piano & Organ Purchasers' Guide for 1908, contains a description of the Æolian Company. Please read that descrip-

tion as found on page 121, and state whether or not that description is correct in all respects."

"XQ. 395. Do you deny that the statements contained in the article found on page 121, under the title 'Æolian Company,' were true at the date of the publication of this exhibit, namely, in 1908?"

"XQ. 398. In 1908 did it have a surplus of \$2,000,000?"

"XQ. 402. I again show you defendant's Exhibit No. 10, and call your attention to an article at the top of page 237 of the exhibit, and ask you if the Æolian Company referred to in said article is the same Æolian Company which is the complainant in this suit.

"XQ. 403. Do you deny that the Æolian Company referred to in this article last referred to is the same Æolian Company which is the complainant in this suit?"

"XQ. 407. So that there is a relation existing between the Æolian, Weber Piano & Pianola Company and the Æolian Company, complainant herein, which relation you could fully describe but for the instructions which have been given you by counsel for complainant; is that correct?"

"XQ. 409. In the answer of complainant's witness Davis to Q. 273, the witness makes the statement that the Æolian, Weber Piano & Pianola Company was formed to own and control the following manufacturing and operating companies: Æolian Company, the Weber Piano Company, George Steck & Co., the Wheelock Piano Company, the Stuyvesant Piano Company, the Vocallon Organ Company, the Votey Organ Company, the Orchestrelle Company of Great Britain, the Choralion Company of New Jersey, and the Orchard Land Company. Is this statement of complainant's witness Davis correct?

"XQ. 410. Are you in possession of information that would enable you to corroborate the statement of the witness Davis as found in his answer to Q. 273?

"XQ. 411. XQ. 632 in the deposition of complainant's witness Davis and the answer thereto reads as follows: 'In the second paragraph of the quotation from your speech as made in answer to XQ. 627, occurs the following: "The Æolian Company is a \$10,000,000 concern." Is the "Æolian Company" here quoted in this extract the complainant company herein? A. It is, or rather the complainant company is one of the ten companies forming the "\$10,000,000 concern." I have named the other nine companies in my previous answers.' Please state whether or not the statements of the witness Davis as contained in his answer to XQ. 632, and particularly that portion of his answer as included after the fourth word ('rather'), is true?"

The principle that controls this motion relates to the right of cross-examination, and not to whether the testimony sought to be elicited is material to the issue. *Blease v. Garlington*, 92 U. S. 1, 23 L. Ed. 521, relied upon by the defendants, therefore, is not applicable. In that case a judicial interpretation was given of that part of the sixty-seventh equity rule which directs the taking of testimony regardless of objection being interposed as to its competency, materiality, or relevancy.

As was said by Judge Ward in *Æolian Co. v. Simpson-Crawford Co.* (C. C.) 157 Fed. 320:

"The purpose of the rule laid down in *Blease v. Garlington* was to bring before the court on appeal all the testimony offered, so that the case might be finally disposed of there without the necessity of sending it back for testimony improperly excluded below. When the objection is to the relevancy and materiality, the testimony excluded will never get into the record if the ruling is adhered to; but in this case the objection is that the defendant is injecting his defense into plaintiff's prima facie case. At the proper stage in the action all testimony in support of the defenses will be admitted."

In *Blease v. Garlington*, no judicial consideration was given as to the proper scope of cross-examination. That question was not involved. Equity rule 67 does not attempt to change the practice in

that respect. On the contrary, it expressly provides that the examination, cross-examination, and re-examination shall be conducted as near as may be in the mode now used in common-law courts.

On the argument, in response to the court's question, counsel for the defendants referred to the first answer of the witness as authorizing such a line of cross-examination. The question to which this answer was given is as follows: "Q. 1. Please state your name, age, residence, and occupation?" And the answer, after giving the name and residence, is as follows: "Assistant treasurer of the Æolian Company."

Such questions and answers mark the beginning of all properly conducted examinations, and, if they can be made the basis for cross-examinations such as is here sought to be enforced, then, even the primary rules for the taking of testimony, founded in reason, and justified by centuries of experience, are of no avail. In his brief, counsel for the defendants seeks to justify this line of cross-examination in the following language:

"Complainant, having made certain charges in its bill of complaint, and having endeavored to support those charges by the testimony of three witnesses, has disclosed certain irregular practices which has led the defendant company into the belief that the complainant company has been guilty of unfair and deceptive practices in its own trade. In order to lay before the court for its consideration what those practices have been and are, defendant has put certain questions to the witness, and it is believed that complainant should not be permitted by its counsel to close the mouth of that witness against the disclosure of such facts when the witness is in a position to have and has knowledge of all the facts."

This but begs the question raised on this motion. With defendants' right to show that the complainant has been guilty of deceptive practices in the trade, the court is not now concerned. This they may do under equity rule 67, whether the Circuit Court deems it competent or not; but they must do it in accordance with the established rules regulating the introduction of evidence. A party offering a witness stands sponsor for his credibility, and, stated generally, is bound by what he may say both on direct and cross examination. Being so bound, he has the right to call him for a particular purpose, and his adversary has no right to examine him generally, but is confined to the subjects testified to by him in chief. The cross-examiner will not be unduly restricted in the examination. Full scope and opportunity will be afforded, for cross-examination is the best-known method for the ascertainment of truth; but it must be confined to the subjects of the direct examination. If it is desired to examine the witness as to other matters, the proper practice is to make him his own witness. The only exception to this rule is to show bias or prejudice and to lay the foundation to admit evidence of prior contradictory statements. *Wills v. Russell*, 100 U. S. 621, 25 L. Ed. 607; *Montgomery v. Ætna Life Ins. Co.*, 97 Fed. 913, 38 C. C. A. 553; *Thomson-Houston Elect. Co. v. H. W. Johns Mfg. Co.* (C. C.) 105 Fed. 249; *Resurrection Gold Min. Co. v. Fortune Gold Min. Co.*, 129 Fed. 668, 64 C. C. A. 180; *Æolian Co. v. Simpson-Crawford Co.*, supra.

In his supplemental brief defendants' counsel contends that inasmuch as the witness in answering XQ. 125, 130, and 215, has shown that he is an officer of other companies, he may be cross-examined by

him to show a hidden connection and illegal alliance between them for the purpose of deceiving the trade; but the cross-examiner, by leading the witness into fields not touched upon in his examination in chief, cannot make the testimony thus elicited the basis for other and more extended cross-examination. The test of a proper cross-examination is always: Was the subject dealt with on the direct? and not whether the witness referred to it in the cross. Otherwise the party who called him might be bound by the testimony given during a cross-examination upon subjects concerning which he had not testified on his examination in chief. *Resurrection Gold Min. Co. v. Fortune Gold Min. Co.*, supra.

In furtherance of this contention, defendants' counsel insists that this witness' answers to XQ. 125, 130, and 215, are to be considered as a part of his answer to Q. 1; but this is manifestly an error. This is not the case of cross-examination revealing that part of a conversation or transaction to which the witness testified on his direct examination, but which he then failed to disclose. The answer of this witness to question 1 regarding his occupation was complete as far as it related to the subject-matter for the introduction of which the foundation was then being laid.

On cross-examination the showing that the witness held other positions could not be said to be improper; but the fact that he held other positions in no way lessens the completeness of his former answer, so far as the introduction of the record of sales was concerned. Such record was not in the custody of such witness as the holder of any of such other positions, and the tabulated statement derived therefrom was made by him or under his direction as the officer of the complainant. His answer to that question, if it should be considered as anything more than introductory, was complete on direct examination.

The defendants may not introduce the character of testimony which is sought by such unanswered questions on the cross-examination of this witness. If they desire such testimony from him, they must call him when their turn for taking testimony arrives.

In my judgment, this attempt to force such testimony into the record as a part of the complainant's case is a flagrant abuse of the right of cross-examination, and is not to receive judicial sanction.

The motion is denied.

AMERICAN CAN CO. v. WILLIAMS.

(Circuit Court, W. D. New York. November 12, 1908.)

No. 120.

1. TRUSTS (§ 353*)—RIGHT TO FOLLOW TRUST PROPERTY—EFFECT OF INSOLVENCY OF TRUSTEE.

The general rule is that trust funds in the hands of an insolvent that have been fraudulently diverted or appropriated can be recovered of the receiver when they are susceptible of identification, and if they have been intermingled with other property rendering them undistinguishable without fault of the trustee a court of equity is powerless to grant relief.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 526; Dec. Dig. § 353.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. TRUSTS (§ 353*)—FOLLOWING TRUST PROPERTY—EFFECT OF INSOLVENCY OF TRUSTEE.

Where an unlawful appropriation of trust funds by an insolvent results in increasing his general assets, though the trust funds are intermingled with the general funds so as to render their identification impossible, a court of equity will decree priority of payment to the cestui que trust over the common creditors.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 526; Dec. Dig. § 353.*]

3. BANKS AND BANKING (§ 268*)—NATIONAL BANK—INSOLVENCY AND RECEIVERS—RECOVERY OF TRUST FUNDS.

Where the proceeds of a draft sent to a national bank for collection and remittance were paid to the receiver of the bank on its insolvency, the owner of the draft is entitled to recover the amount thereof.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 268.*]

4. BANKS AND BANKING (§ 268*)—NATIONAL BANK—INSOLVENCY AND RECEIVERS—TRUST FUNDS.

Where a draft sent to a national bank for collection and remittance was paid by check on another bank, where the check was deposited and the proceeds credited to the collecting bank, the owner of the draft on insolvency of the collecting bank and appointment of a receiver is entitled to recover only the lowest balance to the credit of the collecting bank in the bank on which the check was drawn between the date of the deposit in the latter bank and the appointment of the receiver.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 268.*]

5. BANKS AND BANKING (§ 287*)—NATIONAL BANK—INSOLVENCY AND RECEIVERS—TRUST FUNDS—BURDEN OF PROOF.

In an action against a receiver of a national bank to recover as a trust fund the amount of a draft collected by the bank, the burden of proof is on the owners of the draft to trace its proceeds into the common assets.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 287.*]

6. BANKS AND BANKING (§ 268*)—NATIONAL BANK—INSOLVENCY AND RECEIVERS—TRUST FUNDS.

Where a draft was sent to a national bank for collection and remittance, and was paid by check, which was deposited in the bank on which the check was drawn and the proceeds credited to the collecting bank, and there was then a sufficient balance in favor of the collecting bank to pay the check, but before the appointment of a receiver of the collecting bank on its insolvency there was a cash withdrawal of an amount, exceeding the amount of the check, though leaving a balance greater than the amount of the check, which balance, however, was extinguished before the appointment of the receiver, the owner of the draft is not entitled to recover its amount out of the general assets.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 268.*]

7. BANKS AND BANKING (§ 268*)—NATIONAL BANK—INSOLVENCY AND RECEIVERS—TRUST FUNDS.

Where drafts sent to a national bank were upon depositors in the bank, and the amount thereof was debited to their accounts, no money coming into the possession of the bank by reason thereof, the owner of the draft cannot recover the amount thereof out of the general assets from the receiver of the bank on its insolvency.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 268.*]

8. BANKS AND BANKING (§ 268*)—NATIONAL BANK—INSOLVENCY AND RECEIVERS—TRUST FUNDS.

Where a draft sent to a national bank for collection and remittance was paid by a check in favor of the bank, and was indorsed and transmitted to another bank, which credited the amount to the collecting bank, and the check was collected through the clearing house after the appointment of a receiver of the collecting bank on its insolvency, the draft not having

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes 176 F.—52

been credited to the collecting bank to make good its overdraft until after the appointment of the receiver, though the receiver may institute proceedings to recover such amount, the owner of the draft is not entitled to recover it out of the general assets of the collecting bank where it has not actually been collected.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 268.*]

9. BANKS AND BANKING (§ 268*)—NATIONAL BANK—INSOLVENCY AND RECEIVERS—TRUST FUNDS.

Where drafts were sent to a national bank for collection and remittance and were paid in checks which were indorsed to another bank and credited to the account of the collecting bank to cover overdrafts, the owner of the drafts is not entitled to recover their amount of the receiver of the collecting bank on its insolvency out of the bank's general assets, though the proceeds diminished the indebtedness of the insolvent bank.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 268.*]

Action by the American Can Company against Christopher L. Williams, as Receiver of the Fredonia National Bank. Decree for plaintiff for part of amount claimed.

See, also, 153 Fed. 882, 82 C. C. A. 628.

Kenefick, Cooke & Mitchell (James McCormick Mitchell, of counsel), for plaintiff.

Frank W. Stevens, for defendant.

HAZEL, District Judge. This action was brought to recover the sum of \$28,933.32, from the defendant as receiver of the Fredonia National Bank, a banking corporation organized and existing under the laws of the United States. On June 19, 1905, said bank on account of its insolvency suspended payment, the Comptroller of the Currency took possession of its assets under the provisions of the act of Congress, and a receiver was duly appointed by him. The facts are not in controversy and have been submitted by agreement of the parties. It appears that the Fredonia National Bank, while insolvent, diverted and misapplied the proceeds of certain sight drafts drawn by the plaintiff between May 17, 1905, and June 14, 1905, upon the United States Canning Company and the Fredonia Preserving Company which had been sent to the bank for collection and remittance. The plaintiff bases its right to recover the amount of the drafts on the claim that the bank mixed or blended the proceeds thereof with its own funds, and that therefore a trust was impressed upon the assets which came into the possession of the receiver. Such assets are insufficient to pay the creditors in full, though they were larger than the aggregate amount appropriated by the bank. Debtor and creditor relations between plaintiff and the insolvent bank did not exist and admittedly their relations were distinctly of a fiduciary character, that of a cestui que trust and trustee. There is no dispute over the proposition that the assets of the bank in the possession of the receiver are subject to an equitable lien in plaintiff's favor to the extent that such assets have been augmented by the wrongful act of the bank. But the defendant contends that there can be no preferential payment unless the receiver has in his possession property or funds into which the amount of the drafts can with reasonable certainty be traced or which

*For other cases see same topic & § NUMBERS in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

in their entirety or in part constitute the proceeds thereof. Before discussing the stipulated facts it probably would not be inappropriate to first state the general rule applicable to fastening special trusts upon receivers of insolvent banking institutions. The great weight of authorities as shown by the decisions of the federal courts which, if there is any conflict of decision, this court is obliged to follow is that trust funds that have been fraudulently diverted or appropriated can be recovered of a receiver whenever such funds are susceptible of identification in the hands of the possessor, and if the trust funds have been intermingled with other property or money rendering it undistinguishable without fault of the trustee a court of equity is powerless to grant relief. But to this rule there are well-recognized exceptions and modifications, and hence, where it is shown that the unlawful appropriation of trust funds resulted in swelling or increasing the general assets of the insolvent then, even though there was such intermingling of the trust funds with the general funds as to render their identity impossible, a court of equity will decree priority of payment to the cestui que trust over the common creditors. That a trust is impressed upon the general mass by reason of the confusion resulting from mingling therewith the converted fund was first authoritatively decided in *Frelinghuysen v. Nugent* (C. C.) 36 Fed. 239, where the rule is stated as follows:

"Formerly the equitable right of following misapplied money or other property into the hands of the parties receiving it, depended upon the ability of identifying it; the equity attaching only to the property misapplied. This right was first extended to the proceeds of the property, namely, to that which was procured in place of it by exchange, purchase, or sale. But if it became confused with other property of the same kind, so as not to be distinguishable, without any fault on the part of the possessor, the equity was lost. Finally, however, it has been held as the better doctrine that confusion does not destroy the equity entirely, but converts it into a charge upon the entire mass, giving to the party injured by the unlawful diversion a priority of right over the other creditors of the possessor. This is as far as the rule has been carried."

This doctrine was expressly approved by the Supreme Court in *Peters v. Bain*, 133 U. S. 670, 10 Sup. Ct. 354, 33 L. Ed. 696, and the same equitable principle was applied in *National Bank v. Insurance Company*, 104 U. S. 54, 26 L. Ed. 693. And such important extension from the former English rule was logically and comprehensively stated by the Circuit Court of Appeals for the Ninth Circuit in *Spokane County v. First National Bank of Spokane*, 68 Fed. 979, 16 C. C. A. 81. The rule is briefly stated in *Multnomah v. Oregon National Bank* (C. C.) 61 Fed. 912, as follows:

"It is settled that a person may follow and reclaim his property wrongfully appropriated by another so long as he can find it. If its form has been changed, he may follow the substantial equivalent of his property, in whatever form. The property into which his own has been changed is impressed with a trust in his favor. But the great weight of authority is against any extension of the rule beyond this."

See, also, *Insurance Company v. Caldwell*, 59 Kan. 156, 52 Pac. 440.

In *Beard v. Independent Dist. of Pella City*, 88 Fed. 375, 31 C. C. A. 562, the extension of the rule was tersely stated in this language:

"Unless it appears that the fund or estate coming into the possession of the receiver has been augmented or benefited by the wrongful use of the trust fund, no reason exists for giving the owner of the trust fund a preference over the general creditors."

An examination of the cases hereinabove cited and other cases to which attention has been directed in the briefs warrants the deduction that to impress a lien upon the general assets of the Fredonia National Bank it must affirmatively appear that the proceeds of the drafts delivered to the bank for collection can be traced into the assets of the bank in the hands of the receiver, or, in the alternative, that the fraudulently diverted proceeds have cumulated on the general assets or added a gain thereto. This brings me to the principal question herein involved—whether the stipulated facts reasonably indicate that the assets in the defendant's possession have been augmented by the appropriated proceeds of the drafts.

1. The defendant admits that the proceeds of the draft of June 14, 1905, amounting to \$1,016.72, was paid to him as receiver by the Lake Shore National Bank, and therefore without further controversy the plaintiff is entitled to recover the amount of the check received, to wit, \$1,017.73.

2. Draft dated May 25, 1905, for \$1,544.48 was paid to the Fredonia National Bank by the drawee by check on the Columbia National Bank. At such time there existed banking relations between said banks, and when the check was presented credit was given on the books of the Columbia National Bank to the Fredonia National Bank. Subsequently the balance of the account amounting to \$750.11 was paid by the Columbia National Bank to the defendant receiver and the question now arises whether the plaintiff is entitled to impress a trust upon the entire balance. The check in payment of the draft in question was received by the Columbia National Bank on June 1, 1905, and the credit to the Fredonia National Bank at the close of said day was \$1,545.03. On June 3d, the credit balance of the Fredonia National Bank had been reduced to \$77.23, and on June 20th, on closing its doors, the credit balance amounted to \$750.11, which amount included the first-mentioned balance of \$77.23. The defendant is entitled to have a lien upon the lowest balance, as presumptively such balance included the remaining portion of the check received in payment of the draft. It makes no difference that between the two banks there was an open and running account. The general assets passing to the receiver manifestly were augmented by a portion only of the diverted proceeds of the draft under consideration, and to that extent only is the plaintiff entitled to enforce his lien. The authorities hold that where the trust fund is commingled with general funds which are afterwards diminished in amount, the plaintiff's recovery cannot exceed the lowest balance between the period of commingling such funds and the date of the receivership. *Boone Co. National Bank v. Latimer* (C. C.) 67 Fed. 27; *Spokane County v. Bank*, *supra*; *Beard v. Independent Dist. of Pella City*, *supra*. In *Board of Commissioners v. Strawn*, 157 Fed. 49, 84 C. C. A. 553, 15 L. R. A. (N. S.) 1100, the Circuit Court of Appeals for the Sixth circuit, in speaking of tracing funds into the general fund, said:

"It is, therefore, a part of the rule applicable to following misappropriated funds into a bank account that, if at any time during the currency of the mingled account the drawings out had left a balance less than the trust money, the trust money must be regarded as dissipated except as to this balance, the sum subsequently added to the account from other sources not being contributed to the trust fund."

3. The draft of May 17, 1905, for \$1,266.86, drawn on the United States Canning Company was paid by check upon the Manufacturers' & Traders' National Bank of Buffalo, which check was transmitted by the Fredonia National Bank to the Columbia National Bank and by the latter duly credited to the account of the former. The credit balance of the Fredonia National Bank at the time was \$1,374.43. On the same day said balance was increased to \$6,048.55, but there was a debit of \$3,876.09, consisting of a check for \$876.09 and a cash withdrawal of \$3,000, leaving a credit balance of \$2,172.46, which balance, however, was extinguished prior to the closing of the bank and the appointment of the receiver. It is well settled that the burden of proof is upon the plaintiff to trace the amount of the draft into the common assets. *Goodell v. Buck*, 67 Me. 514; *Smith v. Mottley*, 150 Fed. 266, 80 C. C. A. 154. I incline to the belief that, as the credit balance of the insolvent bank on the day of the withdrawal of the sum of \$3,000 in currency was more than sufficient to pay the draft, it may be fairly presumed that such withdrawal was from its own funds and not from those which were subject to an equitable lien. *Board of Com'rs v. Strawn*, *supra*; *In re Berry*, 147 Fed. 208, 77 C. C. A. 434. The proceeds of the draft were not traced to the common fund, and in my estimation there was no augmentation of the same by reason of their diversion.

4. Six drafts on the United States Canning Company and three drafts on the Fredonia Preserving Company with the consent of the drawees, who were depositors in the insolvent bank, were debited to their separate accounts, the bank surrendering to them the drafts and bills of lading. The question is whether the proceeds of such drafts, which concededly were not transmitted to the drawer, augmented the common assets of the bank or whether they were used simply to pay its indebtedness to the drawees. No money actually came into the bank's possession as a result of the payments of the drafts and in each instance they were accepted by the drawees whose deposits were correspondingly reduced. In *Multnomah v. Oregon National Bank*, *supra*, the court, in speaking of tracing the fund of a cestui que trust to the general fund, says:

"If his money has been paid out, or has otherwise disappeared, it would not be just that he should take, to the exclusion of the general creditors of the bank, who are in no way responsible for the bank's delinquency, and whose deposits may comprise the entire fund which such creditor seeks to appropriate to his exclusive use."

In *Insurance Company v. Caldwell*, *supra*, it is said:

"The mere saving of the estate by the discharge of general indebtedness otherwise payable out of it or by the payment of the current expenses of the business is not any augmentation or betterment of the estate within the meaning of the rule. If the estate has not been increased by specific additions to it or if what previously existed has not been improved or rendered more valuable, it has not been impressed with the trust claimed."

Such I think is the equitable rule applicable to the particular subject under consideration. The general assets of the bank by the stated method of paying the drafts were not augmented or increased, and there was no addition thereto by debiting the drawees between whom and the insolvent bank there existed debtor and creditor relations. Although the insolvent bank may have discharged its liabilities to said depositors yet nothing tangible came to the receiver. His resources were not increased, and by such bookkeeping transferences nothing passed to him which was capable of being set apart or which could be identified. *Beard v. Independent Dist. of Pella City*, supra; *Sunderlin v. Mecosta Savings Bank*, 116 Mich. 281, 74 N. W. 478.

5. The draft of June 13, 1905, which was paid by drawee's check payable to the order of the insolvent bank, was indorsed by it and transmitted to the Merchants' Exchange National Bank of New York. On receiving the check the latter credited the account of the Fredonia National Bank, and the check was collected through the clearing house after plaintiff's appointment as receiver. As said draft was not credited to the Fredonia National Bank to make good its overdraft until after the appointment of the receiver and was not collected until two days thereafter, the receiver, if it is necessary, will probably institute proceedings to recover such amount. It is not shown, however, that such proceeds either actually or constructively came into the possession of the receiver, hence it is not thought possible at this time to impress a lien upon the general assets. The principle of *Standard Oil Company v. Hawkins*, 74 Fed. 395, 20 C. C. A. 468, 33 L. R. A. 739, and *In re Berry*, supra, is not thought squarely applicable to the stipulated facts, for in those cases the funds to which the plaintiffs in those suits claimed a lien passed into the hands of the receiver or trustee in bankruptcy.

6. With reference to the payment of certain drafts drawn on the United States Canning Company which were paid in checks and indorsed over to the Merchants' Exchange National Bank of New York, which bank credited the account of the Fredonia National Bank, the plaintiff earnestly contends that such checks when treated as cash augmented the general assets of the bank. The argument is, first, that the checks given in payment of the drafts were accepted by the bank as cash and then mingled with its general assets, and this in and of itself was sufficient to impress a trust on the general mass to the amount of the checks received; and, second, that the proceeds of the drafts were in fact used by the bank to reduce its liabilities, thereby increasing its assets and entitling plaintiff to restitution. It is quite true that, customarily, checks received for deposit are regarded as the equivalent of cash, but in this instance neither the checks nor the cash added anything to the assets of the bank. The case of *First National Bank of Montgomery v. Armstrong* (C. C.) 36 Fed. 59, cited by plaintiff, is clearly distinguishable. There, a memorandum indicating the nature of the deposit as cash and the name of the owner was placed with the bank's cash, and the court properly held that there was no such mingling as to render identification impossible. In the present case the Fredonia National Bank fraudulently used the checks for the purpose of paying its overdrafts to the Merchants' Exchange Nation-

al Bank, but as the proceeds were not mingled with its general assets, and cannot be traced to the possessor thereof, no equitable lien has been established. Nor has the contention persuasive merit that in reducing its liabilities by paying its debts the general fund was substantially augmented. To diminish the indebtedness by appropriating the plaintiff's money unfortunately did not benefit the insolvent estate or directly increase the assets. If an equitable lien were to attach upon the general assets of the insolvent bank under such circumstances, it is quite conceivable that the bank or its officers, knowing of its insolvent condition, might give a preference to favored debtors (such as banks with which it has established banking relations), and at the same time protect the customer or drawer whose checks or drafts may have been wrongfully diverted. Obviously such a situation would operate to unjustly discriminate against the general creditors who were in no way at fault for the bank's failure to meet its obligations in full. A reduction in liabilities undoubtedly may inure to the benefit of the general creditors, and probably is an indirect augmentation of the fund, but, as already observed, we must not overlook the patent fact that the essentials of the right to impress funds in the hands of the receiver with a lien in favor of the injured party must rest upon the requirement that the diverted proceeds are traceable to the receiver in their original or substituted form, or at least that the common fund coming into his possession has cumulated by some addition thereto.

For the reasons stated, the plaintiff is not entitled to occupy a position in relation to the assets of the bank different than that of the ordinary creditor save as hereinbefore indicated. A decree may be entered for the plaintiff in accordance with this opinion for the sum of \$1,094.96, without interest, and without costs to either party.

UNITED STATES v. DUPONT.

(District Court, D. Oregon. February 21, 1910.)

No. 5,206.

1. PERJURY (§ 5*)—NATURE OF OATH.

Perjury cannot be assigned of an oath not required by law.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. § 4; Dec. Dig. § 5.*]

2. PERJURY (§ 11*)—NATURALIZATION PETITION—CONTENTS—ONE YEAR'S RESIDENCE WITHIN STATE.

Under Naturalization Act June 29, 1906, c. 3592, § 4, subd. 2, 34 Stat. 597 (U. S. Comp. St. Supp. 1909, p. 478), providing that a naturalization petition shall contain every fact material to the petitioner's naturalization required to be proved on the final hearing, and subdivision 4, declaring that petitioner shall prove, among other things, that he has resided immediately preceding his application continuously within the state or territory where the court is at the time held, for one year at least, petitioner's prior residence within the state or territory for a year is a necessary allegation of a petition for naturalization, and hence perjury may be assigned on a false allegation thereof.

[Ed. Note.—For other cases, see Perjury, Dec. Dig. § 11.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. PERJURY (§ 2*)—NATURALIZATION PETITION.

Perjury committed by a false allegation of fact in a naturalization petition is punishable under Rev. St. § 5392 (U. S. Comp. St. 1901, p. 3652), punishing perjury generally, and applicable to all cases in which a false oath or false testimony is given in a matter required by law before any competent tribunal, officer, or person, regardless of whether such evidence is punishable under Naturalization Act June 29, 1906, c 3592, § 23, 34 Stat. 603 (U. S. Comp. St. Supp. 1909, p. 487), or not.

[Ed. Note.—For other cases, see Perjury, Dec. Dig. § 2.*]

4. ALIENS (§ 72*)—NATURALIZATION PROCEEDING.

Naturalization Act June 29, 1906, c. 3592, § 23, 34 Stat. 603 (U. S. Comp. St. Supp. 1909, p. 487), providing a punishment for knowingly making a false affidavit as to any material fact required to be proved in a naturalization proceeding, is to be regarded as an amendment of Rev. St. § 5395 (U. S. Comp. St. 1901, p. 3654), providing that in all cases where any oath or affidavit is made or taken, under or by virtue of any law relating to the naturalization of aliens, any person who knowingly swears falsely shall be punished by imprisonment, etc.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 72.*]

Jeanne Rose Dupont was indicted for perjury. On demurrer to indictment. Overruled.

Walter H. Evans, Asst. U. S. Atty.
J. E. Fenton, for defendant.

BEAN, District Judge. The defendant was indicted for perjury in falsely stating in a petition for naturalization filed by her in the circuit court of Clatsop county that she had resided in the state of Oregon for one year at least prior to the date of such petition.

The defendant demurred to the indictment on the ground that the facts therein stated do not constitute a crime, for the reason that the declaration in her petition for naturalization touching her residence in Oregon was extrajudicial and immaterial. It is elementary that perjury cannot be assigned of an oath not required by law. Unless, therefore, the law requires an applicant for naturalization to state in his petition that he has resided in the state one year at least, the indictment does not state a crime.

Subdivision 2 of section 4 of the naturalization act of June 29, 1906 (Chapter 3592, 34 Stat. 597 [U. S. Comp. St. Supp. 1909, p. 478]), defining what a petition for naturalization shall contain, provides that not less than two nor more than seven years after an alien has made his declaration of intent to become a citizen he shall make and file in duplicate a petition in writing duly verified, in which he shall state his full name, his place of residence, his occupation, and if possible the date and place of his birth; the place from which he emigrated, the date and place of his arrival in the United States, and, if he entered through a port, the name of the vessel on which he arrived; the time when and the place and name of the court where he declared his intention to become a citizen; the name of his wife, if married, and if possible the country of her nativity, and her place of residence at the time of filing his petition; the name, and place of birth, and residence of each child, if he has any living at the time of filing his petition; that he is not a disbeliever in, or opposed to, organized govern-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ment, or a member of or affiliated with any organization or body of persons teaching disbelief in or opposition to organized government; a polygamist, or a believer in the practice of polygamy; that it is his intention to become a citizen of the United States, and to renounce absolutely and forever all allegiance or fidelity to any foreign prince, potentate, state, or sovereignty, and particularly by name to the prince, potentate, state, or sovereignty of which he, at the time of filing his petition, may be a citizen or subject; and that it is his intention to reside permanently within the United States; and whether or not he has been denied admission as a citizen, and, if denied, the ground or grounds of such denial; the court or courts in which such decision was rendered, and that the cause for such denial has been cured or removed, and "every fact material to his naturalization, and required to be proved upon the final hearing of his application."

The petition is thus required to be verified by the applicant, and, in addition to the matters specially named, to contain a statement of every fact material to his naturalization and required to be proved on final hearing. If, therefore, residence within the state for at least one year prior to the date of the application is a fact material to be proven on final hearing, it is to be stated in the petition, and a knowingly false statement in reference thereto would be perjury, for which the defendant can be indicted and punished in the federal court, although the petition was made and filed in the state court. *Schmidt v. U. S.*, 133 Fed. 257, 66 C. C. A. 389.

Now, subdivision 4 of section 4 provides that it shall be made to appear to the satisfaction of the court admitting any alien to citizenship, among other things, that immediately preceding his application he has resided continuously within the state or territory where such court is at the time held one year at least. This must be shown by the testimony of at least two witnesses, citizens of the United States, in addition to the oath of the applicant. The residence of the applicant within the state where the court is held for at least one year prior to the date of his petition for naturalization is thus made a fact material to be proven on the final hearing, and therefore, under subdivision 2 of section 4, it is to be stated in the petition for naturalization. This construction is confirmed by the form of petition contained and set out in section 27 of the act.

It is argued that no punishment is provided in the act of 1906 for perjury in a naturalization proceeding unless committed on the final hearing of the application. Section 23 reads:

"That any person who knowingly procures naturalization in violation of the provisions of this act shall be fined not more than five thousand dollars or shall be imprisoned not more than five years, or both, and upon conviction the court in which such conviction is had shall thereupon adjudge and declare the final order admitting such persons to citizenship void. Jurisdiction is hereby conferred on the courts having jurisdiction of the trial of such offense to make such adjudication. Any person who knowingly aids, advises or encourages any person not entitled thereto to apply for or to secure naturalization or to file the preliminary papers declaring an intent to become a citizen of the United States, or who in any naturalization proceedings knowingly procures or gives false testimony as to any material fact, or who knowingly makes an affidavit false as to any material fact required to be proved in such proceeding, shall be fined

not more than five thousand dollars, or imprisoned not more than five years, or both."

This section provides the punishment for knowingly making an affidavit false as to any material fact required to be proven in a naturalization proceeding. It is substantially the same as section 39 of the act of March 3, 1903 (chapter 1012, 32 Stat. 1222), referred to by the Court of Appeals in *Schmidt v. U. S.*, supra. And, as said by Mr. Justice Gilbert in that case, it is to be deemed as an amendment of section 5395 (U. S. Comp. St. 1901, p. 3654), so far as it refers to the punishment for perjury in a naturalization proceeding.

But if section 23 is to be construed as applying to perjury committed on the final hearing only, and not in any of the preliminary stages, the facts stated in the indictment bring the case within the terms of section 5392 of the Revised Statutes, defining the crime of perjury and providing for the punishment thereof. This section is of long standing, is general in its terms, and applies to all cases in which a false oath or false testimony is taken or given in a matter required by law, before any competent tribunal, officer, or person. *Babcock v. U. S.* (C. C.) 34 Fed. 873. So that it is manifest that there is a statute prescribing the punishment for perjury committed in a naturalization proceeding.

It is not necessary to determine at this time whether the punishment is to be administered under the provisions of section 23 of the naturalization act or under section 5392 of the Revised Statutes. The only question for decision now is whether the facts stated in the indictment constitute a crime, and upon that question I entertain no doubt.

The demurrer is overruled.

THE ROCHAMBEAU.

(District Court, D. Oregon. February 14, 1910.)

1. SHIPPING (§ 84*)—LIABILITY OF VESSELS—INJURY TO STEVEDORE.

A ship's duty to one employed by stevedores, engaged as independent contractors in discharging the vessel, ends when it furnishes him with a safe working place and a safe passage thereto.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 342, 349-351; Dec. Dig. § 84.*]

2. SHIPPING (§ 84*)—LIABILITY OF VESSEL—INJURY TO STEVEDORE.

Libellant was employed by stevedores, who had contracted to remove the ballast from a vessel, to run a holsting engine used on a scow alongside the vessel. While the work was suspended during a heavy snow-storm, at the request of his employers he went along the deck of the vessel to look after the lines of the scow, and, slipping on a skylight, which was covered with snow, fell and was injured. The passageway across the vessel, over which libellant was required to pass from the pier to the scow, was free of snow. *Held*, that the vessel was not required to keep the other parts of the deck cleared of snow as fast as it fell for his protection, and was not chargeable with any negligence which rendered it liable for his injury.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 342, 349-351; Dec. Dig. § 84.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Admiralty. Suit by J. E. Hatton against the French bark Rochambeau. Decree for respondent.

Albert H. Tanner and John Van Zante, for libelant.
Williams, Wood & Linthicum, for claimant.

BEAN, District Judge. Libel against the French bark Rochambeau to recover damages for a personal injury. On January 5, 1909, the bark was alongside the Oceanic Dock, in the harbor at Portland, for the purpose of removing ballast. McCabe Company, Incorporated, stevedores, were independent contractors employed for that purpose, and had a scow made fast to the bark on the outside thereof, upon which was a hoisting or donkey engine and appliances for handling the bucket or digger used in taking the ballast from the hold. The libelant was employed by McCabe Company as an engineer to operate the hoisting engine. The morning of the accident he reported for work at 6 o'clock to get up steam, preparatory to beginning the regular work of the day. To reach the scow, it was necessary for him to pass from the dock across the deck of the bark. The stevedores came to their work about 7 o'clock in the morning; but a severe snowstorm was then prevailing, and had been during most of the previous night. They worked but a short time, when they were laid off, on account of the storm. The libelant, however, was directed by his employer to remain at the scow, preparatory to resuming work later on in the day, if the storm abated, and in the meantime to see that the scow was safely fastened to prevent injury to it from the high wind and storm.

About 9 o'clock in the morning, while passing along the deck of the bark to examine the stern line of the scow, he stepped on one of the skylights, which was covered with snow, and slipped and injured his knee. The skylight was not in the passage between the dock and the scow, and it was not necessary for him to pass over that part of the deck in going to or returning from his place of work. The snow had been removed from the deck of the vessel by the crew about 7 o'clock; but it was then falling, and had been all morning, and was several inches deep at the time of the accident. The claim is that the ship was negligent in not keeping the snow removed from the skylight as fast as it fell, or sprinkling it with sand or ashes, to prevent persons stepping thereon from slipping. The libelant was not a member of the ship's crew, nor employed by it. He was in the service of an independent contractor. The ship's duty to him ended when it furnished him a safe place to work, and a safe passage thereto. The Saranac (D. C.) 132 Fed. 936.

He was, however, on the vessel by its implied invitation, and it owed to him the same duty as the owner of any other premises would owe to a person thereon by invitation, and that was to use reasonable and ordinary care to keep the premises in a safe and suitable condition, so that he would not be unnecessarily or unreasonably exposed to danger. I do not think, however, that this duty required the ship, under the circumstances and in view of the storm then prevailing, to keep that portion of the deck where the accident occurred free from snow, or to remove the same as fast as it fell, or cover it with sand or ashes. It had no reason to suppose that the libelant was going there to work,

and there was nothing unusual in the construction of the vessel. The skylights were the same as are customarily used by vessels of that kind and trade. The libellant had worked along the water front for some years, and was familiar with the general construction of vessels, and must have known that they were ordinarily provided with deck or skylights, and that when he undertook to walk across the deck, covered as it was with snow, to perform some duty for his employer, he was likely to slip and fall, and necessarily assumed the risk therefrom. The unfortunate accident which resulted in his injury was unavoidable, and not attributable to any negligence or want of duty on the part of the master or crew of the vessel.

The libel is therefore dismissed.

In re SUCKLE.

(District Court, E. D. Arkansas, W. D. February 12, 1910.)

BANKRUPTCY (§ 314*)—CLAIMS OF WIFE—EMPLOYMENT BY HUSBAND—WAGES.

Kirby's Dig. Ark. § 5213, securing to a married woman her real and personal property and the proceeds of her labor, performed on her sole and separate account, free from interference or control of her husband, or from his debts, should be strictly construed, on the ground of public policy, and did not authorize a married woman to recover for services rendered to her husband as clerk in his store, under a contract of employment, against his estate in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 314.*]

In the matter of the bankruptcy of Jacob Suckle. On petition to review the claim of Dora Suckle for wages. Order of referee denying claim affirmed.

The petitioner presented a claim for \$680 against the estate of the bankrupt for alleged services as clerk. The claim was disallowed by the referee and on a petition for a review brought before this court. The facts established by the evidence are that she is the wife of the bankrupt; that they have a family of four children of tender age; that when the bankrupt went into business 16 months ago he entered into a contract with her whereby she was to be employed as clerk in the store and receive as compensation \$10 per week; that she performed the services as clerk for 68 weeks, until the proceedings in bankruptcy were begun, but that nothing had ever been paid to her for her services; that the household duties were performed by a cook, and the children were taken care of by a nurse; that the bankrupt, her husband, paid all the household expenses, including the wages of the servants, and the wearing apparel and other expenses of the claimant.

Wiley & Clayton, for claimant.
Charles Jacobson, for trustee.

TRIEBER, District Judge (after stating the facts as above). It is conceded by counsel for the claimant that at common law a wife could not recover for such services from her husband; but it is claimed that the married woman's act of this state permits such contracts, and therefore entitles her to recover. The statute relied on was enacted on April 28, 1873 (Acts 1873, c. 126), is digested in Kirby's Digest as section 5213, and is as follows:

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"The property, both real and personal, which any married woman now owns, or has had conveyed to her by any person in good faith and without prejudice to existing creditors, or which she may have acquired as her sole and separate property; that which comes to her by gift, bequest, descent, grant or conveyance from any person; that which she has acquired by her trade, business, labor or services carried on or performed on her sole or separate account; that which a married woman in this state holds or owns at the time of her marriage, and the rents, issues and proceeds of all such property shall, notwithstanding her marriage, be and remain her sole and separate property, and may be used, collected and invested by her, in her own name, and shall not be subject to the interference or control of her husband or liable for his debts, except such debts as may have been contracted for the support of herself or her children by her as his agent."

The act has never been construed by the Supreme Court as to this particular question; but it is the settled rule of that court that the entire act must be strictly construed, upon the ground of public policy. Thus it has been held, since the enactment of this act, that the common-law rule that husband and wife are seised of the entirety in land conveyed to them jointly still prevails. *Kline v. Ragland*, 47 Ark. 111, 14 S. W. 474; *Roulston v. Hall*, 66 Ark. 305, 50 S. W. 690, 74 Am. St. Rep. 97. Nor can a husband and wife form a mercantile partnership, although a married woman may form such a partnership with any person other than her husband. *Gilkerson-Sloss Com. Co. v. Salinger*, 56 Ark. 294, 19 S. W. 747, 16 L. R. A. 526, 35 Am. St. Rep. 105. A promissory note of a married woman, not for the benefit of her estate, is void at law as well as in equity. *Conner v. Abbott*, 35 Ark. 365. She cannot convey lands by power of attorney. *Holland v. Moon*, 39 Ark. 120; *Batte v. McCaa*, 44 Ark. 398. Nor make an executory contract to convey lands. *Felkner v. Tighe*, 39 Ark. 357. Nor is the common-law liability for the wife's antenuptial debts abrogated by this act. *Kies v. Young*, 64 Ark. 381, 42 S. W. 669, 62 Am. St. Rep. 198. In view of these constructions placed upon the statute by the highest court of the state, it is but reasonable to presume that, should this question come before it, it would declare such a contract void, as against public policy, and not within the meaning of the act.

The act is a literal copy of that of the state of New York, before the amendment of 1890, and that court has uniformly held that such a contract between husband and wife is void as against creditors, and also against public policy. *Whitaker v. Whitaker*, 52 N. Y. 368, 11 Am. Rep. 711; *Coleman v. Burr*, 93 N. Y. 17, 45 Am. Rep. 160; In the Matter of *Callister*, 153 N. Y. 302, 47 N. E. 268, 60 Am. St. Rep. 620. The decisions of other courts are not harmonious on the subject; but it is unnecessary to cite them, in view of the fact that the identical question based upon a similar statute has been determined by the Circuit Court of Appeals for this Circuit, and it was there held that such a contract is void. *Brittain v. Crowther*, 54 Fed. 295, 4 C. C. A. 341. Judge Caldwell, who delivered the opinion of the court, said:

"While the cases may not be entirely harmonious upon the question of the husband's right under these modern statutes to the earnings of his wife for labor performed by her for third persons, the authorities are uniform that such statutes do not operate to give the wife a legal claim upon her husband or his estate for wages for performing her domestic duties as a wife, or for aiding and assisting him by her labor in any business pursuit he may be en-

gaged in, and any promise of the husband to pay his wife for such services is without consideration and void as against the claims of his creditors, and property transferred to the wife by the husband to pay for such services long after they were rendered, and after he has become insolvent or is largely in debt, may be seized and appropriated to the payment of the husband's debts."

In *Re Kaufmann* (D. C.) 104 Fed. 768, it was held that under the statutes of New York, as amended by the act of 1896, which permits a married woman to make contracts in respect to her separate estate with any person, including her husband, does not permit a contract for her personal services to the husband. The court there said:

"If so, it would enable her to acquire property by contract with him respecting her domestic services. There is a wide distinction between the power to acquire property by contract with the husband and a power to create property which shall be her own, by an agreement that she shall be paid for services that the law intends that she shall render gratuitously, if at all. In other words, a contract with the husband for the acquisition of property does not include a contract to convert her personal services to her husband into property."

A similar conclusion was reached in *Re Trombly*, 16 Am. Bankr. Rep. 599, by the United States District Court of Vermont.

The claimant is not entitled to any compensation for her services, leaving out the question of the suspicious circumstances connected with the claim.

PHILADELPHIA EXTRACTING CO. v. KEYSTONE EXTRACTING
CO. et al.

(Circuit Court, E. D. Pennsylvania. February 14, 1910.)

No. 401.

1. INJUNCTION (§ 56*)—DISCLOSURE OR USE OF TRADE SECRETS.

Where complainant was the owner of an unpatented secret process for extracting alcohol from empty whisky barrels, and for many years had employed the same, using reasonable precautions to insure secrecy, its servants necessarily intrusted with knowledge of the process being enjoined not to disclose any of its steps, complainant was entitled to restrain an ex-servant, who had learned the process during his service, from communicating the same to others and using such information to organize a competing business on his own account.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 110; Dec. Dig. § 56.*]

Disclosure of trade secrets, see note to *S. Jarvis Adams Co. v. Knapp*, 58 C. C. A. 8.]

2. INJUNCTION (§ 113*)—LACHES.

Laches was no defense to a master's right to an injunction to restrain an ex-servant's future use of a secret process disclosed to the servant in the course of his employment by complainant.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 198, 199; Dec. Dig. § 113.*]

In Equity. Suit by the Philadelphia Extracting Company against the Keystone Extracting Company and others. On motion for preliminary injunction. Granted.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Duane, Morris & Heckscher, for complainant.

Ira J. Williams and Simpson & Brown, for respondents.

J. B. McPHERSON, District Judge. Upon the hearing of this motion I enjoyed the advantage of listening to the examination and cross-examination of the witnesses in open court; and I believe, therefore, that the case is practically presented as if on final hearing. In my opinion the facts and the proper legal conclusions therefrom may be briefly stated as follows:

1. The plaintiff is the owner of a secret process for extracting alcohol from empty whisky barrels.

2. This process is not patented, and has been employed by the plaintiff for several years. Reasonable precautions have been taken to insure secrecy; and, among these, the plaintiff's servants who were necessarily intrusted with knowledge of the process have been enjoined not to disclose any of its steps.

3. Davies, one of the defendants, learned the process fully during a service of two years as engineer. While still in the plaintiff's employ he determined to use his information by going into the business upon his own account. In the effort to attain this object he interested the other two individual defendants in his plan, and Christopher Koch furnished the capital with which the defendant corporation was organized and has been carrying on business.

4. The process by which the defendants extract alcohol from barrels is essentially the secret process that was thus betrayed by Davies, although it may perhaps be combined with the use of a jet of steam. This combination, however, if it exists at all, does not need special attention. It does not constitute a new method of operation, although in one particular—the better protection of the barrels—it may be an improvement on the secret hot air process of the plaintiff.

5. I do not think that the plaintiff is chargeable with laches. But, even if laches be assumed to exist, the plaintiff should not be estopped from enjoining the use of its secret process in the future. Whether damages may be recovered for infringement in the past is a question that need not now be decided; but it seems to me that the plaintiff's right to restrain the continuance of the defendants' flagrant misconduct has not been impaired.

6. The evidence does not prove that the process has in effect been thrown open to the public, or has been so negligently guarded that other persons have probably discovered it by means that were not unfair.

7. In my opinion the disclosure by Davies was a clear breach of trust, by which neither he nor the other defendants should be allowed to profit.

Upon the plaintiff's filing of a bond in the sum of \$2,500, a preliminary injunction will be awarded.

ENDERS v. SUPREME LODGE KNIGHTS AND LADIES OF HONOR.

(Circuit Court, E. D. New York. March 1, 1910.)

1. COURTS (§ 328*) — FEDERAL COURTS — JURISDICTION — AMOUNT IN CONTROVERSY.

Where a suit against a mutual benefit association to invalidate an assessment involved a certificate for \$2,000 and benefits, and defendant's allegation as to the amount involved was not traversed, the amount was sufficient to confer federal jurisdiction, notwithstanding a tender of premium.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 890-896; Dec. Dig. § 328.*]

Jurisdiction of Circuit Courts as determined by the amount in controversy, see notes to *Auer v. Lombard*, 19 C. C. A. 75; *Tennent-Stribling Shoe Co. v. Roper*, 36 C. C. A. 459.]

2. REMOVAL OF CAUSES (§ 106*)—RIGHT TO REMAND—WAIVER.

Plaintiff, by noticing a demurrer for argument after the removal of cause, waives his right to remand.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 216; Dec. Dig. § 106.*]

Action by Fred Enders against the Supreme Lodge Knights and Ladies of Honor. On motion to remand. Denied.

Norbert Blank, for complainant.

Joline, Larkin & Rathbone, for defendant.

CHATFIELD, District Judge. Motion to remand will be denied. The plaintiff has not traversed the allegation by the defendant of amount involved (*Weaver v. Nor. Pacif.* [C. C.] 125 Fed. 155); but the points appear on the pleadings, and no testimony seems to be required.

The amount involved is \$2,000 and benefits, which of itself would seem to be sufficient. The premium is only a tender, and is not what is involved by the action. Further, the relief asked is a decree against the validity of an assessment, which would affect as *stare decisis* all similarly situated who could under the federal laws join in the suit or who are subject to this court's jurisdiction, even if the question did not become *res adjudicata* as to the other parties who did not come in.

If a patentee with a fixed license rate should seek to restrain in equity an infringement, and thereby stop a business involving thousands of dollars, it would scarcely seem that the license value alone could be held as the amount involved, even if it were all the damage recoverable.

The plaintiff has noticed a demurrer for argument, and this is certainly a waiver of his right to remand, in the face of the allegations of the record. But on all the reasons the result reached must be the same.

Motion denied.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

WEST PUB. CO. v. EDWARD THOMPSON CO.

(Circuit Court of Appeals, Second Circuit. March 7, 1910. On Petition for Rehearing, March 21, 1910.)

No. 114.

1. COPYRIGHTS (§ 29*)—SUBSEQUENT EDITIONS OF BOOK—NOTICE OF COPYRIGHT.

There can be but one copyright for the same book for the first term of 28 years, and notice of only a single entry for copyright is necessary therein. If there is a subsequent edition of the book, the notice of copyright in it must be either of the date of the original or of the date of the subsequent entry, depending upon whether or not such changes or additions have been made as to constitute the later edition a new book.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. §§ 29, 30; Dec. Dig. § 29.*]

2. COPYRIGHTS (§ 5*)—SUBSEQUENT EDITIONS OF BOOK—ADDITION OF NEW MATTER—"NEW BOOK."

Under the copyright statutes as they stood prior to Act March 4, 1909, c. 320, 35 Stat. 1075 (U. S. Comp. St. Supp. 1909, p. 1239), as well as by the express provision of section 6 of such act, the addition of new matter to a copyrighted book in a second or subsequent edition makes it a "new book" subject to copyright as an original work.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 3; Dec. Dig. § 5.*]

3. COPYRIGHTS (§ 29*)—ORIGINALITY OF WORK—AGGREGATION OF PRIOR PUBLICATIONS.

The mere aggregation of weekly law reporters, which have been singly copyrighted, into volumes, does not constitute a new work requiring a new copyright.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. §§ 29, 30; Dec. Dig. § 29.*]

4. COPYRIGHTS (§ 29*)—ORIGINALITY OF WORK—COMPILATION OF COPYRIGHTED MATTER—LAW DIGEST.

The compilation and rearrangement and reclassification of syllabi in digests into new and larger digests constitute new works entitled to copyright, which need only notice of their own entry for copyright.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. §§ 29, 30; Dec. Dig. § 29.*]

5. COPYRIGHTS (§ 61*)—INFRINGEMENT—USE OF COPYRIGHTED MATTER.

The copying or paraphrasing of the syllabi from a copyrighted report of law cases by a subsequent publisher of a similar report or a digest, whether by so doing he saves literary work or merely mechanical labor, constitutes an infringement of the copyright.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 57; Dec. Dig. § 61.*]

6. COPYRIGHTS (§ 56*)—INFRINGEMENT—USE OF LAW DIGEST.

A writer of a law text-book may use a copyrighted digest of decisions, and may copy lists of cases therefrom, to assist him in running down the cases, and such use is a fair one and within the purpose for which the digest is sold; but extensive copying or paraphrasing of the language of the syllabi in the digest is an unfair use and constitutes an infringement of the copyright.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 52; Dec. Dig. § 56.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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7. COPYRIGHTS (§§ 86, 87*)—SUIT IN EQUITY FOR INFRINGEMENT—LACHES—POWER OF COURT TO AWARD DAMAGES.

Under Rev. St. § 4970 (U. S. Comp. St. 1901, p. 3416), which gives the Circuit Courts power to grant injunctions to prevent the violation of copyrights "according to the course and principles of courts of equity," the fact that a complainant, with knowledge that its copyrights were being infringed by defendant, delayed bringing suit until defendant after 16 years of labor and at large expense had practically completed the publication of its work, constituted such laches as warrants the denial of an injunction or an accounting of profits; but in such a suit, although equitable relief is denied, the court has power to award the complainant damages as compensation for the violation of its rights.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. §§ 79-81; Dec. Dig. §§ 86, 87.*]

Laches as a defense in suits for infringement of copyrights, see notes to *Taylor v. Sawyer Spindle Co.*, 22 C. C. A. 211; *Richardson v. D. M. Osborne & Co.*, 36 C. C. A. 613.]

Appeal from the Circuit Court of the United States for the Eastern District of New York.

Suit in equity by the West Publishing Company against the Edward Thompson Company. Decree for defendant (169 Fed. 833), and complainant appeals. Decree modified.

William B. Hale, Henry E. Randall, and Edmund Wetmore, for appellant.

Walter Large and Frank P. Prichard, for appellee.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

WARD, Circuit Judge. April 13, 1903, the complainant, a corporation and citizen of the state of Minnesota, filed the bill against the defendant, a corporation and citizen of the state of New York, charging it with infringement of copyright. The complainant is a publisher of reports of cases and of legal digests. It began with the year 1879 the publication of weekly reporters, which gradually grew into what is known as the "National Reporter System," covering the decisions of all the highest courts throughout the United States. It also published all the decisions of the United States District and Circuit Courts from 1789 to 1880 in a series under one alphabet called the "Federal Cases." It also became the owner of the United States Digests of decisions known as the First and the New Series, and it published a digest of the Federal Cases, a digest of the Federal Reporter, the American Annual Digest of all the decisions throughout the United States, and the Century Digest, which includes the decisions of all courts throughout the United States from 1858 down to 1896 under one alphabet.

Each weekly number of Reporters was copyrighted. Then several such numbers were aggregated into a volume which was copyrighted. The headnotes of the cases in the National Reporter System were gathered into monthly or bimonthly digests, and these again into annual or semiannual digests; these again into the American Annual Digest; and these again down to 1896 with the syllabi of the United States Digests, First and New Series, into the Century Digest under

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

one alphabet. Speaking generally, these books, consisting of some 600 volumes of reports and 99 volumes of digests, were copyrighted.

The defendant from the year 1887 was the publisher of encyclopedias composed of articles alphabetically arranged intended to cover the whole body of the law, known as the "American and English Encyclopedia of Law, First Edition," "Encyclopedia of Pleading and Practice," and "American and English Encyclopedia of Law, Second Edition," comprising in all 78 volumes. When this suit was begun, the American and English Encyclopedia of Law, First Edition, the Encyclopedia of Pleading and Practice, and 23 out of 30 volumes of the American and English Encyclopedia of Law, Second Edition, had been published.

A fuller statement of the facts of the case and reference to the authorities may be found in the careful and able opinion of Judge Chatfield, reported in 169 Fed. 833.

The defendant contends that the complainant has largely lost the benefits of its copyrights by the method in which it has published its books. This makes an examination of the copyright statutes necessary.

Rev. St. U. S. § 4956 (U. S. Comp. St. 1901, p. 3407), provides that no one shall be entitled to a copyright unless he shall on or before a certain day deliver to the Librarian of Congress a printed copy of the title of the book and two copies of the book.

Act June 18, 1874, c. 301, § 1, 18 Stat. 78 (U. S. Comp. St. 1901, p. 3411), provides that no person shall maintain an action for infringement of copyright unless he shall have given notice thereof by inserting in the several copies of every edition, as, for example, "Copyright 18— by A. B."

Section 4954 requires a new copyright to be taken out for a further term of 28 years.

Section 4959 requires one copy of every subsequent edition containing substantial changes to be delivered to the Librarian of Congress. The provision that books of foreign authors "heretofore" published of which new editions shall thereafter appear are entitled to copyright was enacted by Act March 3, 1891, c. 565, 26 Stat. 1110 (U. S. Comp. St. 1901, p. 3417), section 13 of which extended the benefit of our copyright laws upon certain conditions to foreigners. Prior to that act no foreign author or assignee of a foreign author could avail of our copyright law. *Yuengling v. Schile* (C. C.) 12 Fed. 97; *Fraser v. Yack*, 116 Fed. 285, 53 C. C. A. 563.

Taken together, we think these provisions show that there can be but one copyright for the same book for the first term of 28 years. It follows that if there may be a copyright for a subsequent edition the notice of copyright given in it must be either of the date of the original or of the date of the subsequent entry. It would certainly be fair to authors and to the public if improvements of and additions to a copyrighted book should be regarded as mere incidents of the original work covered by the original copyright, so that notice of it only need be given. In this way the public would be relieved of the burden and risk of ascertaining the time at which the copyright of the original work and the copyright of the additions, respectively, expired. No new

copyright of the same book because of alterations or additions apparently was contemplated by section 4959. It says nothing about recopyright, and, instead of a deposit of two copies of the altered work, as required for copyright, requires but one, evidently as a means of identifying it with the original copyrighted book. This view is corroborated by the exception it contains in favor of foreign authors whose books, not copyrightable if published before March 3, 1891, were allowed to be copyrighted if added to or improved after that date. Still, Mr. Justice Clifford at Circuit in the leading case of *Lawrence v. Dana*, 4 Cliff. 1, Fed. Cas. No. 8,136, while holding that there could be but one copyright, treated subsequent editions with notes or improvements as new books subject to copyright, and held that the notice to be printed in them should be of the date of entry of the improved edition without any reference to the date of original entry. In that case, which was for infringement of editions of *Wheaton's Elements of International Law* issued in 1836, 1846, 1855, and 1863, it was objected that the contents of the earlier editions had become public property because no notice was given in the later, of the entry for copyright of the earlier, editions. The learned justice said:

"Subsequent editions without alterations or additions should have the same entry, because they find their only protection in the original copyright; but second or subsequent editions, with notes or other improvements, are new books, within the meaning of the copyright acts, and the authors or proprietors of the same are required to 'deposit a printed copy of such book,' and 'give information of copyright being secured,' as if no prior edition of the work had ever been published; and the term of the copyright as to the notes or improvements is computed from the time of recording the title thereof, and not from the time of recording the title of the original work. Copyrights, like letters patent, afford no protection to what was not in existence at the time when they were granted. Improvements in an invention not made when the original letters patent are issued are not protected by the letters patent, nor are the improvements in a book not made or composed when the printed copy of the book was deposited and the title thereof recorded as required in section 4 of the copyright act. Protection is afforded by virtue of a copyright of a book, if duly granted, to all the matter which the book contained when the printed copy of the same was deposited in the office of the clerk of the District Court, as required by section 4 of the copyright act; but new matter made or composed afterwards requires a new copyright, and, if none is taken out, the matter becomes a public property, just as the original book would have become if a copyright for it had never been secured. Publishers may be in the habit of inserting more than one notice in new editions, but there is no act of Congress prescribing any such condition.

"Whenever a renewal is obtained under section 2 of the copyright act, the requirement is that the title of the work so secured shall be a second time recorded, and that the applicant must comply with all the other regulations in regard to original copyrights; but there is nothing in any act of Congress to show that each successive edition must specify the date of the original copyright, as contended by the respondents. Any tendency to mislead the public cannot be successfully predicated of a copyright in due form of law, where it appears that the party who secured it complied with all the conditions prescribed in the copyright act. This is all that need be remarked in reply to the suggestion of the respondents upon that subject."

This view, obviously more in favor of authors and publishers than of the public, probably caused the practice of the Librarian of Congress to recopyright copyrighted books which have been added to or improved in subsequent editions. Mr. Drone, in his work on Copy-

rights (page 270), dissents from Justice Clifford's reasoning, contending that to prevent abandonment the proper practice is to give notice in each new edition of every copyright previously taken out, and many publishers do so.

Section 6 of the act of 1909 (Act March 4, 1909, c. 320, 35 Stat. 1077 [U. S. Comp. St. Supp. 1909, p. 1291]), which is obviously declaratory, seems to confirm Justice Clifford's view that there is but one copyright of the same book, that additions and improvements make a new book, and that the only notice required is of the date of entry of the last edition. It is as follows:

"Sec. 6. (Compilations, etc., of works in public domain, etc.—subsisting copyrights not affected)—That compilations or abridgements, adaptations, arrangements, dramatizations, translations, or other versions of works in the public domain, or of copyrighted works when produced with the consent of the proprietor of the copyright in such works, or works republished with new matter, shall be regarded as new works subject to copyright under the provisions of this Act; but the publication of any such new works shall not affect the force or validity of any subsisting copyright upon the matter employed or any part thereof, or be construed to imply an exclusive right to such use of the original works, or to secure or extend copyright in such original works."

The mere aggregation of the Weekly Reporters into volumes does not in our opinion constitute a new work. But the compilation and rearrangement and reclassification of the syllabi in the digests into new and larger digests do constitute new works entitled to copyright which need only notice of their own entry for copyright. This view seems also to be corroborated by the same section, which provides that compilations, arrangements, and abridgements of matter in the public domain or of copyrighted matter with the proprietor's consent are to be regarded as new works subject to copyright.

Accordingly, we think that the complainant's works, with exceptions not necessary to be considered, are duly covered by copyright of which proper notice has been given.

In this respect we differ with the court below, which was of opinion that the complainant had abandoned a large part of its copyrighted volumes because of insufficient notice of copyright. It was held that the contents of all earlier digests carried forward into later and larger digests became public property because the later digests contained no notice of copyright of the earlier ones. In coming to this conclusion the learned judge relied largely upon the cases of *Holmes v. Hurst*, 174 U. S. 82, 19 Sup. Ct. 606, 43 L. Ed. 904, *Mifflin v. White*, 190 U. S. 260, 23 Sup. Ct. 769, 47 L. Ed. 1040, and *Mifflin v. Dutton*, 190 U. S. 265, 23 Sup. Ct. 771, 47 L. Ed. 1043. But these were all cases of the abandonment of the same work as the result of an earlier publication without copyright or with insufficient copyright. They do not apply to later digests regarded as new books entitled to copyright and needing only notice of their own entry in accordance with the views we have above expressed.

Rev. St. U. S. 4970 (U. S. Comp. St. 1901, p. 3416), gives the Circuit Courts power to grant injunctions to prevent the violation of copyrights "according to the course and principles of courts of equity on such terms as the court may deem reasonable." This brings us to a consideration of the question as to what is a fair use of the complain-

ant's copyrighted works. Obviously it would not be fair for any publisher of reports of the same cases or of digests of them to copy lists of cases or to copy or paraphrase syllabi from the complainant's publications whether by so doing he merely saved mechanical labor or literary work. This would be true of any publication similar to a former copyrighted publication. But a fair use of copyrighted material in a different publication may be broader. Suppose one were to issue a map of Kansas showing the annual amount and value of the chief products of each county. Could not a person writing a history of Kansas take those amounts and values bodily into his text? May not one reprint out of a copyrighted compilation of English love songs open to the public one or more for use in a work on English literature? We think there is a great difference between text-books and volumes of reported cases or digests of those cases. The encyclopedias under consideration are really collections of text-books. The headnotes of reported cases are a digest of the law and facts of those cases, and digests of headnotes of various cases constitute collections and classified arrangements of decisions. On the other hand, a text-book states the principles of law and refers generally in footnotes to cases supporting or illustrating the propositions in the text. A poem or a novel or a history or a directory or a dictionary or a scientific treatise is intended to please, interest, instruct, or satisfy the reader, so to speak, in itself; but a digest considered by itself is nothing. Its purpose is as a tool to enable judges to write their opinions, lawyers to write their briefs, and authors to write their text-books. Such persons may cut out parts of the digests to assist them in running down the cases and copy lists of cases from the digests, as many of the defendant's writers have done. Such a use of the digests seems to us, differing in this respect from the court below, to fall directly within the purpose for which they are sold, and to be fair. On the other hand, extensive copying or paraphrasing of the language of the syllabi would not, we think, be a fair use.

The complainant knew at least as early as 1893 that its syllabi were being paraphrased or copied by the defendant's writers, or some of them. Its conduct shows that it must have considered this to have been a fair use of its publications because it did not begin this action until the defendant, after 16 years of labor and immense outlay of money, had published almost its entire work. The laches of the complainant and the hardship upon the defendant are such that we think the trial judge, "according to the course and principles of courts of equity," was right in refusing an injunction and accounting of profits. But we also think that the court can give damages in this case by way of compensation. Because Rev. St. U. S. § 4921 (U. S. Comp. St. p. 3395), entitles complainants in equity suits arising out of patents "to recover in addition to the profits to be accounted for by the defendant the damages the complaint has sustained" by the infringement, and there is no similar provision as to equity suits arising out of copyrights, it is sometimes said that damages cannot be awarded in the latter. We think this a misunderstanding of the statute. It applies to all patent causes without distinction and permits damages to be assessed when equitable relief is granted in addition to profits. This should not be construed to impair the power of courts of equity to do justice by al-

lowing the complainant compensation in damages where equitable relief, though it might be given, is for some satisfactory reason withheld. In such a case the damages are not given in addition to profits as provided by section 4921. It does not seem to us right to turn the complainant over to a court of law after over 5,000 pages of testimony have been taken in this cause, showing that its rights have been violated to some extent, especially considering that a jury trial would not furnish an adequate remedy in the sense of being adapted to determining the amount of the copying and paraphrasing. The bill asks for an injunction and for damages as well as for an accounting. This court, having obtained jurisdiction of the cause and having the power to grant an injunction, has the right to do justice between the parties and to dispose of it finally, even if this involves withholding injunctive relief and awarding damages. *Masson's Appeal*, 70 Pa. 26; *Valentine v. Richardt*, 126 N. Y. 272, 27 N. E. 255; *Waite v. O'Neil*, 76 Fed. 408, 22 C. C. A. 248, 34 L. R. A. 550; *Andrus v. Berkshire Power Co.*, 147 Fed. 76, 77 C. C. A. 248; *New York City v. Pine*, 185 U. S. 93, 22 Sup. Ct. 592, 46 L. Ed. 820.

The decree of the Circuit Court, therefore, will be modified by the direction to refer the cause to a master for the purpose of determining what damages the complainant has sustained, or at the option of the complainant the decree may be affirmed, with costs of this court, without prejudice to its right to proceed at law.

LACOMBE, Circuit Judge. Although my individual opinion is in entire accord with the decision of this court in *West Publishing Company v. Lawyers Co-operative Publishing Company*, 79 Fed. 756, 25 C. C. A. 648, 35 L. R. A. 400, I accede to the proposition that the law for this circuit is settled in the later decision of the same court in *Edward Thompson Company v. American Law Book Company*, 122 Fed. 922, 59 C. C. A. 148, 62 L. R. A. 607.

Therefore I concur in the conclusion of the majority.

On Petition for Rehearing.

PER CURIAM. The petition for rehearing is denied.

The order for the mandate shall provide that the decree of the Circuit Court be modified, without costs of this court to either party, so that said decree shall not dismiss the bill of complaint upon the merits, but shall deny the injunction and accounting of profits, and shall provide that the complainant recover its damages without costs of the Circuit Court accruing prior to the entry of the decree; the cause to be referred to a master to take proofs and report the same with his findings as to the amount of the damages.

Or in case the complainant shall, by writing filed with the clerk of this court within five days from the date hereof, so elect, the order shall provide for the affirmance of the decree of the Circuit Court, with the costs of this court to be paid by the complainant.

BROCKENBROUGH v. CHAMPION FIBRE CO.

(Circuit Court of Appeals, Fourth Circuit. March 9, 1910.)

No. 945.

1. SALES (§ 128*)—CONTRACT—RESCISSION.

Defendant having contracted to purchase certain pulp wood from plaintiff, deliverable from year to year beginning July, 1908, without objection postponed the delivery until October 1, 1908, and on October 14th suggested that plaintiff defer shipments until spring because of the congested condition of its yards. Plaintiff made no reply to this, but immediately requested cars from a railroad company to "test the matter," which cars were refused because defendant had placed an embargo on shipments of wood which continued only from October 1st to 28th. When plaintiff ordered the cars, he had made no preparation to cut or haul any wood, nor did he own any timber in the territory to which he was limited by the contract, nor had he made any effort to buy any such wood from others. *Held*, that defendant's embargo and suggestion to delay shipments did not constitute a total repudiation of the contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 318; Dec. Dig. § 128.*]

2. APPEAL AND ERROR (§ 171*)—THEORY OF CAUSE—CHANGE—REVERSAL.

Where, in a suit for breach of a contract to purchase pulp wood, plaintiff based his whole case as pleaded on defendant's total repudiation and termination of the contract, on which theory he was defeated, he was not entitled to a reversal on the theory that he was entitled to recover damages for defendant's delaying plaintiff's execution of the contract so far as first year's deliveries were concerned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1063-1061; Dec. Dig. § 171.*]

In Error to the Circuit Court of the United States for the Western District of North Carolina, at Asheville.

Action by Edward H. Brockenbrough against the Champion Fibre Company. Judgment for defendant, and plaintiff brings error. Affirmed.

This was an action at law instituted in the superior court of McDowell county, N. C., by Edward H. Brockenbrough, a citizen of Virginia, against the Champion Fibre Company, an Ohio corporation, operating a wood fiber, pulp, and extract plant at Canton, N. C.

The complaint sets forth the execution of a contract whereby the plaintiff was to deliver from a certain defined territory in that state to defendant company at Canton, during a term of five years, not less than 3,000 nor more than 8,000 cords each year of chestnut and other woods in accord with specifications set forth, for which he was to receive \$4.50 per cord if minimum amount was furnished the first year, and 25 cents additional per cord each succeeding year upon the same conditions as well as fixed bonuses each year after the first. This contract, dated February 15, 1908, provided that shipments under it should commence July 1st following, and should be subject to "delays beyond control of the parties, as to forwarding and receipt." The complaint alleges, in effect, that, at the request of defendant, the date of commencement of shipments was postponed until October 1, 1908, at which time plaintiff was in all respects ready, able, willing, and anxious to commence shipments and comply with said contract to the maximum limit, but that the Southern Railway afforded the only means of transportation, and, when he applied to this company for cars, he was informed that the defendant had on October 1, 1908, placed an embargo on all chestnut wood consigned to it at Canton, in consequence of which the railway company would receive no chestnut wood for

*For other cases see same topic & § NUMBER in Dec. & Am. Digs, 1907 to date, & Rep'r Indexes

shipment to defendant until this embargo was lifted. It is alleged, further, that chestnut wood was the only wood which was contemplated to be furnished by the contract unless small quantities of the other varieties had been found in the course of cutting the chestnut; that, in consequence of this embargo, it became impossible for plaintiff to perform the contract. It is also alleged that, after the execution of the contract and at the time of the laying of the embargo, a great slump in the value of the wood had occurred, and that if plaintiff had been permitted to perform the contract, which he alleges he was financially and otherwise fully prepared to do, he would have derived a profit of some \$61,000, which sum he claims he is entitled to recover by reason of defendant's repudiation of the contract.

The cause was properly removed to the Circuit Court of the United States for the Western District of North Carolina, where answer was made by defendant in effect denying the repudiation of the contract, charging the embargo to have been only temporary, setting forth the reasons therefor, and alleging that it was lifted 28 days after it was laid. A trial was had. Four issues were agreed to be submitted: First, whether the contract had been executed; second, whether defendant committed a breach of it; third, whether at the time of its breach the plaintiff was able, ready, and willing to perform it; and, fourth, what damage plaintiff would be entitled to recover. After all the evidence was presented, the court below, on motion of defendant, directed a nonsuit to be entered. To this action of the court this writ of error has been sued out by plaintiff.

F. S. Kirkpatrick and James H. Merrimon (Kirkpatrick & Howard and Pless & Winborne, on the brief), for plaintiff in error.

Louis M. Bourne (Davidson, Bourne & Parker and Allen T. Morrison, on the brief), for defendant in error.

Before GOFF and PRITCHARD, Circuit Judges, and DAYTON, District Judge.

DAYTON, District Judge (after stating the facts as above). In our judgment the controversy in this case, under the pleadings, narrows itself to a single question of law and fact. It is undisputed that the plaintiff in error had a five-year contract to deliver to defendant in error cordwood within fixed minimum and maximum limits each year for prices increasing in amount from year to year; that he was to commence delivery July, 1908, but, at the request of the defendant company, without objection postponed the beginning of delivery until October 1, 1908; that about October 14th he went from his contract work in Virginia to the defendant's place of business at Canton, N. C., to see Oma Carr, the manager of the defendant's wood and extract departments, in regard to this contract and the delivery of this wood; that he found that, by reason of the overstocking and congestion of the company's woodyards, it had sought and obtained from the railroad company the promulgation of a temporary embargo upon delivery to it of chestnut wood; that, not finding Carr, on the next day he sent Garst back with a letter to him in which he stated:

"I'm again ready to commence shipments & urge you not to delay the performance of this contract longer, having already lost nearly 4 months of best weather. Kindly answer this by Mr. Jack Garst as I will be here this P. M."

Garst saw Carr, who explained the condition of the company's yards to which had been shipped 1,200 cars of wood in September and 1,100 in October, and the reason for the embargo, and sent back to plaintiff a reply to his letter, as follows:

"Suggest that in view of short time until roads get bad, and our difficulties here in being able to handle incoming shipments regularly, you wait until spring before opening your territory. As an alternative, suggest that you look over S. & W. territory for hemlock to work this winter. Can fix this so that you can get \$6.00 on cars at Marion."

Plaintiff made no reply to this, but went immediately to two stations of the railroad company and asked for cars to be placed for the purpose of shipping chestnut wood to defendant at Canton. At one of these places he was informed by the railroad agent that his request could not be granted because of the embargo. At the other the agent, not having received notice of the embargo, informed him that the car would be placed for him when he had wood there with which to load it. Plaintiff then informed this agent of the embargo, and indicated his purpose was to "test the matter." He in fact had made no preparation to cut and haul any wood, owned no timber in the territory to which his contract limited him from which to cut and haul it, and had made no effort to buy any such wood from others. The embargo declared October 1st was lifted on October 28th following. Plaintiff on October 26th, 12 days after his arrival from Virginia at Canton, instituted this suit for the purpose of recovering \$61,000 damages for the alleged breach on the part of defendant of the contract. The sole question is whether the action of the defendant under the circumstances constituted in law a repudiation of the contract in its entirety. We think not. In support of this conclusion we cite *Sitterding v. Grizzard*, 114 N. C. 108, 19 S. E. 92; *May v. Getty*, 140 N. C. 310, 53 S. E. 75; *Redding v. Vogt*, 140 N. C. 562, 568, 53 S. E. 337; *Dingley v. Oler*, 117 U. S. 490, 6 Sup. Ct. 850, 29 L. Ed. 984; *Smoot's Case*, 15 Wall. 36, 21 L. Ed. 107; *Roehm v. Horst*, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953.

But it is insisted that, if the contract was not wholly repudiated, the plaintiff was entitled to recover damages because of defendant's action in delaying its execution, in the deliveries for the first year, and this under the liberality allowed in North Carolina practice and pleading. We do not think so. The whole theory of plaintiff's case as set forth in his complaint was that the contract had been by the company wholly repudiated, and that it was thereby wholly terminated. The whole case was tried upon this theory. The issues to be submitted to the jury were agreed and settled, and no such issue as to whether plaintiff was entitled to damage by reason of delay in execution of the contract was asked to be submitted. Had plaintiff desired to raise an issue of this kind, the way was open for him to have done so by amending his complaint before or at any time before the issues were submitted to the jury. This he did not ask to do, but tried his case upon the sole theory that defendant's acts had wholly terminated the contract. Under such circumstances, he cannot come here and ask for a reversal because he was not allowed to recover in the court below something that he did not there seek to recover. It is true that the North Carolina practice is liberal, but we have no question but what it is in strict accord with this ruling; for in *Moss v. Railroad Co.*, 122 N. C. 889, 29 S. E. 410, it is held:

"A complaint proceeding upon one theory will not authorize a recovery upon another and entirely different theory."

And it is further held in this case to be "a settled maxim of law that proof without allegation is as unavailable as allegation without proof." To the same effect is *McCoy v. Railroad*, 142 N. C. 383, 55 S. E. 270, and *Conley v. Railroad*, 109 N. C. 692, 14 S. E. 303.

In *Sloan v. Hart*, 150 N. C. 269, 63 S. E. 1037, 21 L. R. A. (N. S.) 239, it is said:

"Such specific damages as may have reasonably been within the contemplation of the parties are allowed in this class of cases, but they must be both pleaded and proven before the court can submit them to the consideration of the jury."

If plaintiff had a just cause of action based upon the theory of a partial breach of the contract and not an entire repudiation of it, about which we express no opinion, it is to be borne in mind that the action of the court below in directing a nonsuit does not estop him under certain well-defined rules and limitations from asserting said right.

We therefore find no error in the judgment of the court below, and it will be affirmed.

VISCOUNT DE VALLE DA COSTA V. SOUTHERN PAC. CO.

(Circuit Court of Appeals, First Circuit. March 4, 1910.)

No. 840.

LIMITATION OF ACTIONS (§ 127*)—ACTION FOR WRONGFUL DEATH—LIMITATION—AMENDMENT OF DECLARATION.

The plaintiff in the Circuit Court brought suit against the defendant in the Circuit Court for the death of his intestate, which occurred during the voyage from New York to Galveston aboard a steamship operated by the defendant, which is a corporation created and existing under the statutes of Kentucky. In accordance with *The Hamilton*, 207 U. S. 398, 28 Sup. Ct. 133, 52 L. Ed. 264, the action for the death necessarily rested on the Kentucky statutes. The declaration as originally drawn was informal. A new declaration was substituted by amendment; but, as the original declaration contained every substantial fact necessary to create a case under the statutes referred to, although in an inartificial way, *held*, that *Union Pacific Railway Company v. Wyler*, 158 U. S. 285, 15 Sup. Ct. 877, 39 L. Ed. 983, and *Boston & Maine Railroad v. Hurd*, 108 Fed. 116, 47 C. C. A. 615, 56 L. R. A. 193, so far as they related to the substitution of a statutory cause of action for a common-law cause of action, had no application to this case, and that the amendment here related back to the time of bringing suit.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 543-547; Dec. Dig. § 127.*]

In Error to the Circuit Court of the United States for the District of Massachusetts.

Action by Viscount De Valle Da Costa, administrator, against the Southern Pacific Company. Judgment for defendant (160 Fed. 216), and plaintiff brings error. Reversed.

See, also, 167 Fed. 654.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Wendell P. Murray (Charles F. Smith, on the brief), for plaintiff in error.

William D. Turner (Reginald Foster and George Hoague, on the brief), for defendant in error.

Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

PUTNAM, Circuit Judge. The plaintiff in error was the plaintiff in the Circuit Court, and it is convenient to speak of both parties as there arranged. This is an action of tort for an injury to the intestate, who was an employé of the defendant, and who was injured aboard a steamship operated by it on a voyage from New York to Galveston, followed by continued suffering and death six days later, of which the injury was the cause. The defendant was a corporation created and existing under the laws of the state of Kentucky, so that the law by which the case is governed is the law of Kentucky, in accordance with the decision in *The Hamilton*, 207 U. S. 398, 28 Sup. Ct. 133, 52 L. Ed. 264. The suit was commenced in the superior court of the state of Massachusetts by a writ which issued on the 21st day of November, 1906, subsequently removed to the Circuit Court of the United States for the District of Massachusetts. The *Hamilton* was decided after this suit was brought, namely, on December 23, 1907. There had, of course, been previous decisions looking in the same direction, but *The Hamilton* was the first that authoritatively determined, so far as the purposes of this suit are concerned, that the international rule with reference to the domicile of a vessel while on the high seas applies as between the various states of the Union. There were numerous subordinate rulings in the Circuit Court growing out of the changing aspects of the case, which will in part appear from what we may further say, as to which rulings we find no error.

The case before us turns on the application of the rule with regard to the provision for limitation found in a statute conferring a right of action, in connection with an amendment, as applied in *Union Pacific Railway Company v. Wyler*, 158 U. S. 285, 15 Sup. Ct. 877, 39 L. Ed. 983, followed by us in April, 1901, in *Boston & M. R. R. v. Hurd*, 108 Fed. 116, 47 C. C. A. 615, 56 L. R. A. 193. The litigation in *Union Pacific Railway Company v. Wyler* arose in Missouri. The declaration there as originally drawn was strictly at common law. It was amended by substituting a cause of action arising under the statutes of Kansas. The consequent decision was that the introduction of such an amendment was the substitution of a new cause of action to such an extent, and of such a character, that the period of limitation was counted from the day of the amendment rather than from the day of commencing the suit. The case at bar, according to one proposition of the defendant, was at most a substitution of a cause of action arising under the statutes of Kentucky for a cause of action arising under the statutes of Massachusetts, or some other state than Kentucky; so that the plaintiff's case is not literally governed by *Union Pacific Railway Company v. Wyler*, where the substitution was that of a statutory cause of action for one arising at common law. Again, the plaintiff claims that the litigation in *Union Pacific Railway Com-*

pany v. Wyler arose in Missouri, while in the present case the litigation was initiated in Massachusetts, and that, although in the jurisdiction of the state of Missouri the amendment would be held to be one of an entirely new cause of action, it is otherwise in Massachusetts. If this proposition were correct, it might well be that the federal courts would be governed by the local practice, and that the question made here would not arise. In *Boston & M. R. R. v. Hurd* the litigation originated in the state of New Hampshire, and neither of these propositions was brought to our attention. We are able, however, to dispose of this appeal without reaching any definite conclusions on these particular points.

The substituted declaration contained three counts, one of which was admittedly and specifically based on the statutory laws of Kentucky. This was succeeded by a verdict in favor of the plaintiff. This also was succeeded by the fact that the defendant brought to the attention of the court the proposition that the statutory laws of Kentucky contained a conditional limitation of the same character as that noticed in *Union Pacific Railway Company v. Wyler* and *Boston & M. R. R. v. Hurd*, by virtue of which the right of action had already been lost at the time the amendment was allowed. The verdict was to a certain extent special, so that, on this being brought to the attention of the court, the court directed on the record as it stood a judgment for the defendant, applying to the case the rule of *Union Pacific Railway Company v. Wyler*, already cited. It is this latter ruling on which this appeal turns.

Yet the third count of the declaration as originally drawn stated every substantial fact necessary to create a case under the statutes of Kentucky. It described the intestate as a coal passer engaged in the defendant's employment aboard the steamship *El Valle*. It alleged that the defendant was a corporation existing under the laws of Kentucky; that it owned and employed the steamer named; that at the time of the alleged injury the steamer was on a voyage from New York to Galveston, and, therefore, on the high seas, as known to the court to be a geographical fact; that the intestate was scalded through the neglect of the defendant to provide him with a safe and suitable place in which to sleep, which amounted to a defect in the ways, works, and machinery connected with the business of the defendant, which had not been remedied in consequence of the defendant's negligence; that the machinery was defective in its piping and valves, permitting the improper and dangerous escape of live steam, all of which was through the fault of the defendant; that through the force of the live steam a pipe and valve burst, scalding the intestate, by reason of the defect and negligence described; that the intestate survived in intense pain and agony, and died from the scalding at the end of six days; that all the foregoing was in consequence of the negligence of the defendant, as already stated; and that the intestate left a widow surviving him. This was sufficient to create a cause of action under the statutes of Kentucky. The substituted count under those statutes on which the verdict was rendered repeated that the corporation was organized under the laws of Kentucky, and that the steamer was controlled and managed by the defendant, who employed the plaintiff,

and formally alleged that the voyage was on the high seas. It also expressly stated that while on the voyage the vessel was subject to the laws of Kentucky, which was enlarged upon. It also proceeded that, "by reason of the premises," the defendant became liable to the plaintiff's administrator by virtue of the provisions of the statutes of that state; and it gave extracts from them. All this new matter was inferable in a general way from what was originally pleaded; and therefore, so far as necessary at all, it could have been brought in by amendment of the original count without at all changing its essential nature.

It is to be borne in mind in this connection that *The Hamilton* did not declare a new rule of law, but simply stated one in effect when this suit was brought; so that the legal rights of the parties depend upon the rule as it then existed, and not on any subsequent declaration in regard to it. As the suit was brought after the decease of the injured coal passer, there was not only no action at common law for the damages arising from the death, but also at common law there was no survival of any cause of action whatever, because, although the injured employé survived a few days, the cause of action was merely a personal tort, which never survived at common law, or under any English statute which has been accepted as a part of our common law. Consequently there is no possibility that the original third count could have been construed as setting up a cause of action except statutory. It must be held that it alleged a statutory cause of action; and, in view of the decision in *The Hamilton*, and of the allegations to which we refer affecting the domicile of the corporation and of the steamship on which the injury occurred, and charging the survivorship of the widow, it must be held that the cause of action thus originally declared necessarily arose under the statutes of Kentucky.

The only irregularity which can be charged against the original third count is that it has been settled since *Walker v. Maxwell*, 1 Mass. 104, that according to the practice in Massachusetts, wherever the law of another state is relied on, it must be stated. It is also true there was no allegation that the tort was *contra formam statuti*; but in Massachusetts it never has been held that this formal allegation is usually necessary in remedial actions, though, of course, it might be convenient under some circumstances to inform the court whether the plaintiff was proceeding at common law or under some statute. At the most, we repeat that all these omissions were matters which can always be cured by amendment. In the eye of the law the cause of action must have been understood by the defendant as it appeared originally; so that it appeared always and identically the same from the beginning to the end, namely, one arising under the statutes of Kentucky. What may have been in the mind of the plaintiff or his counsel at the time the suit was brought is of no consequence in law, because the law limits a plaintiff to what appears of record in his declaration, and in like manner it gives him the benefit of whatever this may contain which may work for his advantage. Consequently, inasmuch as on this verdict for the plaintiff the court entered judgment for the defendant on the strength of the cases which we have cited, namely, *Union Pacific Railway Company v. Wyler*, 158 U. S. 285, 15 Sup. Ct.

877, 39 L. Ed. 983, and *Boston & M. R. R. v. Hurd*, 108 Fed. 116, 47 C. C. A. 615, 56 L. R. A. 193, the judgment must be reversed, leaving the verdict to stand; but this does not dispose finally of the case.

Prior to the judgment for the defendant, the defendant had filed one or more draft bills of exceptions. It also seasonably filed a motion for new trial. A waiver of the latter was made by the defendant, stating that this was in view of the ruling of the court on the defendant's motion for judgment in its favor. Under the circumstances, justice requires that this waiver should be discharged, and that the bills of exceptions should receive the consideration of the Circuit Court, and its action thereon, without being prejudiced by the subsequent occurrences. In other words, while the judgment for the defendant is set aside, the case should be restored in other respects, so that the defendant shall have the benefit of all draft bills of exceptions and of its motion for a new trial.

The judgment of the Circuit Court is reversed, and the case is remanded to that court with full leave to proceed in any manner not inconsistent with our opinion passed down this fourth day of March, 1910; and the plaintiff in error recovers his costs of appeal.

NORTHERN PAC. RY. CO. v. LUNDBERG.

(Circuit Court of Appeals, Ninth Circuit. February 14, 1910.)

No. 1,766.

1. MASTER AND SERVANT (§ 271*)—ACTION FOR INJURY TO SERVANT—INCOMPETENCY OF FELLOW SERVANT—EVIDENCE OF MASTER'S KNOWLEDGE.

In an action by a brakeman against a railroad company to recover for an injury received while coupling an engine to a car standing on a spur track, alleged to have been caused by the negligence of the engineer who it was alleged was incompetent and reckless to defendant's knowledge, defendant's records showing that the engineer had been several times suspended and reprimanded for acts of carelessness or incompetence were competent evidence in behalf of plaintiff on such issue.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 930; Dec. Dig. 271.*]

2. MASTER AND SERVANT (§§ 288, 289*)—ACTION FOR INJURY TO SERVANT—QUESTIONS FOR JURY.

The question of the contributory negligence of a brakeman who was injured while coupling a moving engine to a car on a spur track, and also the question whether his injury resulted from a risk of his employment, *held* properly submitted to the jury under the evidence.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1068-1132; Dec. Dig. §§ 288, 289.*]

In Error to the Circuit Court of the United States for the Western District of Washington.

Action by John P. Lundberg against the Northern Pacific Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

George T. Reid and J. W. Quick, for plaintiff in error.

Frank E. Vaughan, for defendant in error.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Before GILBERT and MORROW, Circuit Judges, and HUNT, District Judge.

HUNT, District Judge. This action was brought by John P. Lundberg, who is the defendant in error here, but whom we will call plaintiff, against the Northern Pacific Railway Company, to be herein called defendant, for damages arising from an injury to his left foot, necessitating its amputation, sustained by him while in the employ of the defendant company as a brakeman, while making a head-end coupling of an engine with a freight car located on a spur track, known as "Bouten-Perkins Spur," on the line of the defendant railway company between Kalama and Yacolt, in the state of Washington. The plaintiff's cause of action is based upon the alleged negligence of the defendant company in failing to provide an engine and cars equipped with safe and proper coupling appliances and apparatus and in permitting the engine to be operated by a negligent, reckless, and incompetent engineer, of whose incompetence the defendant company had notice and knowledge. The defendant denies negligence on its part, alleges that the plaintiff was guilty of contributory negligence, and that the facts, circumstances, and conditions which occasioned the accident were incident to and necessarily connected with his work as a brakeman, the risk of injury from which the plaintiff assumed when he entered upon and remained in the defendant's employment.

Just prior to the accident the plaintiff had uncoupled the engine from the train, and had unlocked and thrown the switch for the purpose of removing two cars loaded with ties, standing on the spur, to make room for four gondolas, or coal cars, which were to be cut out of the train and left on the spur. As the engine passed the plaintiff proceeding on the spur towards the cars, the plaintiff stepped on the pilot of the engine, and attempted with his hands to move the drawhead into position at the front of the engine, so as to make the coupling when the engine should come in contact with the drawhead of the car. The drawhead of the engine weighed from 100 to 125 pounds, worked very hard, and plaintiff was unable to adjust it with his hands because of the difficulty of moving it. The drawhead had a lateral play of about six inches, three inches each way from the center, in order that it might be used on a curve, and it appears that the spur track on which the cars were standing was slightly curved. The plaintiff testified that the engine was going at too high a rate of speed, and that as he approached the car, finding that the engine was going too fast, he put out his hand and signaled the engineer to slow down, to which the engineer gave no heed. The plaintiff was standing on the right side of the engine, with his back to the engineer, on a cleat about two feet long and four inches wide, bolted onto the bottom at the back or rear of the pilot, and was holding onto a rod with his left hand. When within 15 or 20 feet of the cars on the spur, being unable to move the drawhead with his hands and push it into position, the plaintiff placed his left foot back of the jaw or head of the drawhead to shove it over with his foot in case it was necessary to do so in order to make the coupling. His object was to have the drawhead in place when he got

within two feet of the car, but, the engineer failing to slow down when the slow signal was given, it came in contact with the car sooner than the plaintiff had anticipated, and the force of the contact kicked up the drawhead on the engine, causing plaintiff's foot to bounce up and off the drawhead, and the cars to roll a distance of from two to five feet—a coupling not having been effected—and his foot came down between the drawheads just as the engine and the car came together again, crushing it between the two drawheads.

Upon the trial of the case the plaintiff sought to prove that the engineer in charge of the locomotive on which he was injured was negligent, unskillful, reckless, and incompetent, and that the defendant company had been negligent in retaining the engineer after it had notice and knowledge of his want of skill and competency. For this purpose the plaintiff offered, and, over the objection of the defendant, was permitted to read, in evidence a record kept by the defendant company of complaints and charges which had been preferred against the engineer in question for various delinquencies in the discharge of his duty. The record, so offered and admitted, disclosed that Heasley, the engineer, entered the employ of the defendant company on November 3, 1899; that in December, 1899, he was given a 30 days record suspension for carelessness in starting a train, and again during the same month a 10 days record suspension for attempting to take water at a tank without cutting his engine from the train. In October, 1900, he was given a 60 days record suspension for making an agreement with the crew of an opposing train that he met on the main line not to make any official report of it, a 30 days record suspension in January, 1901, for poor judgment in making a stop at a water tank, and in August, 1902, a reprimand for derailing a car. In December, 1902, he was given a five days record suspension for running his engine off an open switch, and in August, 1902, he was reprimanded for allowing unauthorized persons to ride in his engine. In April, 1904, he was given a 60 days record suspension for damage to a car on the Kalama Transfer Boat, and in March, 1908, a 30 days suspension for the derailment of an engine at Richfield. In addition to the record just referred to, there was introduced a letter from the defendant company to Engineer Heasley, dated September 1, 1902, reading as follows:

"On August 23d a car was derailed on the transfer boat while train was pulled on. The car was pulled the full length of the boat with truck off the track, although stop signals were given you as soon as the car went off. You were given signals by the use of whistle on road engine which was also on the boat. Apparently no attention was paid to these signals. Derailment caused bad delay to several trains. Investigation shows clearly that you were not keeping proper lookout for signals or using caution such as you should have done in doing work at a place requiring extra precaution. It is expected that you will be more careful in the future."

And again, another letter, dated April 18, 1904, to the same engineer, which read:

"On Sunday, April 10th, while placing first section of train 1 on transfer steamer at Kalama, the forward truck of sleeper Helena was pushed off the stock block at the end of the boat, breaking same and air connections and knocking the track off the center, making it necessary to leave the sleeper on the boat and transfer the passengers. This accident reflects seriously upon the

service, and indicates carelessness on the part of employes. Careful investigation has been had, and it is found that the accident was caused by your failure to obey signals which were given by person from your side of the engine and which you should have seen if you had been looking for them. Failing to see stop signal. It is your duty to stop when the man giving you signals disappeared from view. This being the case, the conclusion is reached that you are responsible for the accident. This is a very serious matter, and you are well aware of the responsibility resting upon men doing the work at that point, and that men are only assigned to such duty because it is expected that they will realize the increased responsibility attendant upon such a position and act accordingly. As you seem to fail to fully realize this the only action possible has been taken; that is to transfer you to some other run with the expectation that your service in such a capacity will demonstrate that you have learned a lesson from this occurrence. For improper service as outlined above a suspension of 60 days has been entered against your record."

The action of the court below in admitting this record and these letters, and the refusal of the court afterwards on motion of defendant to strike out this evidence, are assigned as errors, and the case of *Southern Pacific Co. v. Hetzer*, 135 Fed. 272, 68 C. C. A. 26, 1 L. R. A. (N. S.) 288, is cited to sustain the defendant's contention. In that case *Hetzer*, the plaintiff in the court below, was the rear brakeman of a train of 22 cars which one *Delano*, the engineer in charge of the train, was backing into a gravel pit. As the train approached a switch, which it was *Hetzer's* duty to throw, he gave the slow signal, and his fellow brakeman gave the stop signal to the engineer. The engineer applied the air, *Hetzer* fell to the track, and one of the wheels of the rear car passed over his leg, after which the train came to a stop. He sued the defendant company for negligence in employing and keeping in its employ an incompetent engineer. For the purpose of proving the alleged incompetency of the engineer, *Delano*, the plaintiff, *Hetzer*, was asked by his counsel on the trial of the case if there was any other occurrence of sudden stopping or jerking of the train while *Delano* was in charge of it as the engineer during the day of the accident, and, over the objection of the defendant, the plaintiff was permitted to testify that about three hours before the accident *Delano* stopped his train in a very rough manner, causing the plaintiff to stagger. Evidence of another act of a similar character on the part of the engineer was admitted in evidence over the objection of the defendant company. No attempt was made to bring home to the defendant any knowledge of the engineer's carelessness, and no showing was made either that *Delano* was habitually reckless and careless, so as to charge the defendant company with knowledge thereof, nor was it shown that the defendant company was aware, or had notice, of any acts indicating that the engineer had been reckless or careless on previous occasions, or that he was incompetent to discharge the duties of his employment. It was therefore held that the trial court committed error in admitting this testimony, in the absence of any showing of knowledge on the part of the company. But, in the discussion of the question presented in that case, the court distinctly states the rule to be well settled that prior acts of an engineer, showing want of care and indicating incompetence, are admissible in evidence where knowledge of such acts is brought home to such defendant company. The Court of Appeals said:

"Specific acts of negligence of which the master has notice are conceded to be admissible to prove incompetency and a general reputation for incompetence is admissible to show that the master by the exercise of reasonable care would have known of the incompetence of the servant. In the case at bar there was no evidence that the master knew, or that by the exercise of reasonable care it would have known, of the two specific acts of negligence, the evidence of the commission of which is here challenged, and the question is: Are specific acts of negligence of which the master has no notice admissible to prove the incompetence of his servant whom he has exercised due care to employ? * * * Bearing in mind, now, that it is conceded that specific acts of incompetence of the servant, notice of which was brought home to the master before the accident, are admissible on the issue of his negligence in failing to discharge him, and that the question here is not whether acts known to the master, or so notorious that they ought to have been known, are admissible, but whether or not specific acts of which he had no notice or knowledge are competent to establish the incompetence of the servant, let us consider the authorities upon which counsel for the plaintiff rely."

A number of cases are cited by the court in its opinion, and to the same effect is the case of *Conover v. Neher-Ross Co.*, 38 Wash. 172, 80 Pac. 281, 107 Am. St. Rep. 841. The defendant's objection, therefore, was not well taken, and no error was committed by the trial court in that respect.

The defendant company moved for a nonsuit, and, at the close of the case, for a directed verdict in its favor, on the grounds that there was no evidence of negligence on the part of the defendant, that the evidence showed contributory negligence on the part of the plaintiff, and that he assumed the risk of the injury sustained under the circumstances disclosed by the evidence. It is contended that the court committed error in denying these motions. The plaintiff had been in the employ of the defendant company as a brakeman approximately a year at the time of the accident, which occurred on Friday, June 14, 1907, and had worked a considerable portion of that time as a switchman in the company's yard at Vancouver. The engine used in removing the freight cars from the Bouten-Perkins Spur on that day had been used for switching purposes on the Sunday before in the yard at Vancouver, the plaintiff making the couplings necessary for that purpose. He noticed at that time that the drawbar or drawhead at the front of the engine was not in good working order, in that the front end of the drawhead was from 2 to 2½ inches lower than the rear end. It made it very hard to work the drawhead in moving it into position, and it made it necessary to run the engine with greater speed in order to effect a coupling than would have been required if the drawbar or drawhead had been in proper condition and repair. The plaintiff, however, made the couplings with the drawhead in that condition all day on the preceding Sunday in the Vancouver yard, but, on account of the difficulty in handling it, he would place it in such position so as to enable him to move it into place with his foot, as he did on the day of the accident, when approaching the car with which the coupling was to be made. He called the attention of a Mr. Ritchie, the foreman of the crew, and the person in charge of the switch yard at Vancouver, to the condition of the drawhead, and told him it was working entirely too hard. He had no occasion to use the engine again for the purpose of making a coupling until the following Friday, the day of the accident, and did not know that it was the same engine which had been used

in the yard on the Sunday before until he took hold of the drawhead for the purpose of placing it in position to make the coupling. Finding that the drawhead was still in the same condition in which he found it on the preceding Sunday, he gave the engineer the slow signal, which he expected would be observed. The engine was then within 15 or 20 feet of the car. The engine did not slow down, but the plaintiff says that some engineers will run their engines within five or six feet of a car and then stop and simply touch the drawhead in making the coupling, and, when he found that the engineer was not slowing down after the signal to do so had been given, he supposed that the engineer would follow that course. He had never worked with Heasley, the engineer, before the week during which the accident occurred, and he had no reason to suspect that his signal would not be heeded. He aimed to get the engine drawhead in position when within two feet of the drawhead of the car, but the engine was going too fast and came in contact with the drawhead of the car sooner than he had reason to expect. The plaintiff testified that the engine was going at the rate of at least six miles an hour, while the engineer and fireman say it did not exceed from three to four miles an hour. Both engine and car were equipped with automatic couplers, and a lever was running from the coupler to the side of the engine and also from the coupler to the side of the car with which a coupling could be made without going in between the cars, which levers were pulled, according to the testimony of Heasley, as follows:

"The proper way to adjust the drawhead is to place it in position with the hands just as Mr. Lundberg says he did, and then get out to the side of the car and adjust the knuckle by use of the lever which is for the purpose of binding the knuckle.

"Q. Is it necessary for the brakeman to be between the engine and car when making the coupling? A. No, sir. He should adjust his drawbar, and then step out to the side and make the coupling by use of the lever with which this and all automatic couplings are provided; and if he is on a curve, and it is necessary to change the position of the engine drawbar, he should stop the engine just before the couplings go together and adjust it in that way."

The plaintiff testified that, after he had given the signal to slow down and discovered that it was not complied with by the engineer, it would not have been possible for him to have left his place on the engine without great danger to himself, in view of the surrounding circumstances and the speed of the engine.

With reference to the rate of speed of the engine when approaching the car, the plaintiff says it was at least six miles an hour, while the engineer and fireman say it was not more than three or four miles an hour. The plaintiff testified that the engine struck the drawbar of the car twice, while the engineer and fireman say that the engine and car came in contact but once. Defendant produced a witness who had had many years of practical railroad experience, and who testified that, while it would not be careless for a brakeman to put his foot on the drawbar, yet he thought it would be careless for him to keep his foot there until the couplings came together; it being dangerous because of the jar. Such other differences as there may be in the testimony given by the witnesses are not important in the consideration of this case. The case is quite close, yet, after reading the whole testimony,

we are of opinion that the trial court did not err in refusing to direct verdict for the defendant.

The law is well settled to the effect that, whenever there is room for a reasonable difference as to the inference and conclusions that may be drawn from the facts, the case should be submitted to the jury. "Whether there has been contributory negligence on the part of the plaintiff is a question for the jury, under the same circumstances and subject to the same limitations as the question whether there has been negligence on the part of the defendant." 1 Thompson on Negligence, §§ 425, 426, and cases cited; *Rochford v. Pennsylvania Co.*, 174 Fed. 81.

The question of assumption of risk also involved consideration of the facts and circumstances adduced upon the trial, and was properly submitted to the jury. 4 Thompson on Negligence, § 4657; *Mason & O. R. Co. v. Yockey*, 103 Fed. 265, 43 C. C. A. 228; *Louisville & N. R. Co. v. Kelly*, 63 Fed. 407, 11 C. C. A. 260; *N. Y. & T. S. S. Co. v. Anderson*, 50 Fed. 462, 1 C. C. A. 529; *N. P. R. Co. v. Mares*, 123 U. S. 710, 8 Sup. Ct. 321, 31 L. Ed. 296; *Alder Co. v. Fleming*, 159 Fed. 593, 86 C. C. A. 419; *New England Tel. & Tel. Co. v. Butler*, 156 Fed. 321, 84 C. C. A. 217; *Eastern & Western Lumber Co. v. Ragley*, 157 Fed. 532, 85 C. C. A. 296; *N. P. R. Co. v. Herbert*, 116 U. S. 648, 6 Sup. Ct. 590, 29 L. Ed. 755; *Seewald v. Harding Lumber Co.*, 49 Wash. 658, 96 Pac. 221.

These authorities are decisive of the questions involved. The cases cited by the counsel for plaintiff in error have been read and carefully considered, but they are not applicable to the facts in the present record. We find no error, and the judgment of the Circuit Court must be affirmed.

ILLINOIS STEEL CO. v. RAMSEY et al.†

SAME v. AIGLER et al.

(Circuit Court of Appeals, Eighth Circuit. January 29, 1910.)

Nos. 2988, 3011.

1. APPEAL AND ERROR (§ 95*)—APPEALABLE ORDER—FINALITY OF DETERMINATION.

Where a court by its receiver has taken possession of all of the property of a corporation in a creditors' suit, another creditor may in a proper case intervene in such suit as matter of right, and an order denying it such right is appealable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 652; Dec. Dig. § 95.*]

Finality of judgments and decrees for purposes of review, see notes to *Brush Electric Co. v. Electric Improvement Co. of San Jose*, 2 C. C. A. 379; *Central Trust Co. of New York v. Madden*, 17 O. C. A. 238; *Prescott & A. C. Ry. Co. v. Atchison, T. & S. F. R. Co.*, 28 C. C. A. 482.]

2. APPEAL AND ERROR (§ 143*)—PERSONS ENTITLED TO APPEAL—INTERVENERS.

Where a petitioner was permitted to intervene in a cause, and process issued on its petition to bring in new parties, it thereby became a party

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied April 15, 1910.

to the cause, and the court cannot thereafter strike its petition from the files without the right to appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 921; Dec. Dig. § 143.*]

3. PARTIES (§ 96*)—INTERVENTION—WAIVER OF OBJECTION.

The complainant in a creditors' suit, by consenting to the issuance of process on a petition of intervention filed by another creditor and by demurring thereto, waived the right to thereafter object to the right of such creditor to intervene.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 175; Dec. Dig. § 96.*]

4. RECEIVERS (§ 120*)—POWER TO AUTHORIZE ISSUE OF RECEIVER'S CERTIFICATES.

A court of equity which has appointed a receiver for the property of a railroad company to be administered for the benefit of creditors has power to authorize the receiver to raise money necessary for the preservation and management of the property by the issuance and sale of receiver's certificates, but such power is to be exercised with great caution, and, if possible, with the consent or acquiescence of the parties interested in the fund, and where there is objection receiver's certificates should not be issued on the unsupported petition of the receiver.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 208; Dec. Dig. § 120.*]

Receivers' certificates, see note to *Postal Tel. Cable Co. v. Vane*, 28 C. C. A. 350; *Nowell v. International Trust Co.*, 94 C. C. A. 601.]

5. RECEIVERS (§ 117*)—POWER TO AUTHORIZE ISSUE OF RECEIVERS' CERTIFICATES.

The power of a court of equity, which has undertaken the administration of railroad property through its receiver for the benefit of creditors to authorize the issue of receivers' certificates, is limited by, and is coextensive with, its obligation to conserve the property in its custody, and any expenditure of money that has not this primary purpose is beyond the power of the court, and unauthorized.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 204; Dec. Dig. § 117.*]

6. RECEIVERS (§ 119*)—POWER TO AUTHORIZE ISSUE OF RECEIVERS' CERTIFICATES.

A receiver was appointed for the property of a railroad company having a road 130 miles in length in a creditors' suit by a creditor having a judgment for less than \$2,400, and within four months thereafter on application filed by the president of the company as agent of the receiver, unsupported by any evidence, without notice to other parties in interest, and against the objection of a large creditor, the receiver was authorized to issue certificates to the amount of \$200,000 to be a part of a total issue of \$500,000. *Held*, that the court exceeded its power in making such order, which, without satisfactory proof that the issue of the certificates was necessary to conserve the property in the interest of creditors was wholly unauthorized.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 207; Dec. Dig. § 119.*]

Appeals from the Circuit Court of the United States for the Eastern District of Oklahoma.

In Equity. Suit by Ralph W. Aigler against the Oklahoma Central Railway Company and the Canadian Valley Construction Company. The Illinois Steel Company appeals from an order striking from the files its amended petition in intervention and from an order authorizing Asa E. Ramsey as receiver for the defendant railroad company to issue receiver's certificates. Both orders reversed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

June 2, 1908, Ralph W. Aigler, as a judgment creditor of the Oklahoma Central Railway Company, filed a bill in the United States Circuit Court for the Eastern District of Oklahoma in behalf of himself and all other creditors against said Railway Company and the Canadian Valley Construction Company, wherein he prayed for an accounting between the Railway Company and the Construction Company, and that all the property, income, tolls, issues, and profits as well as the assets of every name and nature of said defendant Railway Company might be sold at a judicial sale, and the proceeds thereof justly and equitably applied for the equal benefit of all creditors of said company in accordance with their just liens, rights, and claims; that a receiver be appointed to take possession of the property and assets of the Railway Company and administer the same under the direction of the court until a sale could be had. On the same day, by consent of the Railway Company, Asa E. Ramsey was appointed such receiver. On July 1, 1908, the Illinois Steel Company, a corporation of the state of Illinois, and a creditor of the Railway Company in the sum of \$129,124.64 for steel rails, steel splice bars, steel track spikes, and steel track bolts, sold to said Railway Company and used in the construction of its railway, on leave granted by the court filed its petition in intervention in said action, and prayed therein that process issue against all parties interested, and that upon final hearing the claim of said Steel Company be adjudged a prior lien on all the property of said Railway Company and paid by the receiver as a preferred debt and obligation of said Railway Company. July 23, 1908, Aigler, through his attorneys, filed in court a consent that the Steel Company, as intervener, should have a writ of subpoena against all parties in interest not then of record in said suit. On September 15 and 16, 1908, Aigler, the complainant, and Ramsey, the receiver, demurred to the petition in intervention for want of equity. October 10, 1908, after argument, the court sustained the demurrer of Aigler, and granted leave to the Steel Company to amend its petition within 30 days. November 6, 1908, the Steel Company filed its amended petition in intervention, which was as follows:

"(1) That it is a corporation duly organized and existing under and by virtue of the laws of the state of Illinois; that it has its principal place of business in the city of Chicago, in the county of Cook, in said state; that it is engaged in the business, among other things, of manufacturing and selling steel rails, splice bars, spikes, and bolts.

"(2) That the Oklahoma Central Railway Company is a corporation organized and existing under and by virtue of the territory of Oklahoma, now state of Oklahoma, and a citizen of the state of Oklahoma, and the Canadian Valley Construction Company is a corporation organized and existing under and by virtue of the laws of the United States, applicable to and in force in the territory formerly known as Indian Territory, now a part of the state of Oklahoma; that said defendant, the Oklahoma Central Railway Company, is authorized to construct, own, and operate a railway from the city of Lehigh in a northwesterly direction through the counties of Coal, Pontotoc, Garven, McLain, and Grady, all located in the Eastern judicial district of Oklahoma; that the Canadian Valley Construction Company was organized for the purpose of constructing the railroad aforesaid.

"(3) That on the 23d day of December, 1905, your intervening petitioner entered into a written contract with said defendant, the Oklahoma Central Railway Company, to sell and deliver to the said Railway Company, 15,000 gross tons of No. 1 steel rails; also a sufficient quantity of its standard steel splice bars to lay the rails covered by said contract, said Railway Company agreeing to accept not exceeding 5 per cent. of No. 2 steel rails, in addition to the above-mentioned quantity of No. 1 steel rails, and said Railway Company, agreeing to pay for first quality steel rails \$28 per gross ton and \$26.60 per gross ton for second quality steel rails and \$1.50 per 100 pounds for said splice bars, said parties also agreeing to furnish and receive the necessary standard steel track spikes at \$1.85 per one hundred pounds and the necessary standard steel track bolts at \$2.45 per one hundred pounds.

"(4) That your petitioner in fulfillment of said contract delivered to said Railway Company 13,430 ¹¹⁴⁰/₂₂₄₀ tons of first quality steel rails, 676-²²²⁰/₂₂₄₀ tons of second quality steel rails, 4,265 kegs of spikes, 785 kegs of bolts, and 907 ¹⁸⁴⁰/₂₂₄₀ tons of splice bars; that the balance of said steel rails, splice bars, spikes, and bolts called for by said contract were not de-

livered for the reason that said defendant Railway Company was in default under said contract, in that it had failed to pay for the material already delivered in accordance with the terms of said contract.

"(5) That there became due to your petitioner under the terms of said contract long before the filing of this petition the sum of \$129,424.64, together with interest thereon; that there is now due and owing to your petitioner from said Railway Company under the terms of said contract, after allowing said Railway Company all just and proper credits, the sum last above mentioned.

"(6) That your petitioner has frequently requested said Railway Company to pay your petitioner the balance so due and unpaid, but said Railway Company has neglected and failed so to do.

"(7) That all of the steel rails, splice bars, spikes, and bolts delivered as aforesaid by your petitioner to said Railway Company were used as your petitioner is informed and believes in the construction, maintenance, operation, and repair of the railroad of said Railway Company; that all or a part of said material was necessary and essential as your petitioner is informed and believes to enable said defendant to operate its road as a going concern; that such use of said steel rails, splice bars, spikes, and bolts has largely increased and added to the value of said railroad, and has substantially increased the assets of said defendant Railway Company; that by means and by reason of such use of said steel rails, splice bars, spikes, and bolts your petitioner ought to have and is entitled to a lien upon all the property, real, personal, and mixed, of said defendant.

"(8) That your petitioner is the holder as security for its claim of 160 first-mortgage trust bonds of said Railway Company, which said bonds are secured by a trust deed to Western Trust Savings Bank of Chicago, Ill., conveying to said bank all of the property of said Railway Company of every kind, character and description, including rights and franchises; that said trust deeds securing said bonds is a lien upon all of the property of the Oklahoma Central Railway Company, and that as the holder of 160 of the bonds secured by said trust deed this petitioner is entitled to and has a lien upon all of the assets of said Railway Company.

"(9) That said defendant, the Railway Company, was organized as your petitioner is informed and believes some time in the month of September, 1904, for the purpose of building a line of railway as above alleged in the second paragraph hereof; that the persons who were connected with and were instrumental in the organization of said Railway Company were, as your petitioner is informed and believes, Dorset Carter, of Purcell, Oklahoma, Herman Wollenburger, J. S. Keefe, Willoughby G. Wallen, and Joseph E. Otis, of Chicago, Illinois, Solomon Frederick Van Oss, The Hague, Holland, and certain other persons to your petitioner unknown; that the authorized capital stock of said company is \$10,000,000; that thereafter and prior to the 14th day of September, 1905, these same persons caused to be incorporated the Canadian Valley Construction Company with a capital stock of \$30,000, of which as your petitioner is informed and believes \$16,000 has been paid in; that the president of said Railway Company has at all times been one Dorset Carter, who has also acted and is now acting as general manager of said Construction Company; that the officers and directors of said Construction Company whose names are unknown to your petitioner with the exception of said Dorset Carter, have been and are mere dummies; that said Construction Company has always been and is now under and subject to the control of the officers and directors of said Railway Company; that the said Construction Company was organized by the persons aforesaid for the sole purpose of building the railroad of said Railway Company; that, through said Construction Company, the persons aforesaid planned to use and put upon the market an amount of stock and bonds largely in excess of the cost of the railroad of said Railway Company; that said Construction Company was organized as aforesaid merely as a scheme or device to enable the persons aforesaid to obtain all of the capital stock of said Railway Company.

"(10) That pursuant to said scheme, the officers and directors of said Railway Company, on or about the 14th day of September, 1905, entered into a contract purporting to be made between said Railway Company and said Construction Company, but as a matter of fact between said officers and directors

as represented by the Railway Company and themselves; that in and by the terms of said contract said Construction Company agreed to construct the line of railway of said Railway Company along the route already surveyed, said Construction Company to furnish, secure, and pay for all necessary right of way and all material used in the construction of said road, to construct necessary water tanks, to build all necessary fence, to construct and furnish complete station buildings, side tracks, repair shops, engine houses, turntables, coal chutes, and six steel bridges, and to equip said road when constructed with rolling stock and motive power, and provide at its own expense the best and most suitable tools and appliances; said Construction Company further to pay in full for all materials and equipment by it furnished for the construction and operation of the line, and for all labor and every other liability incurred in connection with the construction of said road; that in payment therefor said Railway Company agreed to pay or cause to be paid to the Construction Company as and when it completed each 10 miles of the main line of said road, its first-mortgage 5 per cent. gold bonds to the amount of \$200,000 and \$200,000 of its capital stock; that your petitioner is informed and believes that it was the belief and expectation of the incorporators of said Railway Company being the persons aforesaid that said railroad could be built and equipped in accordance with the terms of said contract for not exceeding \$18,000 per mile; that the actual cost of the construction and equipment of said railroad proved to be about \$19,000 per mile; that the cost of the construction and equipment of said railroad did not exceed \$20,000 per mile; that the total length of said railroad is approximately 130 miles and that the total cost thereof has been considerably less than \$2,600,000.

"(11) That thereafter on or about the 1st day of November, 1905, said persons caused a trust deed to be made by the Railway Company to Western Trust & Savings Bank of Chicago, dated the first day of November, 1905, whereby said Railway Company conveyed to said trustee all of its estate and property, including its right of way in trust to secure a total authorized issue of first-mortgage 5 per cent. gold bonds, not exceeding in the aggregate \$10,000,000, said bonds being dated the 1st day of December, 1905; that under and pursuant to the original plan and scheme of the incorporators of said railroad bonds of the total sum of \$2,640,000 were executed by said Railway Company and certified by said trustee, and delivered as your petitioner is informed and believes either to said Construction Company or to the incorporators of said Railway Company, said bonds being delivered during the course of the construction of said railroad; that additional bonds as your petitioner is informed and believes have been issued and certified amounting to \$540,000; that the persons heretofore referred to as the incorporators of said railroad caused said Railway Company to issue to said Construction Company a certificate or certificates for 27,100 shares of the capital stock of said Railway Company of the par value of \$2,710,000.

"(12) That after the organization of said Railway Company and said Construction Company, the persons mentioned above and others who were unknown to your petitioner as your petitioner is informed and believes, organized a syndicate for the purpose of disposing of the stock and bonds of said Railway Company; that all of said stock and bonds issued as aforesaid were turned over as your petitioner is informed and believes to said syndicate; that said syndicate was controlled and managed by Herman Wollenburger, at the time of the organization of said Railway Company the vice president of the Western Trust & Savings Bank, the trustee of said bonds, Joseph E. Otis, the president of said bank, Solomon Frederick Van Oss, and J. F. Keefe, heretofore referred to, and Abraham Oppenheim; that said syndicate as your petitioner is informed and believes entered into a contract with said Construction Company by the terms of which said syndicate agreed to underwrite the bonds and stocks received by said Construction Company from said Railway Company on the basis of \$800 for each bond and each 10 shares of stock—that is to say, said Construction Company was to receive for every bond and 10 shares of stock of said Railway Company the sum of \$800; that under and pursuant to said agreement all of the outstanding bonds and 27,100 shares of stock of said corporation were delivered to said syndicate; that neither said Construction Company nor said Railway Company has ever received any compensation or consideration for the shares of stock issued by said Railway

Company to said Construction Company and by said Construction Company delivered to said syndicate.

"(13) That your petitioner is informed and believes that said syndicate now owns many of said bonds; that it has sold a large part thereof to various persons whose names are to your petitioner unknown at a discount of approximately 20 cents on the dollar upon the agreement and understanding that such purchasers are to participate in the capital stock of said corporation on a basis unknown to your petitioner; that said syndicate has issued to purchasers of said bonds a certificate evidencing the interest of said syndicate member and said purchaser in the stock of said Railway Company; that the records of the commissioner of corporations of the state of Oklahoma show that the 27,100 shares above mentioned stand on the books of the Oklahoma Central Railway Company in the name of the Canadian Valley Construction Company, but have been indorsed in blank by said Canadian Construction Company and are in the hands of the following named trustees: Joseph E. Otis, The Rookery, Chicago; J. S. Keefe, No. 1222 Commercial National Bank Building, Chicago; H. Wollenburger, The Rookery, Chicago; S. F. Van Oss, The Hague, Holland; that by reason of the facts above set forth the said trustees, Joseph E. Otis, J. S. Keefe, H. Wollenburger, and S. F. Van Oss are personally liable to said Railway Company for the amount of the par value of the stock standing in their names; that each of the participants in the syndicate to the extent of his participation is likewise liable to said Railway Company.

"(14) Your petitioner further shows that some time prior to the 2d day of June, 1908, the funds derived from the sale of said bonds became exhausted; that said Railway Company and said Construction Company were both heavily in debt; that said railroad was not entirely completed and equipped, and the members of said syndicate were unable to raise further funds from the sale of additional bonds for the purpose of paying off the indebtedness of said company and completing said railroad; that for the purpose of financing said railroad until it should prove to be either a success or a failure, and for the further purpose of hindering and delaying the creditors both of said Railway Company and of said Construction Company, the members of said syndicate determined to place said Railway Company and said Construction Company in the hands of receivers; that thereupon, as your petitioner is informed and believes, all or a part of the members of said syndicate being the same persons who had planned and procured the incorporation of said Railway Company and said Construction Company, acquired from Fairbanks, Morse & Co., of Chicago, Ill., a note of said Railway Company in the sum of \$2,301.11; that thereafter on the 2d day of June they caused a suit to be commenced on the common-law side of this court by Ralph W. Aigler on said note; that on the same day judgment was confessed by Dorset Carter, the president of said Railway Company, and a judgment was entered for the sum of \$2,424.34; that thereafter on the same day—that is, on the 2d day of June, 1908—an execution was issued on said judgment, and a return of said execution (no property found) was at once made at the direction of counsel for plaintiff; that your petitioner is informed and believes and so states the facts to be that no levy or demand was made; that said judgment was obtained and said return was procured for the sole purpose of giving the court jurisdiction to entertain a creditor's bill; that your petitioner is informed and believes and so states the fact to be that the issuance of said execution and the return thereof (no property found) was not made in good faith; that thereafter and on the same day said persons composing said syndicate caused a creditor's bill to be filed by said Aigler upon said judgment and a receiver to be appointed for said Railway Company; that said creditor's bill was based upon the judgment above mentioned and the return of an execution thereon (no property found); that because of the fact connected with the issuance and return of said execution this court had no jurisdiction to entertain said creditor's bill and to appoint a receiver of said Railway Company; that therefore said creditor's bill should be dismissed and said receiver discharged; that so far as the above facts are matters of record your petitioner refers to the records and files of this court in the case above described, and makes said records and files a part hereof.

"(15) That upon the same day—that is, on the 2d day of June, 1908—Herman Wollenburger, vice president of the Oklahoma Central Railway Company and formerly vice president of Western Trust & Savings Bank, trustee under said mortgage, one of the managers of said syndicate, commenced a suit on the common-law side of this court against the Canadian Valley Construction Company; that on the same day a confession of judgment was filed by the Construction Company by Dorset Carter, its general manager, and an answer was filed admitting said indebtedness to J. F. Sharp, the general attorney of said Railway Company and of said Construction Company and one of the directors of said Railway Company, and thereupon a judgment was entered in the sum of \$5,175; that on the same day an execution was issued and returned by order of counsel for complainant (no property found); that on the same day—that is, on the 2d day of June, 1908—a creditor's bill was filed by said Wollenburger based upon said judgment, and a receiver was appointed by this court; that your petitioner is informed and believes and so states the fact to be that no demand was made for payment of the judgment aforesaid; that no levy was made upon said execution, and that the same was not returned in good faith (no property found), but that said judgment was entered, and said execution issued and caused to be returned (no property found) for the sole purpose of enabling said syndicate to place said Construction Company in the hands of a receiver; that, for the purpose of giving said proceeding a semblance of good faith and fairness, a bill of intervention was filed on the 4th day of June, 1908, by Solomon Frederick Van Oss, Alexander Van Oss, and Jacobus Santilhan, copartners trading under the firm name of Van Oss & Co., and Abraham Oppenheim, Louis Den Beer Poortugael, and Francois Van Alphan, copartners trading under the firm name of Oppenheim & Van Till, whose firms were both members of the syndicate above mentioned, setting up that they were holders of a large amount of the bonds of said corporation and stockholders in said corporation and joining in the prayer of said creditor's bill for the appointment of a receiver; that because of the facts alleged above said creditor's bill should be dismissed and said receiver discharged; that, so far as the things above alleged are matters of record, your petitioner refers to the files and records in this court in the cases described above and makes said files and records a part hereof.

"(16) That on the same day—that is, on the 2d day of June, 1908—the same persons who had caused the suits above mentioned to be begun against said Railway Company and said Construction Company caused a bill to be filed by the Western Trust & Savings Bank as trustee under the trust deed hereinbefore described in this court for the apparent purpose of foreclosing said trust deed; that the prayer of said bill is for a foreclosure of said trust deed and for the appointment of a receiver; that in and by said trust deed it was and is the duty of said trustee to protect the interests of the holders of the bonds secured by said trust deed; that said trustee unmindful of its duty under said trust deed caused said bill to be filed for the sole purpose of rendering more stable if possible the appointment of the receiver appointed in the case of Aigler v. Oklahoma Central Railway Company, above mentioned, and for the additional purpose of hindering and delaying the creditors of said Railway Company; that the actions of said trustee in this matter are entirely directed by the promoters of said Railway Company and the syndicate aforesaid, and its actions in bringing this suit were entirely in behalf of said persons: that at least two of the officers of said Western Trust & Savings Bank are directly and financially interested in promoting said railroad; that the president of said bank is one Joseph E. Otis, who is also one of the managers of the syndicate hereinbefore mentioned, and one of the trustees holding practically all of the stock of said Railway Company; that the secretary of said bank is one Willoughby G. Wallen, who is also the treasurer of said Railway Company, who, as your petitioner is informed and believes, is largely interested in said underwriting syndicate; that since the institution of said suit by said Western Trust & Savings Bank nothing further has been done therein; that no effort has been made by said trustee to intervene or take part in the suit of Aigler v. Railway Company, aforesaid, but on the contrary said trustee has wholly neglected to protect the interests of the bondholders in said suit.

"(17) That your petitioner is informed and believes and so states the fact to be that the real holders and owners of the note given by the Oklahoma Central Railway to Fairbanks, Morse & Co., above described upon which the judgment was obtained by said Aigler and said creditor's bill by him brought are largely indebted to said Railway Company, upon subscriptions to the capital stock of said company; that the indebtedness due said Railway Company from the holders and owners of said note should be set off as against the amount due upon said note; that in case this is done, it will be found that the holders and owners of said note are largely indebted to said Railway Company over and above the amount of said note.

"(18) That your petitioner is informed and believes and so states the fact to be that the said Herman Wollenburger, the plaintiff in the action on the common-law side of this court above described and the complainant in the creditor's bill hereinabove mentioned is largely indebted to said Railway Company for unpaid subscriptions to its capital stock; that it will be found that said Wollenburger is indebted to said Railway Company largely in excess of the amount due on said note; that such indebtedness for said unpaid subscriptions should be set off as against the amount due said Wollenburger on the note described in said actions.

"(19) Your petitioner further alleges that the institution of all of said actions is a part of the scheme of the promoters of said Railway Company and the members of said syndicate to avoid their liability as stockholders and to hinder and delay their creditors; that although each one of said actions purports to be brought in good faith by different parties represented by different counsel and solicitors, nevertheless, as your petitioner is informed and believes all of said actions were instituted at the instigation of the same parties and are being conducted by the same counsel; that this court should either dismiss all of said actions and discharge the receivers appointed therein, or if it is believed that a receiver should be allowed to remain in charge of the property of said railroad for the purpose of protecting the interests of all parties, then all of said suits should be consolidated and a new receiver appointed to take charge of and manage all of the properties of said Railway Company.

"(20) That the organization of the Canadian Valley Construction Company was a fraudulent device and scheme of the promoters of said railroad for the purpose of enabling them to obtain possession of and hold, or place upon the market, the stock of said railroad company without paying therefor; that said scheme was and is a fraud upon the creditors of said Railway Company; that by means of said device stock of the par value of \$2,710,000 was issued and delivered without any consideration therefor whatsoever; that many persons, as your petitioner is informed and believes, are equitable owners of a part of said stock, the legal title to which is in the trustee above mentioned; that all the members of said syndicate and all of the equitable holders of said stock received and obtained their interest in said stock while knowing that nothing whatsoever had ever been paid therefor, and that said stock was wholly unpaid for; that if a receiver is continued in charge of the property of the said Railway Company he should be directed to proceed at once by appropriate action to collect the amounts unpaid on the subscriptions to the capital stock of said Railway Company; that if a sale of the assets and property of said Railway Company shall be found to be necessary before the institution of the action last above mentioned then said assets and property should be sold subject to said mortgage.

"(21) That your petitioner brings this bill in behalf of himself and all other creditors of said defendant similarly situated."

The Steel Company in its prayer prayed that all the parties mentioned in its said petition should be made parties defendant; that the bills of Aigler and Wollenburger be dismissed and the receivers discharged; that if the court should determine that said creditors' bills should not be dismissed, then that they be consolidated and proceeded with as one case; that your petitioner be allowed to become a co-complainant in said consolidated cause, and that a new receiver be appointed therein; that the intervening petition of the Steel Company might stand as an answer of the Steel Company to the bills of complaint in the Aigler and Wollenburger suits; that the relief asked for

in said bills be denied; that in the event said creditors' bills should not be dismissed that an account might be taken as to the claim of the Steel Company against the Oklahoma Central Railway Company, and the amount found due from said Railway Company to your petitioner ascertained, and that said Steel Company might be decreed to be entitled to a lien upon all of the property of said Oklahoma Central Railway Company, or its receiver might be decreed to pay to said petitioner the amount so found due with interest thereon in due course as a prior and preferred debt of the Railway Company. The bill of intervention also prayed for process and general relief.

Upon the filing of the amended petition in intervention on November 6, 1908, Aigler, through his attorneys, moved the court for an order setting aside and vacating the order of July 1, 1908, allowing the Steel Company to intervene and so much of the order made October 10, 1908, as gave the Steel Company leave to file an amended petition, and striking from the files the original and amended petitions in intervention. The court after argument on November 6, 1908, granted said motion, and struck both the amended and original petitions in intervention from the files of the court. The Steel Company on the same day appealed from said order to this court, and the appeal is No. 3,011 of this record. That there may be no confusion in regard to the record it may be stated that one Gibson was appointed receiver of the Construction Company in the Wollenburger suit on June 2, 1908, but was ordered by the court on August 7, 1908, to turn over the possession of the property in his hands to Ramsey, the receiver of the Railway Company, which was accordingly done.

On October 10, 1908, Dorset Carter, stated in the intervening petition of the Steel Company to have been the president of the Railway Company and general manager of the Construction Company, as agent of Ramsey, the receiver of the Railway Company, applied to the court for the issuance of receiver's certificates, and based his application on a petition verified by himself. It does not appear that any notice was given of this application to any one interested. It does appear, however, by an order of the court made on the same day that the Steel Company did not have sufficient notice thereof. The order of the court sustaining the demurrer of Aigler to the original petition in intervention contained the following:

"It is further ordered that leave be granted to said Illinois Steel Company to file its amended intervening petition within thirty days from this date. And said cause then coming on to be heard upon the petition of the receiver herein recommending the issuance of the receiver's certificates and it appearing to the court that said intervener, Illinois Steel Company, desires to file objections to said petition, and it further appearing to the court that said intervener has not had sufficient notice of said application to enable it to prepare such objections, and it appearing also that there is an immediate necessity of proceeding with the hearing of said cause upon motion of solicitors for said intervener, Illinois Steel Company, it is ordered that said intervener, Illinois Steel Company, be granted leave to file objections to the application of the receiver herein for the issuance of receiver's certificates within thirty days from this date: that said hearing be had as if said objections had already been filed, and that said objections when filed be filed nunc pro tunc as of October 10, 1908, and relate back to said date for all purposes."

The court, however, in face of the admitted fact of want of notice, on the petition alone of Carter and on the same day it was filed, made the following order:

"And it is further ordered, adjudged, and decreed that Asa E. Ramsey, as receiver herein, be and he is hereby authorized and directed forthwith to issue and negotiate for the best price obtainable not less than 85%, his receiver's certificates in the denomination of \$1,000 bearing interest at the rate of 6% per annum, payable semi-annually, the certain installments for such to be evidenced by coupons in appropriate form, such certificates to mature three years after date, with the right, however, to the receiver to redeem the same at par, and accrued interest at any time after the sale of said Railway Company's property pursuant to a decree of this court upon giving 30 days' notice by publishing such notice once each week in some newspaper of general circulation in the state of Oklahoma and some newspaper of general circulation published in the state of New York in the principal sum of \$100,000, the proceeds whereof

are to be used in the payment of such obligations as remain unpaid incurred by the receiver of the Canadian Valley Construction Company while in the management, control, and operation of said Railway Company or paying the unpaid obligations incurred by the receiver herein in the management, control, and operation of said railway; for defraying the expenses of repairing and ballasting of the roadbed of said Railway Company not exceeding \$25,000; for building platforms and stockpens at convenient points along the right of way, not exceeding \$4,000; for building piers for the support of and installing a steel bridge over the Washita river not exceeding \$5,000; for paying notes of the said Railway Company held by the Pullman Company due upon the 1st days of June, July, August, September, and October, respectively, not exceeding \$4,500; for paying George Ristine \$210 for premium on insurance upon passenger equipment; for paying amount due Atchison, Topeka & Santa Fé Railway Company upon freight \$4,007.85; for paying traffic balances to connecting carriers not exceeding \$12,000; for paying terminal rental due Chicago, Rock Island & Pacific Railway Company \$3,635.56. The balance of the proceeds of said \$100,000 certificates, if any, after defraying the items hereinbefore provided for to be reported to this court, and to be held subject to the further direction of this court. Be it further ordered, adjudged, and decreed that the said Asa E. Ramsey, as receiver herein, be and he is hereby authorized and directed to issue his receiver's certificates of the same issue and upon the same terms in such amount as may be necessary to raise funds to pay such labor and salary claims, if any, incurred prior to June 2, 1908, as may hereafter be allowed as preferred claims against said Railway Company not to exceed \$194,000 in addition to the amounts heretofore authorized; such last-named certificates not to be issued before such claims are allowed as preferred against said Railway Company. Be it further ordered, adjudged, and decreed that all of the receiver's certificates herein authorized to be sold shall be a portion of a total issue of receiver's certificates not to exceed \$500,000, all of equal priority and lien, and that there shall remain in this court the right from time to time as in its judgment occasion may require to authorize and direct without notice to the holders of the certificates herein authorized, but upon due notice to all parties to this cause, further sales of the receiver's certificates, the total of which, however, with those herein authorized, shall not exceed \$500,000, which shall all be a portion of a total issue of \$500,000 all of equal priority and lien, and that such certificates now herein authorized or hereafter to be authorized portions of said \$500,000 shall be first prior and paramount liens upon all and singular the property, real and personal, of the said Oklahoma Central Railway Company, including the right of way, cars, locomotives, engines, machine shops, station houses, tools, buildings, equipment, and appurtenances superior to the lien of the trust deed securing the bond of said Railway Company and superior to all and every other lien or incumbrance whatsoever, but without priority or preference of one certificate over another by reason of its prior issue or for any other reason."

From this order the Steel Company appealed, and the appeal is No. 2,988 of this record.

William D. McKenzie (K. K. Knapp, R. W. Campbell, D. M. Tibbetts, and Fred W. Green, on the brief), for appellant.

George C. Preston (Charles H. Hamill, Lessing Rosenthal, and J. H. Gordon, on the brief), for appellees.

Before SANBORN, Circuit Judge, and CARLAND and POLLOCK, District Judges.

CARLAND, District Judge (after stating the facts as above). These appeals have been submitted upon one record. We are met at the threshold of appeal No. 3,011 with the objection that the order of November 6, 1908, striking the petition in intervention of appellant from the files is not appealable. The reason for the objection is the

rule stated in *Credits Commutation Company v. United States*, 91 Fed. 573, 34 C. C. A. 14, as follows:

"When leave to intervene in an equity case is asked and refused, the rule so far as we are aware is well settled that the order thus made denying leave to intervene is not regarded as a final determination of the merits of the claim on which the intervention is based, but leaves the petitioner at full liberty to assert his rights in any other appropriate form of proceeding. Such orders not only lack the finality which is necessary to support an appeal, but it is usually said of them that they cannot be reviewed because they merely involve an exercise of the discretionary powers of the trial court. *Ex parte Cutting*, 94 U. S. 14 [24 L. Ed. 49]; *Hamlin v. Railroad Co.*, 78 Fed. 664 [24 C. C. A. 271, 36 L. R. A. 826]; *Jones & Laughlins v. Sands*, 79 Fed. 913 [25 C. C. A. 233]; *In re Street*, Petitioner, 62 Fed. 218 [10 C. C. A. 446]."

In this same case, however, the court also said:

"It is doubtless true that cases may arise where a denial of the right of a third party to intervene therein would be a practical denial of certain relief to which the intervener is fairly entitled and can only obtain by an intervention. Cases of this sort are those where there is a fund in court undergoing administration to which a third party asserts some right which will be lost in the event that he is not allowed to intervene before the fund is dissipated. In such cases an order denying leave to intervene is not discretionary with the chancellor, and will generally furnish the basis for an appeal since it finally disposes of the intervener's claim by denying him all right to relief."

The above language was approved by the Supreme Court in the same case on appeal. 177 U. S. 315, 20 Sup. Ct. 636, 44 L. Ed. 782. In the case at bar the trial court had taken possession of all of the property the Railway Company had. The Steel Company, if it were to have anything to say as to the disposition of said property, was obliged to intervene so that it could be heard in the protection of its rights. It could not go anywhere else. The bill filed by Aigler by its very terms was filed as much for the benefit of the Steel Company as Aigler. The Steel Company, however, is not obliged to rely upon the exception to the general rule above stated in order to sustain its right to appeal from the order which ousted it as intervener. The case presented is not one where a court has refused to permit a stranger to the record to intervene. The court did permit the Steel Company to intervene and consent that process issue on the petition in intervention to all parties not of record was given by Aigler the complainant. Aigler, and Ramsey, the receiver, demurred to the petition for want of equity and the court on argument sustained the demurrer of Aigler with leave to the Steel Company to amend its petition. By these proceedings the Steel Company became a party to the cause, and the court could not finally dispose of its rights as it attempted to do without the right of appeal. We now come to consider the merits of the order striking the amended intervening petition of the Steel Company from the files. We are not informed by the record as to the grounds upon which the trial court based its decision.

We have a right to infer, however, that the ruling of the court was based upon the grounds stated in the motion for the order and they were as follows: First, that the intervening petition did not show that the Steel Company had any lien upon the property of the Railway Company in the hands of the court; and, second, that said petition did not show that the Steel Company was in any wise interested in the ad-

ministration of the estate in the possession of the court. Manifestly neither one of these grounds were tenable. The Steel Company was the holder of bonds of the par value of \$160,000 secured by a first mortgage on all the property in the hands of the court and it was interested in the estate as a creditor for materials furnished the Railway Company to construct the road in the sum of \$129,124.64. What sort of logic is it which permits Aigler with a claim of less than \$2,500 to invoke the action of the court, and denies the same privilege to the Steel Company? As was said by the Supreme Court in *Louisville Trust Co. v. Louisville, etc., Ry.*, 174 U. S. 687, 19 Sup. Ct. 831 (43 L. Ed. 1130):

"The facts apparent on the face of the record were such as justified inquiry, and upon those facts, supported by the positive and verified allegations of the petitioner it was the duty of the trial court to have stayed proceedings and given time to produce evidence in support of the charges. Taking them as a whole they are very suggestive, independent of positive allegation; so suggestive, at least, that, when a distinct and verified charge of wrong was made, the court should have investigated it."

The Steel Company was entitled to intervene as a bondholder and as a general creditor, the proceeding being one to distribute all property of the Railway Company. *Louisville Trust Co. v. Louisville, New Albany & Chicago R. R. Co.*, 174 U. S. 674, 19 Sup. Ct. 827, 43 L. Ed. 1130; *Savings & Trust Company v. Baer Valley Irrigation Co.* (C. C.) 93 Fed. 339; *Farmers' Loan & Trust Co. v. San Diego Street Car Co.* (C. C.) 45 Fed. 518; *Continental Trust Co. v. Toledo, St. L. & K. C. R. R. Co.* (C. C.) 82 Fed. 642; *Campbell v. Railroad Co.*, 1 Woods, 368, Fed. Cas. No. 2,366; *Williams v. Morgan*, 111 U. S. 684, 4 Sup. Ct. 638, 28 L. Ed. 559; *Wallace v. Loomis*, 97 U. S. 147, 24 L. Ed. 895; *Williamson & Upton v. New Jersey Southern Ry. Co.*, 25 N. J. Eq. 13; *Belmont Nail Co. v. Columbia Iron & Steel Co.* (C. C.) 46 Fed. 336; *Cook, Corporations*, § 848e; *Hamlin v. Toledo, St. L. & K. C. R. R. Co.*, 78 Fed. 664, 24 C. C. A. 271, 36 L. R. A. 826. The right to object to the mere right of the Steel Company to intervene, at the time the order was made had been waived by Aigler by consenting to the issuance of process and in demurring to the petition. *Hamlin v. Toledo, St. L. & K. C. R. R. Co.*, 78 Fed. 664, 24 C. C. A. 271, 36 L. R. A. 826; *French v. Gapen*, 105 U. S. 509, 26 L. Ed. 951; *Perry v. Godbe* (C. C.) 82 Fed. 141; *Weinberg v. Noonan*, 193 Ill. 165, 61 N. E. 1022; Cyc. vol. 16, p. 203; *Encyclopedia of Pleading and Practice*, vol. 14, p. 102. Having obtained jurisdiction by the appeal from the order of November 6, 1908, ousting the Steel Company from the case, we may review the order of October 10, 1908, authorizing the issuance of receiver's certificates whether the latter order is appealable or not. There is, however, persuasive authority that this latter order is appealable. *Farmers' Loan & Trust Company, Petitioner*, 129 U. S. 206, 9 Sup. Ct. 265, 32 L. Ed. 656; *Bibber-White Company v. White River Val. Electric R. Co.*, 115 Fed. 786, 788, 53 C. C. A. 282, 284. It was said by the Supreme Court in *Wallace v. Loomis*, 97 U. S. 162 (24 L. Ed. 895) as follows:

"The power of a court of equity to appoint managing receivers of such property as a railroad, when taken under its charge as a trust fund for the payment

of incumbrances, and to authorize such receivers to raise money necessary for the preservation and management of the property, and make the same chargeable as a lien thereon for its repayment cannot at this day be seriously disputed. It is a part of that jurisdiction always exercised by the court by which it is its duty to protect the trust funds in its hands. It is undoubtedly a power to be exercised with great caution; and if possible with the consent or acquiescence of the parties interested in the fund."

To this rule there is no exception. High on Receivers, page 407; Union Trust Company v. Illinois Midland Railway Co., 117 U. S. 455, 6 Sup. Ct. 809, 29 L. Ed. 963; American and English Encyclopedia of Law, vol. 24, p. 39; Alderson on Receivers, page 457. Where there is objection made to the issuance of receiver's certificates they should not be issued on the unsupported petition of the receiver. Alderson on Receivers, 453, 455; Meyer v. Johnston, 53 Ala. 237. The trial court did not even have the official responsibility of its receiver to rely upon when it made the order authorizing the issuance of receiver's certificates, but only the statement of the agent of the receiver, and that agent a person so related to the affairs of the Railway Company as to at once suggest to the court careful consideration of his petition.

When a court of equity takes possession of railroad property through its receiver for the benefit of all having an interest therein, its honor and integrity is pledged as a guaranty that so far as the court can control the matter everything will be done to conserve and protect that property. It is because of this responsibility and obligation that in proper cases the court may authorize its receiver to issue certificates for the purpose of raising money where the income of the road is insufficient for the proper conservation of the same pending the litigation. The power to authorize the issuance of certificates is limited by, and is coextensive with, its obligation to conserve the property in its custody, and any expenditure of money that has not this primary purpose for its object is beyond the power of the court and unauthorized. To create an indebtedness which shall have priority over the claims of all persons interested in the property taken possession of by the court is a serious matter. Take the present case for illustration: Aigler obtains a judgment of less than \$2,500 in amount against the Railway Company. He has a receiver appointed, and the receiver is authorized to issue and sell certificates to the amount of nearly \$200,000, which shall be considered a part of a total issue of \$500,000, and this is done within a little over four months from the date when the court took possession of a railroad 130 miles in length. The order of October 10, 1908, executed according to its terms would be confiscation, not conservation. In the case of Farmers' Loan & Trust Co. v. Oregon Pacific R. R. Co., 31 Or. 237, 48 Pac. 706, 38 L. R. A. 424, 65 Am. St. Rep. 822, the Supreme Court of Oregon in speaking of a railroad receivership used the following language:

"And if at any time after the appointment has been made it become apparent to the court that it will be unable to pay and discharge the present or future liabilities incurred by its executive officer and manager, it should refuse to continue the operation of the road under the receiver unless its expenses are guaranteed. No court is bound or ought to engage or continue in the operation of a railroad or any other enterprise without the ability to promptly discharge its

obligations, and unless it can do so it should keep out, or immediately go out of the business."

The above language was approved by the Supreme Court in *Atlantic Trust Co. v. Chapman*, 208 U. S. 360, 28 Sup. Ct. 406, 52 L. Ed. 528. We do not say that the receiver in the present case ought not to be authorized to issue any certificates. No court ought to determine that question simply on the showing made by Dorset Carter, the receiver's agent. There should be a full and fair hearing on the petition presented after due notice to all persons interested, and then, guided by the principles declared in the cases cited, the court should limit the amount of certificates if any are issued, to that sum which would be necessary to conserve the estate in its hands. Manifestly, the issuance of certificates to the amount of \$94,000 to raise money to pay labor and salary claims, if any, incurred prior to June 2, 1908, was wholly unauthorized. Our conclusion on this branch of the case is that the order of October 10, 1908, was made without sufficient notice to those interested, and that the court did not have that particular and reliable information before it which was necessary in such a serious matter.

The judgment of this court will be that the order of November 6, 1908, and of October 10, 1908, be reversed and the case remanded to the United States Circuit Court for the Eastern District of Oklahoma, with instructions to proceed in due course upon the intervening petition of the Steel Company, and after due notice to all persons or parties interested to investigate the matters stated in the petition of the receiver for the issuance of receiver's certificates, and proceed thereon as law and justice may require, and in conformity with the views herein expressed.

PORT OF PORTLAND v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. February 7, 1910. Rehearing Denied March 7, 1910.)

No. 1,654.

COLLISION (§ 46*)—STEAMER AND DREDGE IN TOW MEETING—VIOLATION OF RULES.

The lighthouse tender *Manzanita*, proceeding down the Columbia river from Portland at night after starting upon a course from a point on the Washington shore toward a light farther down on the opposite shore, saw the lights of the dredge *Columbia* two points on her starboard bow, and also the lights on a string of pontoons supporting her discharge pipe extending to her right for about a thousand feet. The dredge carried no running lights, and the officers of the *Manzanita* supposed her to be anchored or at work, and that her discharge pipe extended to the Washington shore and closed the channel on that side, and therefore decided to pass to the left of her. The dredge was in fact being moved slowly up the river by a tug on her starboard side, whose lights could not be seen from the *Manzanita*, and her pontoons were trailing behind. After approaching to within a half mile or less, and finding the dredge across the course, the *Manzanita* signaled her intention to pass starboard to starboard and starboarded her helm, but received no answering signal.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Shortly after the vessels came into collision. *Held*, that the dredge and her tug were both in fault for not carrying proper lights to show that the dredge was in motion and for not answering the signal, and that the *Manzanita* was also in fault for not discovering before reaching the dredge that she was in motion and keeping to the right, as required by the rules.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 52; Dec. Dig. § 46.*]

Signals of meeting vessels, see note to *The New York*, 30 C. C. A. 630.]

Appeal from the District Court of the United States for the District of Oregon.

In Admiralty. Suit by the United States against the Port of Portland. Decree for libellant, and respondent appeals. Reversed.

See, also, 147 Fed. 865.

Williams, Wood & Linthicum, for appellant.

John McCourt, U. S. Atty.

Before GILBERT and MORROW, Circuit Judges, and HUNT, District Judge.

GILBERT, Circuit Judge. The appellee brought a libel against the appellant to recover damages resulting from a collision between the lighthouse tender *Manzanita*, a steam vessel, belonging to the appellee, and the dredge *Columbia*, then being navigated on the *Columbia* river by the tug *John McCracken*, both of which latter vessels belonged to the appellant. The collision occurred at about 6:45 o'clock p. m., October 6, 1905, at a point about 2.15 miles below *Waterford*, Wash. The dredge *Columbia* was a scow-shaped craft 265 feet in length, and at the time of the collision had a draft of from 6 to 8 feet. She carried a cutter extending about 30 feet beyond her bow, for loosening the substance of the bed of the stream while dredging. The height of the dredge and its superstructure was 24 feet 8 inches above the water line, and her pilot house extended 2 feet 10 inches still higher. She carried astern, for the purpose of discharging the spoil when dredging, a pipe of an aggregate length of from 900 to 1,000 feet, sustained upon a line of 27 pontoons. While dredging the cutter was lowered to the bed of the stream, and the line of pontoons extended across the channel at about right angles, so as to deposit the spoil in shoal water near the shore. When the dredge was being towed, the pontoons extended in a line astern. The tug *John McCracken* was about 90 feet in length, and the top of her pilot house was about 22 feet above the water line. At the time of the collision she carried running lights in screens upon either side of the pilot house. The *Manzanita* was 152 feet in length and was drawing 11 feet 4 inches aft, and about 6 feet 6 inches forward at the time of the collision.

For some time prior to the date of the collision, the *Columbia* had been engaged in dredging at a point about $3\frac{3}{4}$ miles below the point where the collision occurred. About 4 p. m. on that day she was taken in tow by the tug, which was fastened to her starboard quarter, while a wood scow was placed in front of the tug. At that time the tide was ebbing. At the time of the collision it had commenced to flood slightly.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Slow progress was made, a mile the first hour, a mile and a half in the second, and about a mile and a quarter in the last three-quarters of an hour immediately preceding the collision. The Manzanita left Portland at about 1 p. m. on that day, with orders to proceed to Astoria. She made from 9 to 10 knots an hour until she arrived abreast the Waterford Post Light on the Washington shore. From that point the ordinary course pursued by navigators of the Columbia river is to proceed beyond the light from a quarter to a half mile, then to head directly for Westport Reach Light on the Oregon shore, a light which stands slightly higher than the surface of the water. The master of the Manzanita testified that, after passing the Waterford Post Light, he directed the vessel's course directly for the Westport Reach Light, and almost immediately thereafter he and the mate sighted the dredge, which to them appeared to be at anchor or engaged in dredging. They saw the train of pontoons in the wake of the dredge on which were distributed seven lights, and they assumed that the starboard channel was thereby closed. They decided to pass the dredge on her starboard side. Owing to the height of the dredge, the running lights on the tug were not visible to a vessel coming down the river, and approaching her port side. The dredge herself carried no running or navigating lights, but had an electric white light above the pilot house and two lanterns attached beneath the same, and her staterooms and working rooms were brightly lighted up. The point of collision was from 200 to 300 feet instream from the upper end of two fish traps located upon the Oregon side of the river, which extended into the stream about 500 feet. As to what occurred between the time when the master and the mate of the Manzanita discovered the dredge and the time of the collision, there is some uncertainty in the testimony. There can be no question that the officers of the Manzanita believed the dredge to be at anchor, and believed that her line of pontoons extended across the starboard channel. As the Manzanita approached the Columbia at a distance variously estimated by her own officers at from slightly less than half a mile to two ship lengths, she blew two whistles as a signal that she would pass the dredge starboard to starboard. There was no answer from the tug or from the dredge. The helm of the Manzanita was put astarboard, so as to change her course two points to port, and very shortly thereafter the collision occurred.

At the time when the captain and the mate of the Manzanita first sighted the dredge, the latter was about two miles away, and they testified that the Manzanita had been put upon her course toward the Westport Light. They both testified, also, that, when they sighted the dredge, she was two points on their starboard bow. The court below rejected this testimony as incredible, and reasoned that if the Manzanita, after passing the Waterford Light, was headed toward the Westport Light, to place the position of the dredge two points on the Manzanita's starboard bow would be to place her near the Washington shore, a position which she could not possibly have occupied. We are not convinced that the testimony should be rejected on this line of reasoning. It is not improbable that the officers of the Manzanita, who never had navigated the Columbia river at night, and had had no particular occasion to observe the shore lights, may have mistaken the

light on one of the fish traps for the Westport Light. In that case the dredge would have been, as they testified that it was, about two points on their starboard bow. That their testimony was not inadvertently given is indicated by the fact that Capt. Byrne in that connection explained to the court that a point was 11 degrees and 15 minutes. There is corroboration of this view of the course of the Manzanita in the statement of the mate, who testified that he did not remember seeing the Westport Light until about the time when the Manzanita signaled the dredge, and that then he saw the light clear in front of or across the bow of the dredge. It was impossible for him at that time to have seen the Westport Light in that position, because the dredge had long since intercepted the course from the Waterford Light to the Westport Light, and, if he saw a light across the bow of the dredge, it must have been some other than the Westport Light.

But whether or not they were mistaken as to the light to which their course was directed is not of particular importance. Whether it was the Westport Light or some other light mistaken for it, it is obvious that the Manzanita had before her an unobstructed course at the beginning of which the dredge was on her starboard bow, and it is undisputed that the Manzanita, after heading for a light on the Oregon shore, changed her course but once before the collision. Both the captain and mate testified that, when the Manzanita had approached within a distance of between a quarter of a mile and a half mile of the dredge, the Manzanita was slowed down and her engines were stopped, after which she blew two whistles as signals to pass the dredge starboard to starboard, and about two seconds thereafter starboarded her helm two points, so that the dredge then bore three or four points on her starboard bow, and that they continued on that course until the collision, expecting to pass the dredge at a distance of 200 or 300 feet from her bow. The mate testified that he discovered that there was going to be a collision when the steamer was about a ship's length away from the dredge, and that nothing further was done to avert collision by reversing the Manzanita's engines or otherwise. The testimony of several witnesses who were on the dredge and saw the approaching steamer is to the effect that the latter approached head on directly toward the dredge until within two or three boat lengths, when she turned her course and came around directly across the bows of the dredge. The evidence that the Manzanita was very near the dredge when her course was changed is confirmed by the deposition of the captain of the Manzanita given on May 3, 1906, in which he deposed that he kept on his course until about half a minute before the collision, and that then, when he was about two ship lengths from the dredge, he attempted to pass her on the Oregon side. When, ten months later, he gave his testimony at the trial, he testified that he was in error in so testifying in his deposition, and that, upon refreshing his memory, he would state that, at the time when he put his helm to starboard to pass the dredge, he was something less than half a mile distant from the dredge.

We do not deem it necessary to attempt to reconcile this conflicting testimony. On either statement of the facts, and assuming that they were as the trial court found them, it seems clear that negligence must be imputed to the officers in charge of the Manzanita. It is true that

the dredge was navigating the river without running lights, and that there was everything in her appearance, when the officers of the Manzanita first sighted her, to lead them to the conclusion that she was at anchor. But if the Manzanita was in fact pursuing a direct course between the Waterford Light and the Westport Light, it is evident that, very soon after that course was begun, the dredge must have intercepted the line thereof. The dredge was at that time moving at a speed of a little more than a mile and a half an hour. The Manzanita had started on that course at nine knots an hour, but from the time when she whistled she proceeded at about three knots an hour. The fact that it had become necessary to change the course of the Manzanita was proof to her officers that the dredge had changed her position and was moving upstream. It became their duty to take notice of that fact and adopt all reasonable precautions to avoid collision. And it can make no material difference at what point on her course it was found necessary to starboard her helm to pass the dredge. Whether it was at a distance of a half a mile or only 300 feet, if they had observed, as they should have done, that the dredge was moving, they could have avoided the collision.

We think that the Manzanita was at fault, also, in not turning to starboard instead of to port shortly prior to the collision. The position of the dredge and the pontoons had been materially changed in the 20 minutes which ensued after the dredge was first seen. Assuming, as it was found by the court below, that at the time when the Manzanita sighted the dredge the latter was crossing the channel to the Oregon side and was about to intersect the Manzanita's course, and that she did cross it about a half a mile from the place of collision, it must be evident that at the time of the collision the train of pontoons, which extended only 900 or 1,000 feet astern of the dredge, was well upon the Oregon side of the channel, and that, before the time when the Manzanita's helm was put to starboard, it would have been apparent to the officers of that vessel, had they taken the precaution to look, that the starboard channel was open for their passage. It was their duty to follow that channel under article 25 of the Pilot Rules, which reads:

"In narrow channels, every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or midchannel which lies on the starboard side of such vessel."

In *Chamberlain et al. v. Ward et al.*, 21 How. 548-567, 16 L. Ed. 211, the court said:

"Failure to comply with the regulation in case a collision ensues is declared to be a fault, and the offending party is made responsible for all loss or damage resulting from the neglect; but it is not declared by that section, or by any other rule of admiralty law in the jurisprudence of the United States, that the neglect to show signal lights, on the part of one vessel, discharges the other, as they approach, from the obligation to adopt all reasonable and practicable precautions to prevent a collision. Absence of signal lights, in cases falling with the act of Congress, renders the vessel liable to the extent already mentioned; but it does not confer any right upon the other vessel to disregard or violate the rules of navigation, or to neglect any reasonable or practicable precaution to avoid a collision, which the circumstances afford the means and opportunity to adopt. * * * All we mean to decide is that the neglect of

the propellor to show signal lights did not vary the obligations of the Atlantic to observe the rules of navigation, and to adopt all such reasonable and necessary precautions to prevent the collision, as the circumstances in which she was placed gave her the opportunity to employ."

We do not overlook the rule announced in *The City of New York*, 147 U. S. 72, 13 Sup. Ct. 211, 37 L. Ed. 84, in which it was said:

"Where fault on the part of one vessel is established by uncontradicted testimony, and such fault is of itself sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel. There is some presumption at least adverse to its claim, and any reasonable doubt with regard to the propriety of the conduct of such other vessel should be resolved in its favor."

We think the fault of the *Manzanita* is well established by the circumstances disclosed in the evidence, and in the facts as they were found by the District Court. The belief entertained by the captain and the mate of the *Manzanita* that the dredge was at anchor was at the first justified. The dredge carried no red light upon her port side to indicate that she was proceeding upstream, and she was about two miles away. But we are unable to see how it was possible for those two officers of the *Manzanita*, who stood upon the bridge thereof from the time of passing the Waterford Light to the time of the collision, to fail to discover that the dredge was in motion. After they left the Waterford Light, it was not so dark but that they could see the Oregon shore where the Westport Light was. There was nothing to obstruct their vision of the dredge or of the shore lights. They started upon a course in which at the beginning the dredge was upon their starboard bow, and, if the dredge had been at anchor, they would have crossed her bow at a distance of at least a thousand feet. When, as they proceeded, they found that the dredge intercepted the light to which their course had been directed, they had before them clear evidence that the dredge had changed her position. Again, by taking timely observation of the starboard channel, they must have seen, before they turned their vessel to port, that that channel was then sufficiently clear to allow them to pass the dredge and pontoons port to port. Their errors in these respects were not slight errors, nor were they errors committed in extremis. They were substantial errors in navigation which contributed to the disaster, and which we think are sufficient to justify a court of admiralty in imposing upon the *Manzanita* one-third of the damages which resulted from the collision. *The Gray Eagle*, 9 Wall. 505, 19 L. Ed. 741; *The Mary Morgan* (C. C.) 28 Fed. 333; *Briggs v. Day* (D. C.) 21 Fed. 727.

We find no ground for disturbing the amount of the damages which the court below found that the appellee sustained as the result of the collision. But we are of the opinion that the injuries received by the *Manzanita* from the collision and the damages resulting to her owner therefrom were caused by concurring and co-operating faults of the dredge, the tug, and the steamship, and that they should be borne equally by each.

The decree is reversed, and the cause is remanded, with instructions to enter a decree as herein indicated.

FLINT v. COFFIN et al.

(Circuit Court of Appeals, Fourth Circuit. February 1, 1910.)

No. 823.

1. REMOVAL OF CAUSES (§ 97*)—PROCEEDINGS FOR REMOVAL—EFFECT OF FILING PETITION AND BOND.

The filing of a proper and sufficient petition and bond for the removal of a cause terminates the jurisdiction of the state court, and any subsequent proceedings therein in such court are coram non judice, and absolutely void.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 206; Dec. Dig. § 97.*]

2. APPEARANCE (§ 9*)—GENERAL OR SPECIAL—PROCEEDINGS FOR REMOVAL OF CAUSE.

The filing of a petition for removal in a state court, and of a memorandum by counsel with the record in the federal court on denial of the petition by the state court, stating that they appear for the removing defendant, and their appearance to argue a motion to remand, are all acts essential to secure the removal, and properly done under a special appearance for that purpose, and do not singly or together amount to a general appearance of the defendant, which will preclude them from attacking the jurisdiction of the court on the ground of insufficiency of service.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. § 50; Dec. Dig. § 9.*]

3. REMOVAL OF CAUSES (§ 114*)—PROCEEDINGS AFTER REMOVAL—JURISDICTIONAL QUESTIONS.

A party removing a cause to a federal court has a right, after the removal, to the judgment of that court on any question relating to the validity of the service of process, even though such question has been passed on by the state court, since it affects the jurisdiction of the federal court itself.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 241; Dec. Dig. § 114.*]

4. ATTACHMENT (§ 209*)—SERVICE BY PUBLICATION—CONDITIONS PRECEDENT.

Statutes authorizing the service of process on nonresident property owners, by publication, in attachment suits, must be strictly complied with to give the court jurisdiction.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. § 676; Dec. Dig. § 209.*]

5. PROCESS (§ 96*)—SERVICE BY PUBLICATION—CONDITIONS PRECEDENT UNDER NORTH CAROLINA STATUTE—AFFIDAVIT.

Under Revisal N. C. 1905, § 442, which in certain cases authorizes the making of an order for service of process on a defendant by publication, where it is made to appear by affidavit to the satisfaction of the court that such defendant "cannot after due diligence be found within the state" as construed by the Supreme Court of the state, an affidavit alleging or showing due diligence and that defendant cannot be found within the state is an essential condition precedent to a valid service by publication, and an affidavit in an attachment suit which merely alleges that defendants are residents of another state and cannot be found within the state, but fails to show any diligence or search whatever, is fatally defective, and a publication based thereon does not give the court jurisdiction.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 118; Dec. Dig. § 96.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

G. ATTACHMENT (§ 209*)—SERVICE BY PUBLICATION—ATTACHMENT SUIT—NORTH CAROLINA STATUTE.

Under Code N. C. § 352 (Revisal N. C. 1905, § 766), which provides that when the summons in an attachment suit is to be served by publication, the publication shall state the fact of the attachment, "the amount of the claims," and in a brief way the nature of the demand, an order and a publication based thereon which fail to state the amount of the plaintiff's claims are fatally defective.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. § 682; Dec. Dig. § 209.*]

In Error to the Circuit Court of the United States for the Western District of North Carolina, at Asheville.

Action by E. G. Coffin and F. M. MacDonald, partners as Coffin & MacDonald, against Charles R. Flint. Judgment for plaintiffs, and defendant brings error. Reversed.

James H. Merrimon and J. Frank Snyder (James G. Merrimon, on the brief), for plaintiff in error.

R. C. Strudwick and E. J. Justice (W. P. Bynum, Jr., Justice & Broadhurst, and Norwood & Norwood, on the brief), for defendants in error.

Before GOFF, Circuit Judge, and WADDILL and CONNOR, District Judges.

GOFF, Circuit Judge. In the Superior Court of Swain county, N. C., the defendants in error commenced this suit against the plaintiff in error and others to recover damages alleged to have been sustained because of breaches of certain contracts, charged to have been made in connection with the manufacture of timber into lumber, on certain lands located in said county. The summons issued on the 21st day of November, 1904, and was returned by the sheriff on the 28th of that month indorsed as follows:

"Due search made, and none of the defendants found in my county."

Affidavits on which to base a warrant of attachment and an order of publication were filed, the former being issued on November 21, 1904, and the latter on December 5, 1904. The attachment was levied November 21, 1904, on the land mentioned, and it is claimed by defendants in error that publication was made of the summons and attachment for four consecutive weeks, commencing December 8, 1904. The complaint was filed in the clerk's office of the superior court of Swain county, on the 23d day of February, 1905. On the 2d day of August, 1905, Charles R. Flint, one of the defendants named in the complaint, filed his petition in said superior court, together with a sufficient bond, praying for the removal of the case to the Circuit Court of the United States, as between him and said plaintiffs, upon the grounds set forth in his petition. The said superior court refused to grant the order of removal, and proceeded to hear and dispose of other motions in the case. On the 7th of December, 1905, Charles R. Flint, through his counsel, filed in the office of the clerk of the United States Circuit Court for the Western District of North Caro-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

lina, at Asheville, a complete transcript of the record of said cause from the state court, and the case was then duly entered upon the docket of the United States Circuit Court. At the same time counsel for Charles R. Flint filed with the clerk of the last mentioned court a memorandum in writing which, after reciting the said cause, read as follows:

"To the clerk of the Circuit Court: Take notice that we appear as counsel for the defendant, Charles R. Flint, in the above-entitled action."

The next action taken in the Circuit Court was on March 3, 1906, when the plaintiffs below moved to remand the case to the superior court of Swain county, which motion was, after argument of counsel for plaintiffs and defendant Flint, overruled by the court. On May 14, 1906, Flint moved the court to dismiss the suit "for imperfect service of process," and an order was then entered denying that motion, "the court being of opinion that said question has been adjudicated by the state court." To this action of the court said defendant excepted, and assigns the same as error. The court then allowed Flint 60 days in which to file his answer. The case was duly matured, came on to be heard, and was tried before a jury, which returned a verdict in favor of the plaintiffs, on which a judgment was entered against Flint, on November 28, 1907, for the sum of \$85,000, and costs. The court also directed that the interest of Flint in the land on which the warrant of attachment had been levied should be sold, and the proceeds thereof be applied to the satisfaction of the judgment. The writ of error now before us was then sued out. The assignments of error relate to many questions arising during the pendency and trial of the suit, but few of which, as we see the case, it will be necessary to consider.

The petition filed by Flint in the superior court of Swain county, on August 2, 1905, was duly verified, was accompanied by a proper bond, and clearly set forth sufficient grounds for the removal of the cause to the Circuit Court of the United States. The jurisdiction of said state court over the case actually ceased when said petition and bond were filed, and all of the proceedings taken in that court subsequent thereto were coram non judice and absolutely void. *Gordon v. Longest*, 16 Pet. 97, 104, 10 L. Ed. 900; *Virginia v. Rives*, 100 U. S. 313, 316, 25 L. Ed. 175; *Railroad Company v. Koontz*, 104 U. S. 5, 14, 26 L. Ed. 643.

The insistence of counsel for defendants in error is that, even if it be that the service was imperfect; that the statute had not been complied with so far as the summons, order of publication, and the attachment were concerned; that such irregularities were waived by the general appearance of Flint, who by his counsel they insist submitted himself to the jurisdiction of the court below. This claim is based upon the fact that counsel for Flint filed the petition for removal in the state court; that they filed the memorandum referred to with the clerk of the court below; and that they appeared and argued the motion made by defendants in error to remand the case to the state court. These contentions are without merit. The filing of a petition to remove a cause from a state to a federal court does not amount to

a general appearance. *Wabash Western Railway v. Brow*, 164 U. S. 271, 17 Sup. Ct. 126, 41 L. Ed. 431; *International Text-Book Co. v. Heartt*, 69 C. C. A. 127, 136 Fed. 129. The paper filed with the clerk by counsel for Flint, advising that official that they so appeared, was simply a notice that they, in effectuating the removal from the state court, would file the record of the cause in the federal court. That court was not then in session, and surely the requirement of the clerk that counsel should file in his office a memorandum indicating for whom they appeared cannot be construed as a general appearance, when what was intended is kept in view—the lodging of a record which had been removed from a state court, by a proceeding that was of itself a special appearance. Nor can it be consistently held that the resistance to the motion to remand was a general appearance. All of those things that were essential to secure the final lodgment of the case on the docket and records of the court below were properly done under the special appearance made in the state court, when the petition for removal was filed. To hold otherwise would, in the light of the record of this cause, be painfully technical, would do violence to the evident intention of counsel, which was to challenge the jurisdiction of the court on the ground stated in the motion to dismiss, and would impair the rights intended to be secured to nonresidents by the acts of Congress authorizing the removal of cases against them from a state to a federal court. While it is most undoubtedly true that a general appearance will be held to be a waiver of all objections to the form or the manner of service of the subpoena, and that it will be taken as the equivalent of personal service of process, and also that by such appearance a proceeding that theretofore was in rem may be thereby converted into a personal action, nevertheless we find nothing in the record of this cause indicating that the plaintiff in error ever intended to make or in fact ever made such a general appearance in the court below as renders applicable to this case the conclusions of law we have just referred to. It is only where a defendant pleads to the merits without insisting upon the illegality relating to the process that the objections to it are held to have been waived. In the case at bar the plaintiff in error did not plead until after his motion to dismiss for lack of proper service had been overruled, and then only when required to do so. He first asked for the removal of the case by filing a petition in the state court, for which purpose his appearance there was special as it was when in the court below he tendered the record to be docketed, and opposed the motion to remand. When he moved to dismiss for want of jurisdiction because of defects in the proceedings, he did not submit himself personally to the jurisdiction of the court below, as he would have done by a general appearance, or by pleading to the merits.

It is quite clear that the court below erred in holding that the questions involved in the motion of defendant below to dismiss had been disposed of by the state court. While it is true that the record from that court disclosed that such motion had been denied, it also made it clear that such action was taken after the case had in fact been removed into the federal court. It is we think well settled that the

party causing a case to be removed to a federal court has a right, after the removal, to the judgment of that court on all questions relating to the validity of the service of process as well as upon the merits of the case. This is because of the fact that jurisdiction of the state court over the defendant so removing is involved, and that matter, even though the state court may have deemed it proper to pass upon it, may nevertheless be again considered and adjudged by the federal court. *Wabash Western Railway v. Brow*, 164 U. S. 271, 278, 17 Sup. Ct. 126, 41 L. Ed. 431; *Courtney v. Pradt*, 196 U. S. 89, 92, 25 Sup. Ct. 208, 49 L. Ed. 398; *Remington v. Central Pacific Railroad Company*, 198 U. S. 95, 25 Sup. Ct. 577, 49 L. Ed. 959; *Tortat v. Hardin Min. & Mfg. Co. (C. C.)* 111 Fed. 426; *Lathrop, Shea & Henwood Co. v. Interior C. & I. Co. (C. C.)* 150 Fed. 666. The court below should have considered, and we think should have sustained, that motion. When this suit was instituted, the plaintiff in error was a nonresident of the state of North Carolina. It was because of his residence elsewhere that he was entitled to remove the case into the federal court. He was sued in a state court, under the provisions of a state statute, the terms of which were required to be strictly followed. He availed himself of the benefits of the acts of the Congress of the United States, which entitled him to the judgment of the court below and of this court, concerning the questions raised by the record in the state court. The law of North Carolina (Revisal 1905, § 442), pertinent here, reads as follows:

"Where the person on whom the service of the summons is to be made, cannot after due diligence, be found within the state, and that fact appears by affidavit to the satisfaction of the court, or to a judge thereof, and it in like manner appears that a cause of action exists against the defendant in respect to whom service is to be made, or that he is a proper party to an action relating to real property in this state, such court or judge may grant an order that the service be made by publication of a notice in either of the following cases: * * * (3). Where he is not a resident of this state, but has property therein, and the court has jurisdiction of the subject of the action.

"The order must direct the publication in any one or two newspapers to be designated as most likely to give notice to the person to be served and for such length of time as may be deemed reasonable, not less than once a week for four weeks. A notice, giving the title of the action, the purpose of the same, and requiring the defendant to appear and answer, or demur to the complaint at a time and place therein mentioned; and no publication of the summons nor mailing of the summons and complaint, shall be deemed necessary." Revisal 1905, § 443.

The plaintiffs below, finding themselves under the necessity of proceeding by publication and attachment, in order to give the court jurisdiction of the subject of the action, resorted to sections 351 and 352 of the Code of North Carolina, which read as follows:

"If the action be * * * founded on a contract, and the sum demanded exceed two hundred dollars, a warrant of attachment may be obtained from the judge of the district embracing the county in which the action has been instituted, or from the clerk of the superior court from which the summons in the action issued, and it * * * shall be made returnable in term time to the court from which the summons issued. Revisal 1905, § 761.

"When the warrant of attachment is taken out at the time of issuing the summons, and the summons is to be served by publication, the order shall direct that notice be given in said publication to the defendant of the issuing of the attachment. * * * Said publication shall state the names of the

parties, the amount of the claims, and in a brief way the nature of the demand and the time and place to which the warrant is returnable. * * * " Revisal 1905, § 766.

Under these sections of the Code, did the proceedings taken by the plaintiffs below give the superior court of Swain county jurisdiction of the subject of the action? It is not claimed that the court acquired jurisdiction of the defendants personally, by virtue of the summons, attachment and publication, but that thereby it had jurisdiction to investigate and adjudge what sum, if any, the plaintiffs were entitled to recover in the action, and then to cause the attached real estate to be sold, and the proceeds applied to the payment of the sum so found due. The affidavit on which the order of publication was based, failed to comply with the requirements of the Code, and therefore did not authorize such publication. It simply stated that the defendants were all nonresidents, residing in the state of New York; that they could not be found in the state of North Carolina, and that the summons could not be served on them, or either of them. The questions of fact relating to the "due diligence" on the part of the party whose duty it was to make diligent search in the state were not set forth in the affidavit. The officer says in his return that he made "due search" and that none of the defendants were found in his county, but the affidavit is silent on the questions relating to "due diligence," which was a most essential requisite. The only way it could have been shown to the satisfaction of the court or a judge thereof was by affidavit, which either alleged "due diligence," or in which the efforts to find and serve the defendants were disclosed. Because "due search" was unsuccessfully made in one county or because the defendants were nonresidents, it does not necessarily follow that they might not have nevertheless been found and served in another county of the state. In fact the affidavit filed, which fails to show that any diligence was exercised, was made before the officer who made the return attempted to execute the summons. The statute necessarily implies that "due diligence" to find within the state the party mentioned in the summons shall be used by the person whose duty it is to serve it. That such statutes as we are now considering must be strictly complied with is without question. In *Wheeler v. Cobb*, 75 N. C. 21, the Supreme Court of North Carolina said:

"The service of summons by publication is fatally defective, in that it does not conform to the requirements of the statute. The foundation and first step of service by publication, is an affidavit that the person upon whom the summons is to be served cannot, after due diligence, be found within the state."

In *Faulk v. Smith*, 84 N. C. 501, it is said:

"On the trial in the superior court, several causes are assigned in support of the motion to vacate, only one of which do we deem it necessary to notice—the insufficiency of the affidavit to warrant an order of publication, in that it fails to show that the defendant 'cannot after due diligence be found within the state.' This averment, or its essential equivalent, is a prerequisite of publication, the effect of which is to bring an absent debtor before the court and subject his property to condemnation and sale for his debt. As it is a statutory substitute for personal service of process, the requirement of the statute must be strictly pursued. Everything necessary to dispense with personal service of the summons, says Bynum, J., in *Wheeler v. Cobb*, 75 N. C. 21, 'must appear by affidavit.'"

In *Bank of New Hanover v. Blossom et al.*, 92 N. C. 695, the court held that an affidavit, stating the defendant to be a nonresident having property in the state, was insufficient, as it omitted to aver that such defendant could not, after due diligence, be found in the state. In *Luttrell v. Martin*, 112 N. C. 594, 604, 17 S. E. 573, it is said that "the affidavit to procure publication of summons must contain an averment that the defendant cannot, after due diligence, be found within this state."

In the case of *McCracken v. Flanagan*, 127 N. Y. 493, 28 N. E. 385, 24 Am. St. Rep. 481, the statute being quite similar to the one we are now considering, the court held the omission of the words "after due diligence" fatal to the service, saying that it was necessary to show due diligence by affidavit.

In the case we are now disposing of no diligence is shown in the affidavit, and no effort is made in it to set forth any act or search that can be considered the essential equivalent of the requirements of the statute. So far as the attachment is concerned, the publication fails to comply with the requirements of the statute. The amount of the claims sought to be recovered should have been set forth in the publication, and in a brief way the nature of the demand should have been described. The affidavit filed by plaintiffs below was not sufficient to authorize the order of publication of the summons, and as we understand the statutes in question, and the decisions of the Supreme Court of North Carolina relating thereto, the publication was fatally defective in regard to both the summons and the attachment. There can be no legal service by publication, in attachment cases, unless in the order directing the publication of the summons there is a direction to publish the attachment with the summons, and unless in fact both the summons and the attachment are published. In this case no such order was made, nor was there any such publication. In *Cotton Mills v. Weil*, 129 N. C. 452, 454, 40 S. E. 218, 219, it is said:

"The service by publication gave the court jurisdiction over the property attached (and not over the person) to the extent of its value, not exceeding the amount claimed in the publication. The object of the publication is to inform the defendant of the amount claimed, and that his property within the jurisdiction is sought to be condemned to pay that amount. Being informed by the publication of the amount claimed, and it being true, the defendant might content himself with the proceedings and allow that amount collected out of his property. For it is especially required in section 352 of the Code that said publication (of the warrant of attachment and summons) shall state * * * the amount of claims. * * *

We do not deem it necessary to further discuss the points relating to the illegality of the service of the summons, and the defective proceedings on which the attachment and publication were based, and of the error in the court below in failing to sustain the motion to dismiss. We think it quite evident that counsel for defendants in error, conscious of the weakness of the insistence that the plaintiff in error was, by the proceedings had, brought within the jurisdiction of the Superior court of Swain county, really rely upon their claim that he entered a general appearance in the court below as their only hope for sustaining the judgment complained of. In this contention, as

we have shown, they are mistaken. The conclusion we have reached, disposing as it does of the case, renders unnecessary a discussion of the other questions raised by the assignments of error. The judgment will be reversed, the verdict of the jury will be set aside, and the case will be remanded to the court below with instructions to dismiss the complaint.

Reversed.

BAKHAUS et ux. v. GERMANIA FIRE INS. CO.

(Circuit Court of Appeals, Fourth Circuit. February 1, 1910.)

No. 906.

1. INSURANCE (§ 336*)—FIRE INSURANCE—POLICY CONDITIONS—OTHER INSURANCE—REASONABLENESS.

A condition against other insurance, unless with the written consent of the original insurer, is reasonable.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 856-873; Dec. Dig. § 336.*]

2. INSURANCE (§ 397*)—FIRE INSURANCE—CONDITION AGAINST OTHER INSURANCE—WAIVER.

Where insurer had no knowledge of a breach of a condition against other insurance until after loss, the fact that its general agent employed an expert adjuster to investigate the facts surrounding the fire, and that he requested the state fire marshal to investigate the fire according to his official duty and participate in such investigation only so far as to enable him to determine whether such loss was an honest one, and, not being requested to inform insured as to his conclusion, simply stated that "you will hear from me," his employment by insurer and his conduct did not amount to a waiver of a breach of such condition.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1078-1082; Dec. Dig. § 397.*]

In Error to the Circuit Court of the United States for the District of Maryland, at Baltimore.

Action by John Bakhaus and wife against the Germania Fire Insurance Company. Judgment for defendant, and plaintiffs bring error. Affirmed.

S. S. Field (William F. Pirscher, on the brief), for plaintiffs in error.

W. Calvin Chesnut (J. Morfit Mullen and Gans & Haman, on the brief), for defendant in error.

Before PRITCHARD, Circuit Judge, and BRAWLEY and CONNOR, District Judges.

BRAWLEY, District Judge. This is a suit upon a policy of fire insurance of the ordinary New York standard form, in the amount of \$3,000, issued September 10, 1907, to run for three years, covering six partially completed frame houses, all under one outside wall, with interior partitions, in Anne Arundel county, just outside of the city of Baltimore. In November, 1907, plaintiffs secured \$1,200 additional insurance on the houses in the Caledonia Fire Insurance Com-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

pany. The fire occurred January 18, 1908. The testimony of an experienced builder valued the houses, in the condition in which they were when burned, at \$3,044.29, and, valuing the excavations and concrete foundations at \$325, places the loss at \$2,719.29. One of the conditions of the policy against other insurance is as follows:

"This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy."

The validity of such a clause is the subject of review by the Supreme Court of the United States in *Northern Assurance Company v. Grand View Building Association*, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213, where the court says:

"Over insurance by concurrent policies, on the same property, tends to cause carelessness and fraud, and hence a clause in the policies rendering them void in case other insurance had been or shall be made upon the property when not consented to in writing by the company, is customary and reasonable."

It appearing that no consent to such other insurance was ever indorsed on this policy, or added thereto, no question is made before us denying that the insurance in the Caledonia Fire Insurance Company avoided the policy, and the only question to be considered is whether the above-cited condition in the policy was waived, the contention of the plaintiffs in error being that, after knowledge of its right to declare the policy forfeited, Rolker, the defendant's general agent, recognized the continued existence of the policy. It is not claimed that there was any express waiver, but that the acts of the defendant were inconsistent with an intention to insist upon a forfeiture of the policy, and required affirmative acts from the plaintiffs, putting them to trouble and inconvenience. The testimony is that Rolker, the general agent of the defendant company, received verbal notice of the fire from the son of the plaintiffs on the morning of January 20th, and on the same afternoon Price, representing the Caledonia and other companies, called on him and told him about the policy in the Caledonia, and that this was the first information he had that plaintiffs had other insurance on these houses, and after some conversation with Price they determined to place the matter in the hands of Bond, an independent fire insurance adjuster. Bond's testimony as to the instructions given him by Price and Rolker is as follows:

"These gentlemen came down there and said that they each had a policy; neither of them are gentlemen who employ me ordinarily. They said: 'We want you to take this up and look into it, because there is no permission for other insurance on this thing, and we want it carefully attended to.'"

In reply to a question as to whether they told him to adjust the loss, he said:

"I cannot say they absolutely used the word 'adjust'; they may have said, 'talk it over with us,' or something of that sort."

Rolker's reply to the question as to what instructions he gave to Bond is as follows:

"The usual instructions; I simply told Mr. Bond that the loss had been reported to my office on the six houses, and that we wished him to look after our interests in the matter."

On the day following Bond went out to the site of the fire in company with Brooks, who had placed the insurance for the Caledonia Company, and Deming, who it appears had issued a policy upon the furniture. Bakhaus was not there, but met the parties named as they were returning to Baltimore, and was told to come up next day to Deming's office, where he says he found Deming, Bond, and Deming's son, and was asked about the fire, when Deming told him to make up a list of the furniture that was burned, and Bond said, "You will hear from me further." Bond testifies that he was not at Deming's office at the time stated; that he never met Bakhaus but twice, once in the state fire marshal's office, and once in his own office, about March 26th. On January 24th the state fire marshal, at the request of Bond, began an investigation of the burning of the plaintiffs' houses. In the course of such examination Bakhaus was called by the fire marshal, and questioned by him; he was not put under oath. Bond was present and asked some questions. Bakhaus testified that after such examination he asked Bond what he was going to do, and he replied that, "I would hear from him." The state fire marshal is a public official of the state of Maryland, whose duty it is to investigate suspicious fires. A letter of Bond to the defendant company was offered in evidence by the plaintiffs, and is as follows:

"March 28, 1909.

"Germania Fire Insurance Company, New York City, N. Y.

"Dear Sirs: Referring to my letter of January 29 in regard to claim of John Bakhaus and wife under policy No. 97692, I beg to say that no proofs of loss have been filed in this case, although the time expired on the 19th inst., and that the assured had made no claim other than the first notice given of the loss; nor have I seen him except once, when he was in the office of the fire marshal when he was under investigation, and once within a few days, when he asked me if I had anything to say to him, in reply to which I said that I had not.

"I have endeavored to consider this matter in all its phases, giving the assured the benefits of all doubts, but I am unable to come to any conclusion but that the assured, being deeply in debt, having failed in this building speculation, and having no hope whatever of escape, except by the assistance of the insurance companies, having an opportunity, used it. As your policy contains no permission for other insurance, and the provision in lines 11 and 12 that 'it shall be void if the insured now has, or shall hereafter make or procure any contract of insurance, whether valid or not, on property covered in whole or in part by this insurance.' As the assured has furnished no proofs of loss within 60 days required in the policy, the legal question is eliminated, and the whole matter narrows down to one of moral obligation. As I am satisfied that there was both fraud and crime in this case, I do not hesitate to advise that you should deny liability, and will thank you to inform me at your earliest convenience so that I may give proper answer to the assured when he next calls on me.

"Since dictating this letter I have been called up by Mr. Rosenbush, who stated that he is the attorney for Mr. Bakhaus, and asked me to explain to him why we had not paid the loss. I replied that I had just written the companies on the subject, and on receipt of their replies will communicate with him.

"Yours truly,

Thos. E. Bond, Adjuster."

This is substantially all the testimony tending to show a waiver of that condition of the policy which renders it void in case of additional insurance, and it consists in the reference of the case to Bond, the insurance adjuster, by Rolker, the general agent, after the fire and after he had knowledge of the additional insurance, and in the conduct of Bond. An adjuster's business is to ascertain the loss and adjust the amount. Beyond that, as a general rule, he has no duty to perform or power to act, and it is doubtful that an agent of such limited power has any authority to waive an essential condition of the contract, but it is not needed in this case to make any critical examination of authorities upon the powers of agents of this class, for there is nothing in the conduct of Bond from which may be implied any relinquishment of a known right, nothing which tended to mislead the insured to his prejudice, or lull him into a false security with respect to his rights.

The testimony does not show that Bond had any communication with the insured except to say "you will hear from me." If this had been said after the discovery of the over insurance and before the fire, it might have been argued with some plausibility by the insured that: If you had notified me of the company's intention to insist upon the forfeiture, it would have been in my power to protect myself by other insurance, and it might be claimed that the insured was misled to his prejudice into believing that the company, with full knowledge of the facts, would not insist upon the forfeiture. Mere silence continued for an unreasonable length of time might be considered as some evidence of the intention of the company to waive its rights. So, too, where the insurer, knowing of the other insurance, sent its adjuster to the insured, stating that the company would pay the loss, and the insured was thereby induced to compromise with the other insurance company, this was held sufficient to justify a jury in finding a waiver by the insurer of the breach of the condition; but there are no such facts in the case at bar. All that appears in the testimony, all that can be lawfully inferred from it, is that the general agent of the company, after the fire, when for the first time he learned that there was other insurance which avoided the policy, placed the matter in the hands of an experienced adjuster to investigate the facts surrounding the fire. It appears from the testimony that insurance companies do sometimes waive legal defenses under their policies and pay losses when they are satisfied that they are honestly incurred and that the insured is without fault. Bond, who was charged with this investigation, had his suspicions aroused upon his first visit to the scene of the fire, and immediately thereafter requested the fire marshal, whose duty it was under the laws of the state of Maryland to investigate suspicious fires, to look into it. The result of that investigation seems to have confirmed his suspicions. Whether they were well or ill founded is not a question for our consideration. He was a man of experience in his calling, having no authority to waive any of the conditions of the policy, and claiming none, and there is nothing in his conduct from which any waiver can be implied. The legal proposition relied on by the plaintiffs in error is that "if the company, after knowledge of its right to declare the policy forfeited, does any act

which recognizes the continued existence of the policy, any act which it is authorized to do only by the policy, it thereby elects to waive the forfeiture," citing *Titus v. Insurance Company*, 81 N. Y. 419, and other cases, mainly in the State Reports, the only federal case cited being *Insurance Co. v. Norton*, 96 U. S. 241, 24 L. Ed. 689. The argument, as stated on page 6 of plaintiffs in error's brief, is "when the company employed Bond as its adjuster, and sent him on the plaintiffs' property, it committed a trespass if the policy was void. It did what it had no authority to do, except by virtue of the policy, and thereby it recognized the policy as existing, and in effect." It will not be profitable to review the various cases cited from the State Reports in support of the proposition stated. *Ins. Co. v. Norton*, 96 U. S. 234, 24 L. Ed. 689, was a suit upon a policy of life insurance, where it was claimed that the policy was forfeited by reason of the non-payment of certain notes given for the last payment, and the material question was whether, in view of the express provisions of the policy evidence introduced by the assured was relevant and competent to show that the company had authorized its agent to grant indulgence as to the time of paying the premium notes, and waive the forfeiture incurred by their nonpayment at maturity. We do not find in that case any sanction for the proposition stated. The rule in the federal courts is thus stated in *Insurance Co. v. Wolff*, 95 U. S. 333, 24 L. Ed. 387:

"The doctrine of waiver as asserted against insurance companies to avoid the strict enforcement of conditions contained in their policies is only another name for the doctrine of estoppel. It can only be invoked where the conduct of the companies has been such as to induce action in reliance upon it, and where it would operate as a fraud upon the assured if they were afterwards allowed to disavow their conduct, and enforce the conditions."

In *Astrich v. German-American Insurance Company of New York*, 131 Fed. 13, 65 C. C. A. 251, the plaintiff having several policies, some of which insured both merchandise and fixtures, and others insured fixtures only, had a conversation with one of the adjusters of the companies in interest, after the loss, and after a forfeiture as to the merchandise had been incurred, in which said adjuster requested plaintiff to furnish proofs of loss as to the fixtures and furniture, and it was held that such request, though complied with by plaintiffs, did operate as a waiver of the forfeiture as to the merchandise insured by an insurer whose policy covered merchandise only, and the court thus states the rule:

"A waiver is a voluntary relinquishment of the right that one party has in his relations to another. Such waiver may be either express or implied. An express waiver is governed by its own terms, takes care of itself, and is not often the occasion of dispute or litigation. An implied waiver, of a forfeiture, for instance, is where one party has pursued such a course of conduct, with reference to the other party who has incurred the forfeiture, as to evidence an intention to waive the same, or where the conduct pursued is inconsistent with any other honest intention, than an intention to waive the forfeiture, and the one who has incurred the forfeiture has been induced by such conduct to act upon the belief that there has been a waiver, and has incurred trouble and expense thereby. There is no confusion about the rules of law, applicable to this question. They are founded upon fundamental rules of evidence, and upon the obligations of morality obtaining in human affairs. It is

essentially a matter of intention, though circumstances may sometimes be such that the real intention is immaterial, and the question is, whether a party is not estopped by such conduct evidencing an intention upon which another has acted, to say what his true intention really was. In such cases, the ordinary and well-understood doctrines of estoppel by conduct is applicable."

An insurance company has the right, whenever a fire occurs, to inquire into the circumstances and the appointment by Rolker, the general agent, of Bond as the special agent for that purpose, cannot be construed as a waiver of any of the rights of the company. The policy sued on expressly provides as follows:

"The insured, as often as required, shall exhibit to any person designated by this company all that remains of any property herein described and submit to examination under oath by any person named by this company. * * * This company shall not be held to have waived any provision or condition of this policy, or any forfeiture thereof, by any requirement, act, or proceeding on its part, relating to the appraisal, or any examination herein provided for."

The investigation into the circumstances of this fire was made by the fire marshal, who, by the statute of Maryland, was clothed with the authority and duty to make such investigation, and all that is properly inferable from Bond's participation in it is that he wished to be acquainted with the circumstances, in order to determine whether or not he would advise the company to rely upon the forfeiture. That such investigation was no waiver of the breach of the condition of the policy was expressly determined by this court in *People's Bank v. Aetna Insurance Co.*, 74 Fed. 511, 20 C. C. A. 634, where the Court of Appeals for this circuit indorsed the opinion of the Circuit Judge as follows:

"Another ground relied upon as tending to prove a waiver upon the part of the defendant is the close investigation which the company made of the facts attending this loss, instituted upon its own behalf and prosecuted anterior to the receipt of the proofs of loss. It does not strike me that an insurance company, knowing of a loss, is obliged to wait and make no investigation, or is to limit itself to the information received in the proofs of loss. It can do that which the interests of mankind always induce—look out for yourself and protect your own interests."

As it is not denied that the policy was forfeited by reason of the breach of the condition as to additional insurance, unless the right of the defendant company to insist upon a forfeiture was waived by the acts, declaration, and conduct of the defendant or its agents, and as we are of opinion that there was no such waiver, and no evidence of such nature as would warrant the submission of that issue to the jury, it becomes unnecessary to consider the assignments of error which impeach the correctness of the court's ruling that the plaintiffs were not entitled to recover because of their failure to furnish proofs of loss within the time stipulated.

The judgment of the court below is affirmed.
Affirmed.

UNITED STATES v. SISK et al.

(Circuit Court of Appeals, Fourth Circuit. February 1, 1910.)

No. 933.

1. INTERNAL REVENUE (§ 23*)—DISTILLER'S BOND—BREACH.

Rev. St. § 3260, as amended by Act Cong. May 28, 1880, c. 108, § 1, 21 Stat. 145 (U. S. Comp. St. 1901, p. 2114), requires every distiller to give bond to faithfully comply with all the provisions of law relating to distilleries, and to pay all penalties incurred, or fines imposed on him for violation of any such provisions. *Held*, that such section not only contemplates that the distiller shall comply with all the law relating to distilleries, and pay all penalties and fines imposed on him for violation of its provisions, but also that he shall pay taxes on spirits distilled within the required 15 days, and hence, in an action on a distiller's bond for failure to pay taxes on spirits within such time, it was no defense that the spirits were seized by a revenue officer under a distress warrant and lost through the officer's negligence; the breach of the bond being the distiller's failure to pay the taxes within the time, or to warehouse the spirits according to law.

[Ed. Note.—For other cases, see Internal Revenue, Dec. Dig. § 23.*]

2. INTERNAL REVENUE (§ 23*)—DISTILLER'S BOND—ACTION.

Where a complaint on a distiller's bond alleged that the distiller produced 138 gallons of spirits which he removed from the distillery premises without paying the taxes thereon, and such allegation being denied, it was not material that the proof did not show that the distiller removed the spirits from the distillery premises; it appearing that the tax was not paid within the required 15-day period, as required, and that the spirits were seized by a revenue officer.

[Ed. Note.—For other cases, see Internal Revenue, Dec. Dig. § 23.*]

3. UNITED STATES (§ 78*)—NEGLIGENCE OF OFFICERS.

The United States is not responsible for the negligence of an internal revenue officer, by reason of which spirits seized for nonpayment of the tax by the distiller were lost.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 62; Dec. Dig. § 78.*]

4. INTERNAL REVENUE (§ 12*)—DISTILLED SPIRITS—"CASUALTY."

Rev. St. § 3221 (U. S. Comp. St. 1901, p. 2087), provides that when any spirits are destroyed by accidental fire or other "casualty" without any fraud, collusion, or negligence of the owner, after they should have been drawn off by the gauger and placed in the distillery warehouse, no tax shall be collected thereon, or, if collected, it shall be refunded. *Held*, that spirits lost after seizure by an internal revenue officer, through the latter's mere negligence, were not lost by reason of "casualty," within such section.

[Ed. Note.—For other cases, see Internal Revenue, Dec. Dig. § 12.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1, 2; vol. 3, p. 7597.]

Goff, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Western District of North Carolina, at Greensboro.

Action by the United States against Kelly W. Sisk and others. Judgment for defendants, and plaintiff brings error. Reversed.

This is an action of debt on a distiller's bond. The complaint in the fourth paragraph alleges that the breach of bond consists in the fact as therein alleged that the defendant Sisk, during the period from the 1st day of May,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

1901, to the 1st day of May, 1902, produced "138 gallons of spirits which he removed from the said distillery premises without paying the tax thereon," which was \$151.80; and the object of the action is to recover not only that amount of tax, but 5 per cent. penalty and interest at 12 per cent. per annum from the 1st of September, 1901.

The answer denies the allegations of the fourth paragraph of the complaint; that is, it denies that the distiller Sisk removed from the distillery premises the spirits so alleged to have been produced without paying the tax thereon.

On the trial the plaintiff introduced the assessment list for September, 1901, showing an assessment for \$151.80 upon three packages of spirits produced by the defendant's distillery during the months of June and July, 1901, and thereupon the defendant Sisk, sworn in his own behalf, testified that the spirits produced in the months of June and July, 1901, were not entered in bond, and no warehousing bond was given therefor; that the taxes upon the spirits were assessed and a warrant of distraint issued therefor, and the spirits so produced were taken by the deputy collector and removed from the distillery premises to a place 10 miles distant and advertised for sale and lost and never sold, without any fraud or collusion on the part of the said defendants.

The court charged the jury that if the spirits upon which the taxes were assessed under the warrant of distraint were taken by the deputy collector and removed from the distillery premises and from the possession of the distiller 10 miles distant, and placed in an old warehouse, as testified to by the defendant Sisk, and were removed therefrom and allowed to waste, and were lost without fraud or collusion on the part of the defendants and without the defendants' knowledge, the plaintiff would not be entitled to recover. The jury found the issue thus submitted in favor of the defendants, and judgment was rendered accordingly.

To this charge of the court the plaintiff in error excepted, and upon that is based the only assignment.

A. L. Coble, Asst. U. S. Atty. (A. E. Holton, U. S. Atty., on the brief).

William P. Bynum, Jr., for defendants in error.

Before GOFF and PRITCHARD, Circuit Judges, and WAD-DILL, District Judge.

PRITCHARD, Circuit Judge (after stating the facts as above). Treating the statement of the case as found in the record made by the court below as the bill of exceptions required by our rule 10—the same having been signed and sealed by the judge—and evidently intended as such bill, we find the facts to be as follows:

"The plaintiff introduced the assessment list for September, 1901, from the office of the collector of internal revenue for the Fifth collection district of North Carolina, showing an assessment of \$151.80 assessed upon three packages of spirits produced by the defendant's distillery during the months of June and July, 1901.

"The defendant, Kelly W. Sisk, offered himself a witness in behalf of himself, and testified that the spirits produced for the months of June and July were not entered in bond, and no warehousing bond was given therefor; that the taxes upon the spirits were assessed and warrant of distraint issued therefor and placed in the hands of J. A. Petree, the then deputy collector in charge of the division, who seized the same spirits on which the taxes were assessed under the warrant of distraint and removed them from the distillery premises to an old warehouse at Walnut Cove and had the same advertised for sale; that by the negligence of the said deputy collector the said spirits whilst in his custody were lost and were never sold, without any fraud or collusion on the part of the said defendant."

From the foregoing it will be seen that the distiller in this instance neglected and failed to comply with the requirements of the law, to

wit, to pay the taxes on spirits distilled within the period required by law, or to place the same within a bonded warehouse after having executed a bond for the payment of the taxes thereon.

Section 3260, as amended by Act May 28, 1880, c. 108, § 1, 21 Stat. 145 (U. S. Comp. St. 1901, p. 2114), provides as follows:

"Every person intending to commence or to continue the business of a distiller, shall on filing with the collector his notice of such intention, and before proceeding with such business, and on the first day of May of each succeeding year, execute a bond in the form prescribed by the commissioner of internal revenue, conditioned that he shall faithfully comply with all the provisions of law relating to the duties and business of distillers, and shall pay all penalties incurred or fines imposed on him for a violation of any of the said provisions; and that he shall not suffer the lot or tract of land on which the distillery stands, or any part thereof, or any of the distilling apparatus, to be incumbered by mortgage, judgment, or other lien, during the time in which he shall carry on said business. Said bond shall be with at least two sureties, approved by the collector of the district, and for a penal sum of not less than * * * the amount of tax on the spirits that can be distilled in his distillery during a period of fifteen days."

Among other things, this section contemplates that the distiller shall comply with the provisions of law relating to the duties and business of distillers, and pay all penalties and fines imposed upon him for a violation of its provisions, and also that he shall pay the taxes on the spirits that may be distilled at his distillery during a period of 15 days. It appears in this instance that the spirits seized were not placed in a warehouse, but retained in the possession of the distiller, and that he failed to pay the taxes on the same. The government by proper proceedings attempted to collect the taxes due on the spirits by assessment, and in pursuance of such assessment a distraint warrant was issued, and the packages of spirits were seized and taken into custody by the deputy collector. Under these circumstances, there was a breach of the distiller's bond, and the distiller and his sureties thereby became liable for the payment of the taxes on the spirits thus produced.

It is insisted by counsel for defendants in error that inasmuch as "it is alleged in the fourth paragraph of the complaint that the distiller, Sisk, produced 138 gallons of spirits which he removed from the distillery premises without paying the taxes thereon, and this allegation being denied in the answer, and there being no proof to sustain it, the plaintiff was not entitled to recover."

This being a suit on a distiller's bond, wherein the sureties, among other things, undertook to pay the taxes on any spirits that might be produced and not warehoused at any time during a period of 15 days, it necessarily follows that the real issue in this controversy is as to whether the distiller has complied with the law in this respect.

It being alleged that the distiller produced 138 gallons of spirits upon which he did not pay the taxes, it is immaterial as to whether the spirits were removed from the distillery premises by the distiller, or, as in this instance, by an agent of the government. The breach of the bond was the failure of the distiller to either pay the taxes within the 15-day period or to warehouse the spirits in accordance with the provisions of law.

In the case of *Harkins v. Williard*, 146 Fed. 706, 77 C. C. A. 132, this court, among other things, said:

"Primarily the distiller is liable for the taxes due on the spirits distilled, and, in case of default, his sureties are also jointly liable for the same."

However, it is insisted by counsel for defendants in error that the government is liable for the negligence of its officers or agents, and that such negligence constitutes a bar to recovery. This question was passed upon in the case of *United States v. Guest*, 143 Fed. 456, 74 C. C. A. 590. The court, among other things, in disposing of that case, said:

"We are inclined to differ with the learned judge of the lower court in all three particulars. As to the loss of the spirits, it is true that the distillery and its contents had been seized by the government's representative, and the defendants may be said to have in no manner brought about the loss; still it does not serve to relieve the liability under the bond. That the government is not liable for negligence or laches of its officers or agent is well recognized and settled, and such negligence constitutes no bar or defense to a recovery upon a bond taken by the government. * * *"

The Supreme Court of the United States also passed upon this question in the case of *Hart v. United States*, 95 U. S. 318, 24 L. Ed. 479. That suit was instituted on a distiller's bond, as in this case. The breach alleged was the nonpayment of \$3,000 demanded of him, being the amount of taxes on 6,000 gallons of spirits which he had distilled after the 1st day of June, 1871. The distiller made no defense. The other defendants filed three pleas. On motion of the plaintiff, all of the first plea except such as averred the nondelivery of the bond sued on was stricken out. Demurrers to the second and third were sustained, whereupon the defendants excepted. The third plea reads as follows:

"That the taxes charged and sued for were assessed against Hosmer on spirits he had distilled, and were a first and paramount lien thereon; but that the collector of internal revenue for the district, without the knowledge or assent of the defendants, and without first requiring the payment of the taxes thereon, permitted him to remove from the bonded warehouse a quantity of said spirits—more than sufficient to pay any just claim of the plaintiff."

Demurrers to the second and third counts of defense were sustained by the court below, whereupon the defendants excepted, and the case was carried to the Supreme Court of the United States. Chief Justice Waite, who delivered the opinion, in referring to the second and third counts of defense, said:

"The second defense relied upon in this case is disposed of by *Osborne v. United States*, 19 Wall. 577 [22 L. Ed. 208], which we are not inclined to reconsider.

"The third defense is equally bad. Under the law as it stood when this suit was commenced, no distilled spirits could be removed from a distillery warehouse before the payment of the tax [Act July 20, 1868, c. 186] 15 Stat. 130, § 15 [U. S. Comp. St. 1901, p. 2122], without subjecting all those engaged in such a removal to heavy penalties. 15 Stat. 140, § 36. An officer of the United States had no authority to dispense with this requirement of the law. If in violation of his duty he permitted such a removal, he subjected himself to punishment, but did not bind the government by his acts. The government is not responsible for the laches or the wrongful acts of its officers. *Gibbons v. U. S.*, 8 Wall. 269 [19 L. Ed. 453]; *United States v. Kirkpatrick*, 9 Wheat. 720 [6 L. Ed. 199]; *United States v. Vanzandt*, 11 Wheat. 184 [6 L. Ed. 448]; *United States v. Nicholl*, 12 Wheat. 505 [6 L. Ed. 709]; *Jones et al. v. United*

States, 18 Wall. 662 [21 L. Ed. 867]. Every surety upon an official bond to the government is presumed to enter into his contract with a full knowledge of this principle of law, and to consent to be dealt with accordingly. The government enters into no contract with him that its officers shall perform their duties. A government may be a loser by the negligence of its officers, but it never becomes bound to others for the consequences of such neglect, unless it be by express agreement to that effect. Here the surety was aware of the lien which the law gave as security for the payment of the tax. He also knew that, in order to retain this lien, the government must rely upon the diligence and honesty of its agents. If they performed their duties and preserved the security, it inured to his benefit as well as that of the government; but, if by neglect or misconduct they lost it, the government did not come under obligations to make good the loss to him, or, what is the same thing, release him pro tanto from the obligation of his bond. As between himself and the government, he took the risk of the effect of official negligence upon the security which the law provided for his protection against loss by reason of the liability he assumed."

Also the following cases are in point: *Minturn v. United States*, 106 U. S. 437, 1 Sup. Ct. 402, 27 L. Ed. 208; *United States v. Witten*, 143 U. S. 76, 12 Sup. Ct. 372, 36 L. Ed. 81.

It appears from the brief of plaintiff in error that the foregoing cases were not called to the attention of the learned judge who tried this case below.

The court below instructed the jury that, if they found from the evidence that the collector seized the spirits under warrant of distraint for taxes due thereon, removed them from the possession of the distiller, and placed them in an old warehouse, and they were there allowed to waste or be lost, without the collusion or fraud of the defendants and without the defendants' knowledge, the plaintiff would not be entitled to recover; and to sustain this view of the law counsel for defendants in error relies upon the provisions of section 3221 (U. S. Comp. St. 1901, p. 2087), which reads as follows:

"And when any distilled spirits are hereafter destroyed by accidental fire or other casualty, without any fraud, collusion, or negligence of the owner thereof, after the time the same should have been drawn off by the gauger and placed in the distillery warehouse provided by law, no tax shall be collected on such spirits destroyed, or, if collected, it shall be refunded upon the production of satisfactory proof that the spirits were destroyed as herein specified."

In the case of *Freeman et al. v. United States*, 157 Fed. 195, 84 C. C. A. 643, this court held that the "destruction of spirits in a warehouse by accidental fire or other casualty may be set up as a defense to an action by the government on a distiller's warehouse bond to recover the taxes thereon." However, the facts in this case are not such as to entitle the defendants in error to relief under the foregoing section. There is nothing in the record to show that the packages of spirits were destroyed by accidental fire or other casualty. They were distilled and in the possession of the distiller, without the taxes having been paid, and in order to collect the taxes thus due, and unpaid, a distraint warrant was issued by which the packages of spirits were seized and taken out of the possession of the distiller.

Suppose that the deputy collector had seized the spirits in question, and while en route with them to the place of deposit a portion of the spirits had been lost by leakage, leaving a wantage in the packages

thus seized of one-half the amount contained therein at the time of seizure, could it, under such circumstances, be contended that the distiller and his sureties would not be liable under the distiller's bond for the taxes on the amount of spirits lost? We think not.

The failure of the distiller to pay the taxes on the spirits produced within the time prescribed by law not only rendered the spirits on hand liable to seizure, but the property of the distiller as well; but this does not in any wise relieve the sureties of their liability on the distiller's bond.

For the reasons stated, we are of opinion that the court erred in its instructions to the jury involved in the assignment of error. It necessarily follows that the judgment of the lower court must be reversed, and that the cause be proceeded with in that court in accordance with the views herein expressed.

Reversed.

GOFF, Circuit Judge, dissents.

THE SANTA RITA.

(Circuit Court of Appeals, Ninth Circuit. February 28, 1910.)

No. 1,771.

1. ADMIRALTY (§ 118*)—REVIEW ON APPEAL—FINDINGS OF FACT.

Where the testimony of the witnesses in a suit in admiralty was largely taken by deposition, there is not the same presumption in favor of a finding of fact by the trial court as when based on oral testimony of witnesses appearing before it, and it will be more readily reviewed by an appellate court.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 770-772; Dec. Dig. § 118.*]

2. NEGLIGENCE (§ 62*)—PROXIMATE CAUSE OF INJURY—INTERVENING EFFICIENT CAUSE.

One of the most valuable tests to apply to determine whether a negligent act was the proximate or remote cause of an injury is to determine whether a responsible human agency has intervened, sufficient of itself to stand as the cause.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 76-79; Dec. Dig. § 62.*]

3. SHIPPING (§ 81*)—LIABILITY OF VESSEL FOR INJURY TO ANOTHER—PROXIMATE CAUSE OF INJURY.

An oil burning steamer, lying beside Long Wharf at Oakland, in San Francisco Bay, discharged a considerable quantity of inflammable fuel oil from her hold into the waters of the bay, which was carried by the wind and tide under the wharf, where, mixing with floating debris, it formed a mat. The wharf was 90 feet wide, supported on piles, and there were vessels lying on the opposite side. The floor of the wharf was in places soaked with oil which had escaped from oil burning engines used thereon. By some accidental means the inflammable mat formed on the water was set on fire, burning a portion of the wharf, and also injuring libellant's vessel lying on the other side and around which the oil floated. *Held*, that the negligent act of the steamer in discharging the oil into the bay was the proximate cause of the injury, which, with knowledge of the inflammable character of the oil, the adjacent wharf on which men and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

engines were working, the surrounding vessels, and the prevailing wind and tide, should reasonably have been anticipated as a probable consequence.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 344; Dec. Dig. § 81.*]

Appeal from the District Court of the United States for the Northern District of California.

Suit in admiralty by the Société Nouvelle d'Armement, as owner of the bark Boieldieu, against the steamer Santa Rita; the United Steamship Company, claimant. Decree for respondent (173 Fed. 413), and libellant appeals. Reversed.

William Denman, for appellant.

Charles Page, Edward J. McCutchen, and Samuel Knight, for appellee.

Before GILBERT and MORROW, Circuit Judges, and HUNT, District Judge.

HUNT, District Judge. The Société Nouvelle d'Armement, a corporation of France, brought this libel against the American steamer Santa Rita, to recover damages for injuries inflicted upon the Boieldieu, a three-masted steel bark belonging to the libellant. The lower court found that the alleged negligent act of the defendant was not a proximate, but remote, cause of the injury. The libellant sued out this appeal from a judgment in favor of defendant.

The material uncontroverted facts are substantially as follows: The Santa Rita, an oil burning steam vessel, 450 feet long, was moored to the north side of a wharf at Oakland, Cal. The British ship Whittleburn and the libellant's bark Boieldieu were moored on the south side of the same wharf and directly opposite the Santa Rita. The wharf was 90 feet wide, built on piles driven into the bottom of the harbor. Between 4 and 5 o'clock on the afternoon of March 11, 1907, a fire broke out, partially consuming the wharf and greatly injuring the Boieldieu.

The libellant alleges that this fire was caused by the negligence of the Santa Rita in pumping into the bay or allowing to drip from her decks therein large quantities of volatile fuel oil, which collected under the wharf in the alleyway formed by the vessels and the wharf, and that, as the tide started to come in, this mass of oil, held and matted together by particles of inflammable rubbish and debris, moved partially out from under the wharf and surrounded the Boieldieu. The libellant further contends that, while the Boieldieu was thus surrounded by this highly combustible oil mat, a spark from an engine on the wharf, or a live coal from the fuel box of the donkey engine, or a burning cigar, was thrown from the wharf into this oily mass, igniting it and causing the conflagration which damaged the wharf and the Boieldieu.

The court found, among other things, that oil of a highly combustible nature was discharged from the Santa Rita and collected in the water under the wharf and around the Boieldieu. There is ample

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

evidence to support this conclusion. Much of the evidence offered by the defendant relating to this finding is that of men who testify that they did not pump any oil overboard or see any thus pumped.

On the other hand, the libelant supports its contention by the testimony of those who saw the oil thrown into the bay, and, in fact, were actors in putting it there. *The Lakme. Tyee. Queen Elizabeth*, 118 Fed. 972, 55 C. C. A. 466. The decision of this question of fact depends upon the veracity of the libelant's witnesses, and who is better fitted to judge of their credibility than the court before whom they appeared? The surrounding facts and circumstances also point strongly to the probability that the oil which burned on the water around the *Boieldieu* came from the *Santa Rita*. We believe the finding of the lower court was correct.

The court further found that this mat of oil was ignited by the heat or flame from the burning wharf, taking the view that in some unexplained manner the wharf caught fire, and that the fire was communicated to the oil which lay on the water in close proximity thereto, and that the injury to the *Boieldieu* was caused jointly by the burning of the wharf and by the burning of the oily mass on the water. The finding that the fire originated on the wharf is vigorously assailed. The libelant contends that the oil ignited first, and that the flame spread from the oil to the wharf. We regard the defendant's contention that no oil whatever burned on the water as plainly against the evidence and without merit. There is no reasonable doubt that the wharf burned, and some oil on the water burned; and the further question now arises: Where did the fire originate? On the wharf, or in the oil?

There is no evidence tending to show that any particular act started the conflagration; nor do the circumstances of themselves point to any probability by which the court may safely be guided to one view or the other. There were several oil burning locomotives, a donkey engine, and 20 or 25 men on the wharf at the time of the fire. The wharf itself was more or less oil soaked in spots, and there were several car loads of hay or other inflammable material thereon. The men were smoking. It is not at all improbable that one of them carelessly let drop a burning match near the hay, thus starting the fire. Or, an engine may have dropped some fire or sparks on the oil soaked planks of the wharf, and so caused the fire. On the other hand, the presence of active engines and smoking men might lead equally as well to the conclusion that the fire started in the oil on the water. It is well established that this matted mass of fresh oil was very inflammable, even though floating. A burning cigar stub, or a live spark thrown from an engine, falling on a chip or other more or less solid material in the oil, would furnish a rational explanation of the origin of the fire.

The natural probabilities in favor of the different theories being equal, it is necessary to weigh and examine carefully the testimony of the eyewitnesses, in order to arrive at as just and right a conclusion as is possible under the circumstances. Fortunately, there is little real conflict in the testimony of those who saw the fire as to where it

started. One of defendant's witnesses says positively that it started on the wharf, and the others say that it looked to them as if it started there. But those who were in a position to see where it started—who were south of the line of cars—testify directly and unequivocally that the fire started on the water, and that they saw it there before any was visible on the wharf proper. Whether on the water or on the wharf, it is undeniable that it started either to the south of the cars or in the cars themselves. The witnesses of libelant who testified on the point were in such a position that a fire in either of the places above named would have been easily discernable by them, while the defendant's witnesses were so situated that they could not have seen a fire on the water near the Boieldieu unless the flames mounted very high, and even then they were so far off that they might easily have been mistaken about the exact position of the conflagration. After a careful consideration of all the testimony, we are of opinion that the finding of the lower court, to the effect that the fire originated on the wharf, was clearly against the weight of the evidence and cannot stand.

In our examination of the evidence, which has led us to the conclusion that the learned judge of the lower court erred in his finding upon this point, we observe that libelant's principal witnesses, who gave direct-evidence thereon, testified by depositions. Upon this matter, therefore, the trial judge had not the advantage of seeing and hearing the witnesses. His position, to arrive at a true result, was scarcely better than ours. Hence the rule that, when oral testimony is evidently the basis of a finding, or the written testimony relates to matters as to which the trial court is better able to reach a satisfactory conclusion than the appellate court, the finding will be adhered to, does not apply with the same force.

The court, after finding the facts as hereinbefore recited, made the further finding that the negligence of the Santa Rita in discharging oil into the bay could not be regarded as the efficient or proximate cause of the injury to the Boieldieu. The court said:

"The burning of the wharf was entirely disconnected, and unrelated to the original act of the Santa Rita in discharging the oil, and was not caused by any person connected with that vessel, and whose actions were subject to her control. Unless, therefore, the burning of the wharf and the consequent ignition of the oil were matters which ought to have been reasonably anticipated as probable—that is, more likely to occur than otherwise—the burning of the wharf must be found to be the efficient cause of the damage to the Boieldieu. Was the burning of the wharf, and the ignition of the oil, something more likely to occur than not—something that a person of ordinary prudence would have thought to be probable? The result has shown that such a fire—the ignition of oil thereby—and the consequent damage to the Boieldieu, were matters which might occur—events which any person of ordinary judgment would have known to be possible. But the question is not whether a person of ordinary prudence would have known that such results were possible, but whether they would have been regarded by him as probable—something likely to occur, and therefore to be guarded against—by not discharging fuel oil into the bay.

"It seems to me this question must receive a negative answer. A man of extreme caution might have anticipated the result; but one of ordinary prudence and foresight would not have thought, in view of all the surrounding circumstances, that fuel oil, if discharged into the waters of the bay, with its

tides and winds, would probably be set on fire, by the accidental or negligent burning of the wharf, or by live coals thrown into the bay and coming in contact with the oil."

We cannot give our assent to this view of the case. The respondent ship, being an oil burning one, was charged with knowledge of the inflammable quality of fresh oil, even on water and was also charged with knowledge of the probable effects of ordinary winds and tides in carrying the oil to where it might do great injury. The respondent cannot, therefore, be heard to say that she did not know fresh oil on water was inflammable, or that she had no reason to believe that the oil which she put into the harbor would be driven by the winds and tide under the dock and in among the shipping. It ought to have been known that the presence of a large quantity of fresh oil of a very combustible nature was a menace and danger while lying in an exposed position around a busy wharf. It ought reasonably to have been anticipated by those in charge of the Santa Rita that such a mass of oil floating under the wharf and around the shipping was likely to be ignited in some manner through the numerous and patent sources of fire which were near by. What would be more natural than for a man about the shipping to throw his lighted cigar stub into the bay, or for an engineer on the wharf to dump his live coals into the water? Certainly, one not having any reason to believe that the water was covered with an inflammable sheet could not be held to be negligent in thus throwing his burning coals or lighted cigar into the harbor. Indeed, a careful man, anxious to avoid all risks of fire, would select the water as the natural and seemingly proper place to put them. Surely, the defendant was charged with notice that men rightfully do these things, and that the doing of them where large masses of inflammable oil are floating about would probably produce a conflagration.

There is no infallible rule by which one can distinguish between a proximate and a remote cause.

Justice Moody, for the Supreme Court, has recently said:

"Few questions have more frequently come before the courts than that whether a particular mischief was the result of a particular default. It would not be useful to examine the numerous decisions in which this question has received consideration, for no case exactly resembles another, and slight differences of fact may be of great importance. The rules of law are reasonably well settled, however difficult they may be of application to the varied affairs of life." *Atchison, etc., Ry. Co. v. Culhoun*, 213 U. S. 1, 29 Sup. Ct. 321, 53 L. Ed. 671.

In *Milwaukee Ry. Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256, the court said:

"Did the facts constitute a continuous succession of events so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application, but it is generally held that, in order to warrant a finding that negligence, or an act not amounting to a wanton wrong, is the proximate cause of an injury, it must appear that the injury is the natural and probable consequence of the negligent or wrongful act, and that it ought to have been foreseen in the light of the attendant circumstances."

Tried by the above rule, it appears to us that the negligent act of the Santa Rita in pouring oil into the bay was the proximate cause of

the injury to the Boieldieu. The injury flowed directly from the negligent act. The result of the act is not incompatible with what one would expect. The question is not whether such an act would produce a conflagration in the majority of cases, but whether it has a decided and natural tendency to produce such a result.

One of the most valuable tests to apply to determine whether a negligent act is the proximate or remote cause of an injury is to determine whether a responsible human agency has intervened between the fact accomplished and its alleged cause. "If a new force or power has intervened, of itself sufficient to stand as the cause of the misfortune, the other must be considered too remote." *Insurance Co. v. Tweed*, 7 Wall. 44, 19 L. Ed. 65; *Washington & Georgetown R. v. Hickey*, 166 U. S. 521, 17 Sup. Ct. 661, 41 L. Ed. 1101.

In this case another force or power had not intervened. The throwing of the lighted cigar, or burning coal, into the bay cannot be said to be another force, or to break the causal chain. These acts were innocent, yet probable, and as natural as were the acts of the shopkeepers in throwing around the squib, in the famous "squib case" (*Scott v. Shepherd*, 2 W. Bl. 892), although we recognize that the causal connection that existed in the squib case between the original act and the intermediate acts is not found in the present instance.

We are of opinion that the injury to the Boieldieu was the natural and probable consequence of the negligent act of the Santa Rita, and ought to have been anticipated in the light of the surrounding circumstances. The circumstances which must be considered are the highly combustible nature of the oil, the condition of the tide and wind, the proximity of the wharf and shipping, the inflammable condition of the oil soaked wharf, and the many chances of accidental ignition to which the oil was exposed. Without doubt, the natural and probable consequence of covering water with oil might not, under different circumstances, have had a natural tendency to produce any injury. If the oil had been dumped into the middle of the bay, far from any ship or wharf; if the wind and tide had been different; if the wharf had been fire proof; if the oil had been less inflammable; if the chances of fires had been much less—we might have reached a different conclusion. But, considering all the facts and circumstances, we must conclude that the injury done by the floating oil ought to have been foreseen, and that, therefore, the placing of it on the water was the proximate cause of the injury inflicted by its ignition. *Milwaukee R. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256; *Insurance Co. v. Boon*, 95 U. S. 117, 24 L. Ed. 395; *Washington & Georgetown Ry. Co. v. Hickey*, 166 U. S. 521, 17 Sup. Ct. 661, 41 L. Ed. 1101; *McGill v. Michigan S. S. Co.*, 144 Fed. 788, 75 C. C. A. 518.

The libellant placed great reliance on section 374½ of the Penal Code of California, as affecting the question of proximate cause and the burden of proof in relation thereto. That is a statute which makes it a misdemeanor for any one to discharge petroleum or certain other substances into the waters of a navigable bay or river of the state. In arriving at our conclusion, we have not taken this statute into consideration, because, under the facts, we believe liability exists irrespective of the statute.

The decree of the District Court, dismissing the libel with complainant's costs, is reversed.

It is further ordered that the District Court enter decree in favor of libelant in usual and proper form.

WILMERTON v. WILMERTON et al.

(Circuit Court of Appeals, Seventh Circuit. January 4, 1910.)

No. 1,609.

WILLS (§ 764*)—LEGACIES—ADEMPTION.

Testator bequeathed to plaintiff and another notes and moneys to the amount of \$75,000 as per contract, to be managed by a specified bank for the benefit of testator's estate, and the remainder of the estate, after payment of specific bequests, was given to a residuary legatee. The contract referred to created a trust by which the bank agreed to collect and receive the principal and interest of the notes and securities, paying the income to testator on demand, reinvest the principal, and on testator's death to account for all the property to his estate. Testator having become incompetent, a conservator was appointed, who demanded and received from the bank the income that had accumulated in its hands, which on testator's death was claimed by the executor as a part of the residuary estate. *Held* that, since a legacy will be held to have been adeemed only where such was testator's apparent intention, the collection of such income by the conservator did not constitute such a withdrawal of the amount collected from the fund as to constitute an ademption of the bequest thereof to that extent, in the absence of any other evidence that such was testator's intention.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1978-1994; Dec. Dig. § 764.*]

Appeal from the Circuit Court of the United States for the Northern Division of the Southern District of Illinois.

Bill by Frank Wilmerton against William W. Wilmerton and another. Decree dismissing the bill, and complainant appeals. Reversed, with instructions.

The bill was by appellant, a citizen of Iowa, against appellees, citizens of Illinois, the appellee, William W. Wilmerton, being made defendant both in his own right and as executor of the will of William Wilmerton, deceased; and was to recover complainant's one-half share in \$12,442.03, together with interest thereon, said to be due to appellant under the will of William Wilmerton, deceased, and wrongfully withheld by appellee, William W. Wilmerton, as executor of such will. A demurrer to the bill having been sustained, the bill was dismissed for want of equity.

The salient facts, stated in the bill, are as follows: On January 12, 1904, William Wilmerton, deceased, executed his will, wherein there was bequeathed to the appellee, Louisa Little, and to appellant, Frank Wilmerton, daughter and son respectively of the testator, "notes and moneys to the amount of \$75,000, as per contract to be managed by said bank [The Central Trust and Savings Bank of Rock Island] for the benefit of my estate." The remainder of the estate, after three other specific bequests, went to William W. Wilmerton, appellee, amounting, after the deduction of the other bequests, to considerably more than \$75,000 in value. The trust, recited in the contract with the bank, was as follows:

"The said party of the first part [the bank], shall collect and receive the interest and principal of the said notes and securities at maturity, pay the income thereof to said party of the second part William Wilmerton, on de-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

mand, and reinvest the principal thereof as speedily as it is able to, after the receipt of the same, and upon the death of the said party of the second part, to account for all said property to the estate of the said party of the second part. The said party of the first part, in and about the said collecting of interest, principal, and re-investment, to be held to the exercise of the same degree of care as it would of its own property. * * *

At the date this contract was entered into, William Wilmerton was about eighty years of age, and at the date the will was executed was a little past eighty-one years of age; but on both dates was of sound and disposing mind and memory. Subsequently Wilmerton became insane, and on the twelfth day of June, 1906, one Thomas J. Medill was duly appointed conservator of his estate, and forthwith took possession and control of the estate, except so much thereof as was, at the time, in the care, custody and control of the trustee above mentioned. Wilmerton, up to the time of his death, November 26th, 1907, did not recover his reason.

The bill shows that during the entire period of the conservation, Wilmerton's estate was worth something like \$200,000; no need is shown for the taking of any portion of the \$75,000, embodied in the trust agreement, either for the conservation of the estate or the support of the ward; nor any occasion for the change of securities. Notwithstanding this, the conservator, considering himself entitled to act upon that provision of the trust agreement under which, "on demand," it was provided that the trustee should pay the income to Wilmerton (and apart from any need arising from the conservation of the estate or the maintenance of the ward), on the third day of October, 1906, demanded of the trustee that it should pay over to him the accrued interest or income that had accumulated in its hands; and thereupon there was paid to him such accumulation to the amount of \$12,442.03; which sum, appellee William W. Wilmerton, as executor, has treated as a part, not of the specific trust, but as a part of the residuary estate—refusing to pay over the same to appellant Frank Wilmerton and appellee Louisa W. Little, as a part of the specific trust fund bequeathed to them. The further facts are stated in the opinion.

S. S. Gregory, for appellant.

H. A. Weld, for appellees.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

GROSSCUP, Circuit Judge (after stating the facts as above), delivered the opinion:

The argument of appellee William W. Wilmerton is, that under the law of Illinois, the conservator succeeded to the right of the beneficiary in the trust agreement "to demand" the income accumulating and that had accumulated upon the securities embodied in the trust; that such demand having been complied with, the income thus paid over became at once segregated from the trust fund—was no longer a part of the trust fund in fact, but became a part of the general property of the conservator's ward; from which it follows, that the will, acting as of the testator's death, a date subsequent to this act of segregation, acted only, so far as the bequest to appellant and Louisa W. Little went, upon the securities remaining; the test of the testator's intention being, not what, aside from the will, he may be shown to have said or done in relation to the specific bequest involved, but what property was, in fact, included in and acted upon by the specific bequest at the date of his death.

We accept this as the true test of the testator's intention. It does not follow, however, that intention is thereby shown in the will that the power of the testator to take down "on demand" the income of the

securities mentioned in the specific bequest, should go over to his conservator in case of his subsequent mental incapacity. No such intention is affirmatively shown in the will. Nor does it follow that such power of the testator to take down the income goes by operation of law to the conservator, to the end that the special fund, acted upon in the specific bequest, shall be by that amount diminished. That, indeed, is the real question in this case.

Counsel for appellee have brought to our attention two cases, one an English, the other a Pennsylvania case, the former, at least, supporting his contention, viz: In *Re Freer*, 22 L. R. Chancery Division, 622, and *Hoke v. Herman*, 21 Pa. 301. The *Freer Case* was that of a testator who bequeathed "all his first preference bonds" in a certain railroad to one of his sons, the residuary estate to a son and daughter. Subsequently, but before the testator's death, and while he was of unsound mind, a conservator, under an order of the Lord Justices, transferred these bonds, on the ground that they were an unsafe investment, into consols, and this was held by Chitty, Justice, to have been an "ademption" or "extinguishment" of the legacy—the learned Justice finding that he need make no distinction between those two terms in their application to the question before him.

In the Pennsylvania case, *Herman* held a note against *Hoke*, which was the subject of a bequest to *Hoke* by *Herman*, in his will made subsequently, as follows:

"I give and bequeath unto my said nephew *Herman Hoke*, and his heirs, a promissory note of \$600, with interest, which I hold against him at this time."

Subsequently *Herman* became insane, a committee of his person and estate was appointed, and this committee, settling with *Hoke* for certain services rendered by him to *Herman* after the date of the will (the bequest, above mentioned, being known neither to *Hoke* nor to the committee), credited \$178.63 on the interest on the note, and a receipt was given by *Hoke* to the committee in full of his claim. Upon the death of *Herman*, the note, thus in part paid and endorsed, was delivered to *Hoke*; but *Hoke* demanded the return of the \$178.63, with interest, debited against him in his settlement with the committee, there being assets of the estate sufficient to pay the demand if he were entitled to recover. The Court, Black, C. J., delivering the opinion, held:

"That if a thing bequeathed in a will by such a description as to distinguish it from all other things be disposed of, so that it does not remain at the death of the testator, or if it be so changed that it cannot be called the same thing, the bequest is gone. If such a legacy be of a debt, payment necessarily makes an end of it. The legatee is entitled to the very thing bequeathed if it be possible for the executor to give it to him; but if not, he cannot have money in place of it. This results from an inflexible rule of law applied to the mere fact that the thing bequeathed does not exist, and it is not founded on any presumed intention of the testator."

In the English case, the ruling is made to turn upon the proposition that if the testator himself, not being a lunatic, had sold the stock and placed the proceeds to a separate account on his books, there would have been an ademption or extinguishment of the specific legacy, notwithstanding a memorandum placed there by the testator to the effect

that for all purposes the proceeds were to stand in place of the stock—a proposition that is as true here as in England, for the stock having been voluntarily taken down by the testator from the specific bequest, and the memorandum not having been attested according to the Wills Act, there stood at the date of the testator's death (the date when the will took effect), no disposition by special bequest of the stock thus involved. But is that proposition a true criterion of the question before the Court in the Freer Case, or the question before us now? Had the testator in the Freer Case sold the specific preference bonds, so that they no longer, in specie, were a part of his property, or had the testator in this case taken down the interest, or any portion of the principal (provided he had power, under the trust agreement, to take down the principal), the act would have been one performed by him in view of his then existing will, and, therefore, a voluntary and conscious extinguishment or diminution of the corpus of the specific thing upon which the specific bequest was intended to act. In other words, the will and the subsequent act, considered together, would give us the testator's final testamentary intention.

But how can that be said to be the case where the diminution or extinguishment of the thing, upon which the specific bequest acts, is not the subsequent voluntary or conscious act of the testator himself. The conservation of an estate under the lunacy laws, both here and in England, is purely an administrative function. Is it contemplated that an administrator may, at his will, change the testator's will? The testator, lunacy coming on, is, so far at least as a disposing mind is concerned, civilly dead. Does the disposing mind, along with the ward's effects, go over to the conservator? Is the conservator anything more than a mere custodian and administrator of the ward's estate, with no power, either directly or by indirection, to change the ward's duly expressed purposes respecting the disposition of that estate until the ward recovers his reason, or the administration after death begins?

The Pennsylvania case is expressly founded on *Blackstone v. Blackstone*, 3 Watts, 338, 27 Am. Dec. 359, an early Pennsylvania decision, holding that where a specific bequest of bank stock, after the date of the will, was exchanged for a bond, the bequest was adeemed, notwithstanding the declared intention of the testator to keep the bond for the legatee in lieu of the stock—a ruling that again is founded upon the fact that the so-called "declared intention" was not attested according to the laws of Pennsylvania relating to wills; and the change having been made voluntarily and consciously by the testator in view of his will, must, in the absence of any duly attested further intention, be held to have been an intentional and conscious change in his testamentary disposition. Nor is *Hoke v. Herman* exactly in point; for the voluntary payment of interest on a note by the intended legatee, even though the testator was not in a mental condition to determine whether he would accept or reject it, is not the case of a stranger to the bequest changing, at his own will, the carrying out of the bequest.

In the Am. & Eng. Encyclopædia of Law (2d Ed.), Vol. 1, p. 625, it is said:

"There is some early English authority for the view that the question whether or not a legacy has been adeemed does not depend upon the supposed intention of the testator, but is to be determined solely according to the strict rule requiring the property bequeathed to remain in specie and a part of the testator's estate. There are, however, English cases to the contrary." Citing *Jenkins v. Jones*, L. R. 2 Eq. 323.

"In the United States the doctrine of the latter line of cases has been generally followed; and in deciding questions of ademption the courts here have been disposed to observe the same rule which prevails elsewhere in the construction of wills and testaments, and to hold legacies adeemed only where the testator apparently so intended."

Though none of the cases cited precisely support this statement of the rule, there are no cases, other than the ones above mentioned, that are contrary thereto. Upon sound reason, we think that the English and Pennsylvania cases cited ought not to be followed, and upon what appears to us to be sound reason, we think that the rule, that legacies are adeemed only where such an intention appears on the part of the testator himself, ought to be followed. The question, in our judgment, is not whether, as a mere matter of accident, or of purpose outside of the testator's purpose, the thing set apart as the corpus of a special bequest has been changed in specie. The real question is whether, all things considered, the testator's testamentary disposition did, or did not, remain, with reference to the particular thing embodied in the specific bequest or its proceeds, the same as it was the last moment he was able to exercise a testamentary disposition. In that way, and in that way only, we think, can the right of the man to dispose of his property according to his own wishes, exempt from the interference, caprice or interest of others, be fully carried out. In that way only can his intention, as embodied in his will, be truly administered.

The decree of the Circuit Court is Reversed, with instructions to overrule the demurrer to the bill and to proceed further in accordance with this opinion.

BALTIMORE & O. R. CO. v. WHITE.

(Circuit Court of Appeals, Fourth Circuit. February 28, 1910.)

No. 938.

CARRIERS (§ 320*)—INJURIES TO PASSENGERS—NEGLIGENCE PER SE.

Plaintiff, a passenger, was injured by the derailment of the train, and in an action for the injuries sustained alleged that defendant was negligent in the formation of the train, in its operation in a negligent manner, and in that the roadway was defective. There was evidence that the derailment might have been caused by a broken rail, and it was admitted that the train at the time was being operated with a locomotive in the rear, a passenger coach, and two tank cars in front. There was also testimony that it was necessary to move the train as constructed at the time of the derailment, to reach a siding on which it was to be rearranged, and that the other tracks were so congested that the use of the siding was the only feasible way to accomplish the purpose, and that the train was then being moved cautiously and only four miles an hour. It also appeared that these changes might have been made before permitting passengers to board the train, but were not. *Held*, that an instruction that the operation of a train so arranged for the carriage of passengers

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

was negligence per se was erroneous, though the jury was also charged that, in order to warrant a recovery on such ground, the jury must be satisfied that such negligence was the proximate cause of plaintiff's injury, whether the operation of a train so arranged under such circumstances was negligent being for the jury.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 320.*]

In Error to the Circuit Court of the United States for the Northern District of West Virginia, at Philippi.

Action by Elizabeth White against the Baltimore & Ohio Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

Fred. O. Blue and Arthur S. Dayton, for plaintiff in error.

W. Taylor George and A. G. Jenkins (J. C. Jenkins, on the brief), for defendant in error.

Before GOFF and PRITCHARD, Circuit Judges, and BOYD, District Judge.

BOYD, District Judge. Elizabeth White, the defendant in error, whom for convenience we will hereafter refer to as the plaintiff, brought this action against the Baltimore & Ohio Railroad Company, the plaintiff in error, which will be referred to further as the defendant, to recover damages for personal injury alleged to have been caused by the negligence of the said company whilst plaintiff was a passenger on its railroad.

The defendant operates in connection with its railway system what is known as the "Berryburg Branch," and which extends from Hacker's Junction, in Barbour county, W. Va., to Berryburg, about four miles distant, in the same county. On the 5th of December, 1908, the plaintiff purchased a ticket from defendant's agent at Philippi to the B. & O. Scale House on the Berryburg Branch. She traveled on the ticket on defendant's road a short distance from Philippi to Hacker's Junction, where it was necessary for her to change cars and take the train on the Berryburg Branch in order to reach her destination. The train from Philippi reached Hacker's Junction about 4 o'clock in the afternoon. The connecting train which plaintiff was to take to go to the B. & O. Scale House was standing at Hacker's, on the track of the Berryburg Branch, having come in from Berryburg about 40 minutes before. The Berryburg train was composed of a locomotive, a passenger car, and two tank cars, and was formed with the two tank cars in front, the passenger car next, and the locomotive, with its front towards the passenger car, behind.

The plaintiff went aboard the passenger car, and soon thereafter the train moved, the locomotive in the rear pushing the train with the cars in the order stated, and when it had gone across the bridge on the way to the siding, and whilst on a curve, the two tank cars and the passenger car were thrown from the track, and in the derailment plaintiff alleges she was injured. Immediately after the accident, and at the point of derailment, a rail was discovered to be broken. It was in testimony in behalf of the defendant, and so far as the rec-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ord shows was uncontradicted, that at the time of the wreck, in which plaintiff's alleged injury occurred, the train was moving under orders to Boylen's Siding, which is estimated to be some 2,200 feet from the Junction, and the purpose was to use the siding in order to shift the passenger coach to the rear of the locomotive, and run the train thence to Berryburg with the two tank cars in front, the locomotive next, and the passenger coach in the rear. The witnesses for the defendant testified, further, that it was necessary to operate the train from the Junction across the bridge to the siding in order to make the change, because, as they stated, the main line was filled with freight cars and could not be used to make the desired change in the formation of the train.

The case was tried at the Circuit Court of the United States for the Northern District of West Virginia, at Philippi, in June, 1909, and resulted in a verdict by the jury in favor of the plaintiff for the sum of \$3,500, for which judgment was entered. The case is here for review upon exceptions taken at the trial, several in number; but we do not regard it as necessary to consider but one of these exceptions in order to dispose of the case. The court in its charge to the jury, among other instructions, gave the following:

"The first thing for you to determine, when you take up this case, is whether or not this defendant has been negligent as shown by the evidence in this cause, and, second, whether or not that negligence was the direct and proximate cause of the plaintiff's injuries. Negligence may be shown on the part of the defendant, and yet the circumstances may be such in a given case that that negligence was not the direct cause of the injury. What I mean by direct and proximate cause can be illustrated in this case. To my mind it was negligence, and as a matter of law I charge you it was negligence, for the railroad company, under the circumstances detailed in this case, to run this train with those two tank cars in front, the passenger coach next, and the engine in the rear; but, while that was negligence, you must believe from the testimony that that negligence was the direct cause of the accident before on that account you can find for the plaintiff against the defendant. If, for instance, this accident was caused alone when this train was moving over this track by the breaking of that rail, and would have been caused in your judgment, as disclosed by the testimony, regardless of the position of those cars and this engine, and of how the train was made up, then the negligence in running it in that manner would not be the proximate cause of the injury, but the broken rail would be; but you must believe, gentlemen, from all of the evidence that this rail was broken, not by the character of the train that run over it, but that it was purely an accident that could not be foreseen and guarded against. But, as the court has instructed you, in the management of passenger trains, and in the running of them, and in the keeping in order and repair their track, the company is held to the highest degree of diligence and care; and all those things must enter into and govern you in determining whether or not, first, the company was negligent, and, second, whether or not that negligence was the direct and proximate cause of this plaintiff's injury."

Defendant's counsel duly excepted to this instruction, more particularly to the following language of the court contained therein:

"To my mind it was negligence, and as a matter of law I charge you it was negligence, for the railroad company, under the circumstances detailed in this case, to run this train with those two tank cars in front, the passenger coach next, and the engine in the rear."

We think there was error in this respect. There were three specific acts of negligence alleged in plaintiff's declaration as causing the

injury, to wit, the improper formation of the train, that the train was operated in a careless and negligent manner, and that the roadway was defective. Either one of these might have been the cause of the derailment of the car in which plaintiff was riding, and the consequent injury to her; or the combination of the three, or of two of them, if they were shown to exist, may have been the cause, or any one of them alone might have brought about the result.

There was testimony introduced by the plaintiff in support of her several allegations, and defendant offered testimony contra. It was admitted that the train on which the plaintiff was a passenger at the time of the injury was being operated with a locomotive in the rear, the car in which she was riding next, and the two tank cars in front; but these were not the sole facts involved, for, as before stated, there was testimony on the part of the defendant tending to show that it was necessary to move the train as constructed in order to reach the siding, upon which it was to be rearranged, and, further, that the other tracks were so congested that the use of the siding was at the time the only feasible way to accomplish this purpose, and, still further, that the train was being moved at the time cautiously, at not exceeding four miles an hour. The plaintiff's reply to this was that there had been ample time before she went aboard to have changed the formation of the train, either by the main line or by the use of the siding, and, even if there had not been such time, the change should have been made before the passengers were permitted to go aboard, and there was testimony tending to sustain these contentions.

It will therefore be seen that the facts and circumstances attending the action of defendant in operating the train as it was formed, and in the manner in which it was run, were in dispute, and negligence thus became an issue of fact for the jury, and not a question of law for the court. It is true that the court advised the jury further, in the instruction given, that although the running of the train as formed was negligence per se, yet the jury must be satisfied that this negligence was the proximate cause of the injury before plaintiff would be entitled to recover on that ground. We cannot assume that the ordinary jury, unfamiliar, perhaps, with the legal distinctions affecting proximate and remote cause, would fully comprehend the relation of this instruction to the whole case, especially in view of the fact that there were other allegations of negligence, upon one of which, at least, there had been introduced testimony on the part of the plaintiff sufficient to go to the jury tending to prove that defendant was negligent. And we can readily see in this situation how the minds of the jury would, without stopping to consider the question of proximate cause, come to the conclusion that, as the court had declared defendant to be negligent in one respect, the plaintiff was entitled to a verdict in any event.

However, we do not wish to be understood as holding that to form and operate a railroad train with the locomotive in the rear, the passenger car with passengers aboard next, and two tank cars in front, would not under some conditions be negligence per se, or that it would be error to so instruct the jury; nor do we lose sight of the well-

settled principle that where the facts are admitted or clearly proven—that is, where there is no controversy as to the facts, and the reasonable and legal inferences to be drawn therefrom—alleged negligence based on such facts is for the court, and not for the jury. But in the case here the testimony was such that whether or not there was negligence in running the train as formed under the circumstances, in our opinion, became an issue of fact for the jury, and was not a question of law for the court; for it has also become a recognized principle in the administration of the law of negligence that, where the facts and circumstances accompanying and surrounding an alleged negligent act are such that reasonable men may fairly differ as to whether there was negligence or not, the issue is for the jury and should be so submitted. *Railroad Company v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485, clearly lays down the law upon the last-mentioned principle, and is a leading authority on that subject.

We deem it unnecessary, as stated before, to consider other exceptions and assignments of error in the record, as we conclude that for the error which we have discussed the judgment of the Circuit Court should be reversed. The case is therefore remanded, to the end that the judgment of the court below may be set aside and a new trial had.

Reversed.

GRUBNAU v. UNITED STATES.

(Circuit Court of Appeals, Third Circuit. February 10, 1910.)

No. 69 (1,975).

CUSTOMS DUTIES (§ 85*)—REAPPRAISEMENT—REVIEWABILITY—"FINAL AND CONCLUSIVE."

Under Customs Administrative Act June 10, 1890, c. 407, § 13, 26 Stat. 136 (U. S. Comp. St. 1901, p. 1932), providing that decisions by the Board of General Appraisers in reappraisement cases shall be "final and conclusive," it was clearly intended that such decisions shall not be open to judicial review, except to inquire whether the appraisers have exceeded the authority conferred upon them by law or have otherwise acted illegally or fraudulently; and where there was no charge that the Board of Appraisers had acted illegally in denying the importers a hearing and opportunity to produce testimony in the matter, and there was some evidence to support the Board's conclusions as to value, its reappraisement was conclusive under said section.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 85.*

For other definitions, see Words and Phrases, vol. 3, pp. 2772, 2773.]

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

For decision below, see 171 Fed. 284, affirming a decision by the Board of United States General Appraisers, which had affirmed the assessment of duty by the collector of customs at the port of Philadelphia on merchandise imported by Carl Grubnau.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Curie, Smith & Maxwell and Francis Fisher Kane (W. Wickham Smith, of counsel), for importer.

D. Frank Lloyd, Deputy Asst. Atty. Gen. (Jasper Yeates Brinton, Asst. U. S. Atty., of counsel, and J. Whitaker Thompson, U. S. Atty., on the brief), for the United States.

Before GRAY, BUFFINGTON, and LANNING, Circuit Judges.

GRAY, Circuit Judge. This is an appeal from the decision of the United States Circuit Court for the Eastern District of Pennsylvania, affirming a decision of the Board of General Appraisers, which sustained the action of the collector in regard to an appraisement at the port of Philadelphia. The material facts with reference to the appraisement referred to are set forth in the stipulation of counsel, filed with the Board of General Appraisers, as follows:

It is hereby agreed that the merchandise covered by the above protest consists of washed Smyrna wool, embraced in two invoices; that these invoices cover certain bales of white wool, other bales of black wool, and other bales of gray wool, all invoiced at a round price; that on appraisement before the local appraiser at Philadelphia the appraiser found a separate value for the white wool and made certain additions to make the foreign market value of such white wool, which made it worth over 12 cents per pound; and he appraised the black and gray wools as valued at under 12 cents per pound; that thereafter the importer called for reappraisement of said white wool by single United States General Appraiser pursuant to section 13 of the act of June 10, 1890 (26 Stat. 136, c. 407 [U. S. Comp. St. 1901, p. 1932]), and said General Appraiser affirmed the appraisement as made by the local appraiser; that said importer called for further reappraisement of said white wool by a board of three General Appraisers, pursuant to said section 13 of the act of June 10, 1890, and said board of three General Appraisers affirmed the values already found for said white wool.

The protest of the importer challenges the legality of the action of the General Appraiser, charging that he had improperly found a separate value for white wool, apart from the colored wool, and that the merchandise having been invoiced at a round sum the same should have been accepted by the collector, on the ground that, with respect to the merchandise in question, there is no separate market for the white and for the colored wools. The testimony of the importer and of one other in the same business was to the effect that wool was bought in Smyrna at first hand from the producer, in lump lots, in which white, gray and black wool were mixed, and that, according to custom, the importer's agent had separated the white wool from the colored wools, baled and invoiced them separately, but at the round price actually paid for the unassorted lot. There was also testimony on the part of the government to show that white wool had a separate market value in Smyrna, although the usual mode of buying these wools in one lot, separating them, and exporting them in separate bales, was as stated by the importer. The round price of the wool as bought, including the white wool and the colored wool, was less than 12 cents a pound, and at that price would have been liable, under paragraph 358 of the tariff law, to a duty of 4 cents per pound. The appraisers, however, made a separate appraisement of the invoice of white wool at over 12 cents per pound, thereby sub-

jecting it, under paragraph 359 of the tariff law, to a duty of 7 cents per pound.

The Board of General Appraisers affirmed these preceding appraisements, and from their action the importer took an appeal to the court below, who affirmed the action of said Board.

Section 19 of the customs administrative act (Act June 10, 1890, c. 407, 26 Stat. 139 [U. S. Comp. St. 1901, p. 1924]) provides as follows:

Sec. 19. [Ad Valorem Duties, How Assessed—"Value," "Actual Market Value," Defined.] That whenever imported merchandise is subject to an ad valorem rate of duty, or to a duty based upon or regulated in any manner by the value thereof, the duty shall be assessed upon the actual market value or wholesale price of such merchandise as bought and sold in usual wholesale quantities, at the time of exportation to the United States, in the principal markets of the country from whence imported, and in the condition in which such merchandise is there bought and sold for exportation to the United States, or consigned to the United States for sale. * * *

The appellant's contention is that the appraisers ignored and failed to act upon this plain standard of valuation, as prescribed by the customs law, and that therefore a question of law is raised touching the power of the appraisers and the legality of their action.

Section 13 of the same act provides that the appraisement of the different appraisers of the value of imported merchandise shall be final and conclusive, until a reappraisement is asked for, either by the importer or the government, in the manner prescribed by the statute, and that the last appraisement by the Board of General Appraisers, when their jurisdiction has been invoked, "shall be final and conclusive as to the dutiable value of such merchandise against all parties interested therein." This express provision of the statute would seem to make clear the intention of the legislative department of the government, that, after providing for appeals to successive appraisers and boards of appraisers, who are supposed to be experts as to the duties imposed upon them, there shall be an end of controversy when their decision is finally made, and that such decision is not to be open to review in a judicial court, except to inquire whether said appraisers have exceeded the authority conferred upon them by law or have otherwise acted illegally or fraudulently.

The Supreme Court in *Hilton v. Merritt*, 110 U. S. 97, 3 Sup. Ct. 548, 28 L. Ed. 83, prior to the enactment of the customs administrative act, after reviewing the various provisions of the Revised Statutes establishing the system of appraisement of merchandise, said:

These provisions of the statute law show with what care Congress has provided for the fair appraisement of imported merchandise subject to duty, and they show also the intention of Congress to make the appraisal final and conclusive. When the value of the merchandise is ascertained by the officer appointed by law and the statutory provisions for appeal have been exhausted, the statute declares that the appraisement thus determined shall be final and deemed to be the true value, and the duty shall be levied thereon accordingly. This language would seem to leave no room for doubt of construction. * * *

We are of opinion, therefore, that the valuation made by the customs officers was not open to question in an action at law, as long as the officers acted without fraud and within the power conferred on them by the statute.

The Board of Appraisers in the case before us acted within its jurisdiction as conferred by law, and there is no charge that it acted

illegally in denying to the appellant a hearing and opportunity to introduce testimony bearing upon the question they had to decide. The record discloses the fact that there was some evidence as to a market value for white wool in Smyrna, the place from which the importation was made; and in this respect the case differs from the case of *Gulbenkian & Co. v. United States* (decided in the Second circuit) 153 Fed. 858, 83 C. C. A. 40, where the court expressly find that there was not a scintilla of evidence as to the market value of white wool at Bagdad separate and apart from its value in the lump when mixed with colored wools.

The judgment of the court below is therefore affirmed.

In re CLOVER CREAMERY ASS'N.

EVANS v. CLARIDGE.

(Circuit Court of Appeals, Seventh Circuit. January 4, 1910.)

No. 1,619.

BANKRUPTCY (§ 328*)—CLAIMS—LIQUIDATION BY LITIGATION—PROOF—TIME.

A motion for rehearing in the Supreme Court of the state, in proceedings in which a claim was liquidated, was denied December 15, 1908, and after remittiturs were filed on January 28, 1909, a stipulation to offset costs was filed, leaving a judgment for costs in favor of claimant amounting to \$119.70. Afterwards, on March 29, 1909, the judgments were offset, and claimant was found to be owing the bankrupt's trustee \$956.01, which he paid, and on April 16, 1909, filed a claim with the referee amounting to \$3,454.61. *Held*, that the claim was not filed within 60 days after rendition of the judgment liquidating the same, as required by Bankr. Act, § 57n (Act July 1, 1898, c. 541, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3444]), and was therefore barred.

[Ed..Note.—For other cases, see Bankruptcy, Dec. Dig. § 328.*]

Appeal from the District Court of the United States for the Western District of Wisconsin.

In the matter of the bankruptcy proceedings against the Clover Creamery Association. From an order allowing J. W. Claridge to prove a claim against the bankrupt's estate, Evan A. Evans, trustee, appeals. Reversed, with directions to dismiss.

Appellant herein appeals from the order of said District Court allowing appellee, as it is alleged, to prove up his claim against the said bankrupt's estate after the expiration of the period of 60 days succeeding the rendition of the judgment had in proceedings to liquidate the same in the state court, and contrary to section 57n of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3444]), which reads as follows, viz.:

"Sec. 57n. Claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication; or if they are liquidated by litigation and the final judgment therein is rendered within thirty days before or after the expiration of such time, then within sixty days after the rendition of such judgment."

The association was adjudged a bankrupt on February 18, 1907. Appellee filed his claim before the referee on April 16, 1909. At the time of the adjudication appellee held an indebtedness of \$2,500 against the Association, secured by a mortgage upon its real estate. On April 5, 1907, the said real estate was sold by order of the referee in bankruptcy, free and clear of the mortgage, and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the lien was transferred to the proceeds in the hands of the trustee. Thereafter appellee brought suit in a Wisconsin court to foreclose said mortgage, and about the same time the trustee brought suit in the same court to recover certain alleged preferences amounting to \$2,716.17, alleged to have been paid to appellee within four months prior to the adjudication. On March 26, 1908, a judgment was rendered in said latter cause against appellee for \$2,573.79, and at about the same date the court rendered judgment against appellee in the foreclosure proceeding in favor of the trustee for \$1,725, the proceeds of the sale of the mortgaged property. On appeal taken in both cases, the judgment for the alleged preference was affirmed, and the foreclosure suit was reversed, and judgment was entered therein for \$1,725, in favor of appellee. Both decisions were handed down on October 20, 1908. A motion being made for a rehearing in the preference suit in the Supreme Court, the same was on December 15, 1908, denied. Remittiturs were filed in the trial court in both causes on January 28, 1909. On January 26, 1909, and pursuant to stipulation in the Supreme Court, the two judgments for costs were offset, leaving a judgment for costs in favor of appellee in the foreclosure action of \$119.70. Afterwards, by agreement made March 29, 1909, the parties offset their respective judgments, whereby appellee was found to be owing the trustee \$956.01, which sum he paid on April 16, 1909. On the same day appellee filed his said claim with the referee as aforesaid, for \$3,454.61, which was on June 26, 1909, allowed for that sum by the referee. On hearing before the District Court, the claim was reduced and allowed for \$2,573.79. The errors assigned raise the one question whether appellee's claim was presented in due time.

Sam T. Swansen, for appellant.

F. W. Hall, for appellee.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

KOHLSAAT, Circuit Judge (after stating the facts as above). The only matter presented to the court for its determination turns upon the construction to be placed upon the proceedings of the parties in the state courts after final judgment, wherein appellee's claim was liquidated. Unless these may be considered steps in the liquidation by litigation of the appellee's claim, it is evident that more than 60 days had elapsed after the claim was adjudicated in the state court when the claim was filed. While not entirely clear, it may be conceded that it appears from the stipulation of facts that on January 26, 1909, in pursuance of a stipulation between the parties, the Supreme Court entered an order offsetting the two judgments for costs against each other, leaving a judgment for costs in appellee's favor on that date of \$119.70. Whether or not this latter order was a part of the liquidation proceedings contemplated by the statute may be doubted. Nor is it important, as we view it. Certainly, after this was done and the several amounts of the two judgments thus definitely ascertained, there remained nothing more that the state courts could do in liquidating appellee's claim. Between themselves, they proceeded very leisurely—i. e., from January 26, 1909, to April 16, 1909—to offset one judgment against the other and satisfy the balance due the trustee. Surely this transaction, covering the period from March 29, 1909, to April 16, 1909, was in no sense a part of the liquidation by litigation described in said section 57n of the statute. It was simply the negotiations of the parties, which might have been long or short, as they chose. It never has been held that, in the absence of fraud, delays so

caused would avail to suspend any statute of limitation, much less the exception of section 57*n* aforesaid.

There was no obstacle to prevent appellee's filing his proof of claim at any time within the time fixed by the act, without avoiding his preference. True, he could not have secured its allowance until liquidated and surrender of preference, nor be permitted to vote at a meeting of the creditors. It would nevertheless be a pending claim. By making his formal proof, he would bring himself within the statutory requirement as to time. *Stevens v. Nave McCord Mercantile Co.*, 150 Fed. 75, 80 C. C. A. 25.

We are of the opinion that appellee failed to prove his claim against the bankrupt estate within the time prescribed by the act, and that it was barred and cannot be proved. The judgment of the District Court is therefore reversed, with direction to dismiss the claim.

BAKER, Circuit Judge, concurring, is of the opinion that when the Wisconsin Supreme Court overruled appellee's petition for rehearing, there was an end of the litigation by which the amount of appellee's claim as a general creditor of the estate was being determined or "liquidated by litigation."

LYLE v. PATTERSON et al.

(Circuit Court of Appeals, Eighth Circuit. February 21, 1910.)

No. 2,996.

1. PUBLIC LANDS (§ 81*)—HOMESTEAD ENTRY—CONFLICTING CLAIMS—POSSESSION OBTAINED BY TRESPASS.

A person cannot initiate a right of homestead by settling upon land at the time in the actual possession of another, who purchased it in good faith and for full value from a railroad company in the erroneous belief that the company was the owner, which will give him standing in a court of equity to contest the entry of such actual occupant to whom the land was awarded by the Land Department.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 53; Dec. Dig. § 31.*]

2. PUBLIC LANDS (§ 138*)—SUIT TO CONTEST HOMESTEAD ENTRY—BONA FIDE PURCHASER.

One claiming the right to enter as a homestead land awarded by the Land Department to another cannot assert such right as against a bona fide purchaser from the entryman after patent and without notice of such claim.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 368; Dec. Dig. § 138.*]

Appeal from the Circuit Court of the United States for the Northern District of Iowa.

Suit in equity by Roscoe Lyle against George M. Patterson and others. Decree for defendants (160 Fed. 545), and complainant appeals. Affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Edwin J. Stason (Madison B. Davis, on the brief), for appellant.
W. D. Boies, for appellees.

Before SANBORN, Circuit Judge, and RINER and WM. H. MUNGER, District Judges.

WM. H. MUNGER, District Judge. This case was tried in the court below upon an agreed statement of facts, from which it appears that on May 12, 1864, Congress passed an act (Act May 12, 1864, c. 84, 13 Stat. 72) granting lands to the state of Iowa, to aid in the construction of a railroad, from Sioux City in said state to the south line of the state of Minnesota, at such point as the said state of Iowa may select between the Big Sioux and the west fork of the Des Moines river, also, to said state for the use and benefit of the McGregor Western Railroad Company for the purpose of aiding in the construction of a railroad from a point in South McGregor, in said state, in a westerly direction, by the most practical route, on or near the Forty-Third parallel of north latitude, until it shall intersect the said road running from Sioux City to the Minnesota state line, in the county of O'Brien, in said state, every alternate section of land, designated by odd numbers, for 10 consecutive sections in width on each side of said roads, to which the right of pre-emption or homestead settlement had not attached at the time of the definite location of such roads, and where any such alternate sections, within said 10-mile limit, had been sold or pre-emption or homestead settlements attached at the time of the definite location of the road thereon, the Secretary of the Interior was authorized to select as indemnity therefor other lands in alternate sections within limits of 20 miles of said roads. On April 20, 1866, the General Assembly of the state of Iowa accepted said grant, and on the 19th day of September, 1866, the Sioux City & St. Paul Railroad Company filed in the office of the Secretary of State of Iowa its acceptance of the grant of Congress and the acts of the General Assembly of the state of Iowa, relating thereto, upon the terms, conditions, and limitations therein contained, and on the 27th day of September, 1866, the Sioux City & St. Paul Railroad Company commenced the location of its line of railroad in Sioux City, and on October 4, 1866, completed the location to the southern line of the state of Minnesota, in section 12, township 100 north, range 41 west, of the Fifth P. M. On the 2d of April, 1867, said Sioux City & St. Paul Railroad Company certified to the map of location and filed the same in the office of the Secretary of State of Iowa, which was afterwards certified to by the Governor and Secretary of the State of Iowa, and filed in the office of the Secretary of the Interior of the United States, and the same was duly accepted by the Secretary of the Interior as the basis for the adjustment of the land grant made to the state of Iowa. And the lands so granted to the state of Iowa within the odd-numbered sections within the limits of 20 miles on each side of said road, as located on said map, were withdrawn from sale or entry under the pre-emption and homestead laws, and the price of the even-numbered sections of land within the 10-mile limit was increased to \$2.50 per acre. In September, 1867, said

map, together with letter of withdrawal, was received by the register of the Land Office at Sioux City, Iowa.

In 1872 the Sioux City & St. Paul Railroad Company commenced the construction of its railroad from a connection with the St. Paul & Sioux City Railroad at the southern line of the state of Minnesota, at or near the southwest corner of section 31, township 101, range 40, on the southern line of said state of Minnesota, and constructed the same in a southerly direction to the town of Le Mars, in the state of Iowa, but did not construct its road between Le Mars and Sioux City, but operated through trains over another line of road already constructed between said towns. Whenever 10 consecutive miles of road were constructed, the same was duly certified to the Secretary of the Interior, and patents were issued by the United States to the state of Iowa for lands within the limits of the grant opposite the sections so constructed. The Chicago, Milwaukee & St. Paul Railroad Company, by certain acts of the Legislature of the state of Iowa, became the successor of the McGregor Western Railroad Company and completed the construction of its road from McGregor to a point of intersection with the said Sioux City & St. Paul Railroad Company, and in 1879 the Chicago, Milwaukee & St. Paul Railroad Company commenced, in the Circuit Court of the United States for the District of Iowa, an action against the Sioux City & St. Paul Railroad Company and certain officers and trustees of the state of Iowa, to have adjusted the rights to lands within the overlapping limits of the respective railroad companies. Said action was prosecuted through the Circuit and Supreme Court of the United States, and in May, 1886, a decree was entered pursuant to a mandate of the Supreme Court, apportioning the lands between the two companies. The particular lands involved in this action were by said proceedings assigned to the Sioux City & St. Paul Railroad Company. Subsequently the state of Iowa, by its General Assembly, relinquished to the United States all the lands which had not been earned by the railroad companies under said grants.

On March 3, 1887, Congress passed an act entitled "An act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands, and for other purposes." Act March 3, 1887, c. 376, 24 Stat. 556 (U. S. Comp. St. 1901, p. 1595). The first section of the act authorized and directed the Secretary of the Interior to immediately adjust in accordance with the decisions of the Supreme Court each of the railroad land grants made by Congress to aid in the construction of railroads, which had not theretofore been adjusted. The second section provided that, upon the completion of said adjustment, if it should appear that lands had been from any cause erroneously certified or patented by the United States for the use or benefit of any company claiming by, through, or under grant from the United States, to aid in the construction of a railroad, the Secretary of the Interior should demand from such company a relinquishment or reconveyance to the United States of all such lands, whether within granted or indemnity limits, and, if any such company should neglect or fail to reconvey within 90 days after

such demand, it was made the duty of the Attorney General to commence and prosecute in the proper courts necessary proceedings to cancel all patents, certifications, or other evidence of title, theretofore issued for said lands, and to restore the title thereof to the United States. By the fourth section of the act it was provided that lands erroneously certified or patented, and which had been sold by the grantee company to citizens of the United States or persons who had declared their intention to become such citizens, the person or persons so purchasing in good faith, heirs or assigns, should be entitled to the lands so purchased upon making proof of the fact of such purchase at the proper land office within such time and under such rules as might be prescribed by the Secretary of the Interior after the grants respectively should have been adjusted and patents of the United States should issue therefor, and should relate back to the date of the original certification or patent, and the Secretary of the Interior, on behalf of the United States, should demand payment from the company which had so disposed of such lands for an amount equal to the government price of similar lands. By section 5 it was provided that, where any company should have sold to citizens of the United States or to persons who have declared their intention to become such citizens, as a part of its grant lands, not conveyed to or for the use of such company, and such lands being the numbered sections described in the grant, and being coterminous with the constructed parts of said roads, and where the lands so sold were for any reason excepted from the operation of the grant to said company, it should be lawful for the bona fide purchaser thereof from said company to make payment to the United States for said lands at the ordinary government price for like lands, and thereupon patents should issue therefor to said bona fide purchaser, his heirs or assigns.

In February, 1873, the Sioux City & St. Paul Railroad Company selected the tract in controversy with other lands as and for a part of the lands inuring to it under said act of Congress of May 12, 1864, and filed a written list of said selection with the register and receiver of the Land Office at Sioux City, Iowa. Said officers, in March, 1873, allowed and approved the filing of said list and certified the same as being within the 10-mile limits of said grant and as being free and clear of homestead, pre-emption, state, or other valid claims, which list was duly transmitted to the Commissioner of the General Land Office. The Commissioner of the General Land Office, in June, 1873, approved the said selection and transmitted to the Secretary of the Interior a list embracing said tract of land. In the same month the Secretary of the Interior approved said selection and certificate, and caused copies of such approved list to be filed with the register and receiver at Sioux City, Iowa, and with the Governor of Iowa, and in June, 1873, the United States issued to the state of Iowa, for the use and benefit of said Sioux City & St. Paul Railroad Company, a patent embracing the tract of land in controversy and other lands, as and for a part of the lands inuring to the state of Iowa, and said

Sioux City & St. Paul Railroad Company, under said act of Congress of May 12, 1864.

On or about the 21st day of May, 1887, one J. H. Pasco, then a citizen of the United States, purchased the land in controversy from the Sioux City & St. Paul Railroad Company, in consideration of certain payments made and to be made by said Pasco or assigns until the full sum of \$2,146.50 should be paid, and thereupon said Pasco entered into the possession of said land and made valuable improvements thereon. On July 17, 1889, said Pasco sold and assigned said contract for the purchase of said lands to the defendant George W. Patterson, who immediately entered into the possession thereof and made lasting and valuable improvements thereon, and said Patterson and subsequent grantees have continued in the possession, occupation, and cultivation of said land continuously since said date. In the agreed statement of facts it is said that, at the time Pasco and Patterson made their purchases of said land, they each believed in good faith that the said land had been earned by the said railroad company; they knew that the land was within the 10-mile limits of said railroad constructed by the said Sioux City & St. Paul Railroad Company, but did not know that the railroad company had sold all the lands it had earned at the time of their said purchase, nor did they or either of them know that the railroad company had received indemnity lands by a patent from the state of Iowa of sufficient quantity, along with other lands that had been patented to said railroad by the state, to equal their entire earnings by reason of the construction of said railroad to Le Mars.

In October, 1889, the United States commenced an action in the Circuit Court for the Northern District of Iowa, against the Sioux City & St. Paul Railroad Company and others, to which action said Pasco and said Patterson were not parties, to quiet the title of the United States in and to certain lands, including those in controversy, for the reason that the same had not been earned by said Sioux City & St. Paul Railroad Company. Such proceedings were had that in October, 1890, said Circuit Court entered a judgment, quieting title to said lands in the United States, from which judgment an appeal was taken to the Supreme Court of the United States and said judgment affirmed on the 21st day of October, 1895. Thereafter, on November 18, 1895, the Commissioner of the General Land Office, with the approval of the Secretary of the Interior addressed a communication to the register and receiver at Des Moines, Iowa, reciting the fact of said suit, judgment, and affirmance by the Supreme Court and directed that, in order to carry the restoration to entry of said lands into effect, they should publish a notice for a period of 30 days that the lands, a description of which was to be included in the notice, would be restored to the public domain, and subject to entry on a day to be fixed by the notice, which should be 90 days from the date of the first publication, and that all persons claiming any part thereof under the act of March 3, 1887, should come forward within the 90 days immediately following the first publication and give notice of their claim by publishing their notice of intention to make proof

thereon upon a day which should be subsequent to that fixed for the restoration. Said communication contained the following sentence:

"To the end that complications which might arise from the former practice of suspending application for these lands may be avoided, and the rightful claimant to acquire title with as little delay as possible, I have to direct that; in the notice of restoration, there be inserted a notice to all prior applicants that their applications confer no rights upon them, and that upon the day set by you for the restoration the lands will be open to entry and disposal without regard to said applications, which shall be held by the notice to be rejected; that all such applicants may also have opportunity to present new applications upon the expiration of the ninety days' notice, you will notice specially all parties shown by your records to have pending applications for these lands, of the rejection thereof, of the date of the restoration and of the necessity of presenting new applications for the protection of their rights. In all cases of conflicting claims, you will proceed in accordance with the rules of practice in contested cases."

Pursuant to said communication, the register and receiver of the United States Land Office fixed the 27th day of February, 1896, as the date prior to which applicants under the act of March, 1887, should file their applications, and as the date upon which persons claiming under the homestead laws of the United States should file their applications, which notice was duly published, etc. On October 22, 1895, the plaintiff, Lyle, settled upon the land in controversy, and in February, 1896, tendered to the register and receiver of the United States Land Office at Des Moines, Iowa, a homestead application with the necessary fees therefor to enter said land, which application and fees were refused by the register and receiver, and on March 24, 1896, defendant appeared before the Land Office at Des Moines, Iowa, and tendered his homestead filing for the land in controversy, alleging a settlement, residence and cultivation of said land, and the legal qualification to make said entry, and tendered the legal and proper fees and homestead filing therefor, which filing and tender of fees the officers held in abeyance, pending the trial and examination of all parties concerned therein. Pursuant to the notice aforesaid, the defendant Patterson, on January 13, 1896, filed with the register and receiver of the United States Land Office at Des Moines, Iowa, his written notice of intention to make proof of defendant's purchase of the land in controversy under the provisions of the act of March 3, 1887. The register and receiver of the Land Office fixed the 13th day of May, 1896, upon which proof should be submitted on behalf of the plaintiff and defendant herein and all others claiming any interest in said land, notice of which date of hearing was duly published in accordance with the requirements of the Department of the Interior. On May 13, 1896, plaintiff and defendant Patterson appeared, as well as other parties who had filed applications to enter the same as a homestead. At said hearing the parties made proof of their respective claims, and the register and receiver rendered their decision in writing that one Louis Hoffman was entitled to the land in controversy as a homestead. From the decision of the register and receiver, plaintiff and defendant Patterson each perfected appeals to the Commissioner of the General Land Office, and in August, 1899, the Commissioner of the General Land Office rendered a decision reversing that of the register and

receiver, and decided that one James A. Beacon was entitled to the lands under the homestead laws of the United States. From that decision the plaintiff and defendant Patterson each perfected appeals to the Secretary of the Interior. The Secretary reversed the decision of the Commissioner of the General Land Office and decided that the defendant Patterson was a bona fide purchaser of said land under and by virtue of his contract of purchase with the railroad company before mentioned, and that he was entitled to the land in question, under the act of March 3, 1887, as a good-faith purchaser. And thereafter a patent was duly issued from the United States, bearing date March 23, 1901, to the land in question to the defendant Patterson as a good-faith purchaser under said act of March, 1887. Subsequent to the decision of the Secretary of the Interior, to wit, January 30, 1901, Patterson conveyed said premises to T. H. Smith and W. H. Smith for a stated consideration of \$6,360, and on March 31, 1901, and after the issue of the patent to Patterson, said T. H. Smith and W. H. Smith sold and conveyed the premises to defendant Thomas Beacom, in consideration of the sum of \$6,600, and at the commencement of this suit the legal title was in the defendant Thomas Beacom. On May 24, 1901, plaintiff commenced this action in the Circuit Court of the United States for the Northern District of Iowa, setting forth in substance, but more in detail, the facts hereinbefore referred to, and praying that it be adjudged and decreed that the decision of the Secretary of the Interior, holding that defendant Patterson was entitled to said lands as a good-faith purchaser under the act of March 3, 1887, be set aside, canceled, and declared void, and that the defendant Beacom hold said land in trust for plaintiff, and for a conveyance from said Beacom to plaintiff. To this action the defendants appeared, issues were joined, proofs taken, and the Circuit Court entered a decree, dismissing complainant's bill, to reverse which decree complainant prosecutes this appeal.

Numerous questions have been presented and discussed by counsel, relative to the effect and interpretation of the respective acts of Congress, and of the General Assembly of the state of Iowa, and Patterson's rights as a purchaser from the railroad company; but in the view which we take of the case but two questions only will be considered. It clearly appears by the agreed statement of facts that Pasco, in his purchase from the railroad company, paid the then full value of the land; that he entered into possession, and he and the subsequent assignees and grantees have continued since such purchase in the actual occupation and possession of the premises, cultivating the same, made lasting improvements, and have paid taxes thereon since the year 1887; that at the time complainant entered upon said land with a view of making a homestead settlement he knew of the occupation and possession by the defendant Patterson, of his improvements thereon, and of his claim of ownership of said land.

If it be assumed for the sake of the argument that Patterson was not entitled to acquire this land under the congressional act of March 3, 1887, yet his possession was not mala fides. It was obtained and held under such a state of facts that no one but the United States could

question his right thereto. Under such circumstances, complainant's entry upon the lands was that of a mere trespasser, and as such he acquired no rights under the homestead laws.

In *Atherton v. Fowler*, 96 U. S. 513, 24 L. Ed. 732, the court said:

"Among the things which the law required of a pre-emptor, and the principal things required of him to secure his right, were: (1) To make a settlement on the land in person. (2) To inhabit and improve the same. (3) To erect a dwelling house thereon."

These things were also principal requirements of the homestead law. *Harvey v. Hollis* (C. C.) 160 Fed. 531.

In *Atherton v. Fowler*, the court also said:

"It is not to be presumed that Congress intended in the remote regions where these settlements are made to invite forcible invasion of the premises of another in order to confer the gratuitous right of preference of purchase on the invaders. In the parts of the country where these pre-emptions are usually made, the protection of the law to rights of person and property is generally but imperfect under the best of circumstances. It cannot, therefore, be believed, without the strongest evidence, that Congress has extended a standing invitation to the strong, the daring, and the unscrupulous, to dispossess by force the weak and the timid from actual improvements on the public land, in order that the intentional trespasser may secure by these means the preferred right to buy the land of the government when it comes into market. * * * Does the policy of the pre-emption law authorize a stranger to thrust these men out of their houses, seize their improvements, and settle exactly where they were settled, and by these acts acquire the initiatory right of pre-emption? The generosity by which Congress gave the settler the right of pre-emption was not intended to give him the benefit of another man's labor, and authorize him to turn that man and his family out of their home. It did not propose to give its bounty to settlements obtained by violence at the expense of others. The right to make a settlement was to be exercised on unsettled land; to make improvements on unimproved land. To erect a dwelling house did not mean to seize some other man's dwelling. It had reference to vacant land, to unimproved land; and it would have shocked the moral sense of the men who passed these laws, if they had supposed that they had extended an invitation to the pioneer population to acquire inchoate rights to the public lands by trespass, by violence, by robbery, by acts leading to homicides, and other crimes of less moral turpitude."

That a party cannot initiate a right of homestead by settling upon land at the time in the actual possession of another, under a bona fide claim of right, is shown in the following cases: *Hosmer v. Wallace*, 97 U. S. 575, 24 L. Ed. 1130; *Quinby v. Conlan*, 104 U. S. 420, 26 L. Ed. 800; *Trenouth v. San Francisco*, 100 U. S. 251, 25 L. Ed. 626; *Clipper Mining Co. v. Eli Mining Land Co.*, 194 U. S. 220-231, 24 Sup. Ct. 632, 48 L. Ed. 944.

To maintain this action and obtain a decree from a court of equity, awarding to him the title to the land in question, complainant must establish that he initiated such a right to the land, by settlement thereon, and offer to enter, as gave to him in equity a right to the land prior and paramount to the legal title of defendants. *Campbell v. Weyerhaeuser*, 161 Fed. 332, 88 C. C. A. 412. In this we think he has signally failed.

After the Land Department awarded the land to Patterson, complainant took no farther steps and made no farther claim to the land until the institution of this suit, and it appears from the agreed statement of facts that the defendant Beacom purchased the land for full

value, after a patent from the United States to defendant Patterson had issued, and without any knowledge of complainant's claim. Such being the case, his title is impregnable as against complainant. *U. S. v. Detroit Lumber Co.*, 131 Fed. 668, 67 C. C. A. 1; *Colorado Coal Co. v. U. S.*, 123 U. S. 307, 8 Sup. Ct. 131, 31 L. Ed. 182.

For these reasons alone, without considering other questions presented, we think the decree of the court below was right; and it is therefore affirmed.

DOCKENDORF v. BASSETT et al.

(Circuit Court of Appeals, Eighth Circuit. February 21, 1910.)

No. 8,019.

PUBLIC LANDS (§ 31*)—HOMESTEAD ENTRY—CONFLICTING CLAIMS—POSSESSION OBTAINED BY TRESPASS.

A person cannot initiate a right of homestead by settling upon land at the time in the actual possession of another, who purchased it in good faith for full value from a railroad company in the erroneous belief that the company was the owner, which will give him standing in a court of equity to contest the entry of such actual occupant, to whom the land was awarded by the Land Department.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 53; Dec. Dig. § 31.*]

Appeal from the Circuit Court of the United States for the Northern District of Iowa.

Suit in equity by Alfred Dockendorf against L. L. Bassett and E. Riddell. Decree for defendants (160 Fed. 543), and complainant appeals. Affirmed.

Edwin J. Stason (Madison B. Davis, on the brief), for appellant.

W. D. Boies (A. C. Parker, on the brief), for appellees.

Before SANBORN, Circuit Judge, and RINER and WM. H. MUNGER, District Judges.

WM. H. MUNGER, District Judge. This suit was commenced on the 30th day of July, 1904, by complainant against defendants, to have a certain patent to the southwest quarter of section 5, township 96, range 42 west, in the county of O'Brien, and state of Iowa, issued by the United States to the defendants, declared illegal and void and canceled and set aside.

The facts in this case are substantially the same as in the case of *Roscoe Lyle v. George M. Patterson et al.* (just decided) 176 Fed. 909. The land herein, as in that case, was within the place limits of the grant to the Sioux City & St. Paul Railroad Company. The material difference in the facts between the two cases is that in this case, on the 12th day of November, 1887, one Rachel B. Calvert, then a citizen of the United States, purchased by contract from the Sioux City & St. Paul Railroad Company the land in question, and, thereafter, on November 30, 1888, she duly sold and assigned in writing

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

her said contract of purchase to the defendants: Immediately after her purchase, Rachel B. Calvert entered into possession of said land, and since the date of the purchase by defendants they have been in the absolute, open, notorious, and undisputed possession of the premises, except that complainant, on the 23d day of October, 1895, undertook to take possession of said land, entered thereon, and erected a small shanty thereon, but did not move his family thereto, except that his wife was there three or four days—they had no children. Defendants did not permit the complainant to remain on said premises and instituted an action of forcible entry and detainer against complainant in a justice court, claiming that complainant had wrongfully, fraudulently, and stealthily entered upon the prior, actual possession of defendants, and upon the trial of said action such justice court rendered judgment, finding complainant guilty of forcible entry and detention of said premises, that he entered thereon by stealth, force, and fraud, and a writ of removal was issued under such judgment duly entered, and complainant was duly ousted from said premises. Complainant appealed to the District Court from said judgment, where the cause has since been pending untried. The register and receiver of the United States Land Office at Des Moines, Iowa, fixed the 10th day of April, 1896, as the date upon which proofs should be submitted by claimants to the land, pursuant to the order of the Land Department referred to in the case of *Lyle v. Patterson et al.* Complainant and defendants appeared, made proof of their respective claims, and the register and receiver decided in favor of defendants, from which complainant took an appeal, and the Commissioner of the General Land Office reversed the decision of the register and receiver. From the decision of the commissioner defendants appealed to the Secretary of the Interior, who reversed the decision of the commissioner and held that the defendants were good-faith purchasers of the land and were entitled to the possession of the same, and thereupon a patent was issued by the United States to the defendants. It is stipulated that, at the time Rachel Calvert and the defendants purchased said lands, they paid the actual, full, and reasonable cash value therefor, and that, at the time, each of the parties thereto believed in good faith that said land had been earned by the said railroad company.

For the reasons stated, and under the authorities cited, in *Lyle v. Patterson et al.*, complainant's entry upon the lands then in the actual and open possession of defendants, and his tender of his homestead filing and the fees to the United States Land Office, which were rejected, did not initiate such a claim to the land as entitles him to maintain this action; and the decree of the court below is affirmed.

PRESSED STEEL CAR CO. v. NIST.

SAME v. FOULDS et al.

(Circuit Court of Appeals, Third Circuit. January 13, 1910.)

No. 1,203.

1. TRIAL (§ 295*)—INSTRUCTIONS—CONSTRUCTION.

A paragraph of the court's charge must be considered with what precedes and what follows it.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703-717; Dec. Dig. § 295.*]

2. MASTER AND SERVANT (§ 291*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

Decedents, having been warned of the defective condition of a temporary steam pipe joint which they had constructed, informed their superior, who examined it at length, and while he went to inform the foreman an explosion of the joint occurred, by which decedents were killed. *Held* that, though such superior servant was not examined as to whether he left any suggestion for decedents to remain, it was not improbable that their return to the joint might be accounted for by the suggestion of their superior that they do so; and hence an instruction that plaintiffs claimed that decedents went there and were at the joint when it exploded under instruction or suggestion of one who had been sent to take care of the joint was not erroneous.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1136; Dec. Dig. § 291.*]

3. MASTER AND SERVANT (§§ 285, 289*)—INJURIES TO SERVANT.

In an action for the death of certain employes by the explosion of a steam pipe joint, evidence *held* to require submission to the jury of the questions how the injuries were inflicted, how threatening the danger, and whether decedents were negligent in voluntarily exposing themselves to a peril that was obvious or might result in injury.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. §§ 285, 289.*]

4. NEGLIGENCE (§ 136*)—CONTRIBUTORY NEGLIGENCE—QUESTION OF LAW OR FACT.

A trial judge cannot infer contributory negligence from disputed facts, but can only pronounce it as a matter of law, when the facts are plain and practically uncontroverted, and the inference cannot fairly be escaped.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 333-346; Dec. Dig. § 136.*]

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

Actions by Annie B. Nist and by George M. Foulds and others against the Pressed Steel Car Company. Judgment for plaintiffs in each case, and defendant brings error. * Affirmed.

W. S. Dalzell (Dalzell, Fisher & Hawkins, of counsel), for plaintiff in error.

Geo. C. Bradshaw and G. R. Speer, for defendants in error.

Before GRAY and LANNING, Circuit Judges, and J. B. McPHERSON, District Judge.

J. B. McPHERSON, District Judge. These two cases were tried together in the Circuit Court and have been argued together before the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Circuit Court of Appeals. They depend upon identical facts and may therefore be disposed of in one opinion.

The actions are based upon the defendant's negligence in constructing improperly a joint in a line of pipe that was designed to carry steam at high pressure. Under this pressure the joint gave way, and as a result of the explosion the two workmen whose deaths are now in question lost their lives. The only controversy raised by these writs of error relates to the conduct of the decedents, and before the dispute can be properly understood a brief statement of the facts is necessary. The joint had been put in by the Car Company's men. Among them were Nist and Foulds; the former being an expert pipe fitter, and the latter his helper. The joint was known to be a makeshift. It was expected to carry the steam for a week, and at the end of that period a permanent device was to take its place. It was finished on Sunday, and appeared to work satisfactorily until Tuesday morning, when it was observed to be leaking. The pipes connected by the joint were in the boiler room, and Stafford, who was in charge of that room, immediately started to notify Vaughan, the foreman of the pipe fitters, so that the necessary steps to remedy the trouble might be taken without delay. Upon his road he met Nist and Foulds, who were then employed in another part of the plant, and remarked to them, in effect, that their job of last Sunday had not been well done. He then carried his report to Vaughan, and Vaughan sent Cochran, another pipe fitter, to examine the supposed defect and see what he could do with it. When Cochran and his helper reached the joint, he found Nist and Foulds already there. Stafford's remark had produced its natural result, and they had gone to see what was the matter with the job upon which they had been engaged a day or two before. In what they thus did they may, perhaps, have been volunteers. There is no evidence that they were ordered to make the examination; but they were apparently acting from a praiseworthy motive, whatever the legal character of the act may have been. It is needless, however, to inquire whether their presence was justified, for no harm was done at that time. Cochran, who may have had the right to ask for their help, if the discharge of his duty made such help either necessary or desirable, accepted their assistance without question, and among the four workmen some effort was made to tighten the joint; Nist applying the wrench. The attempt was not successful. The steam escaped more freely, rather than less; and in a few moments they all went away together—Cochran in order to report to Vaughan, and Nist and Foulds for some place, and with some purpose, that were not disclosed at the trial. Not long afterwards the joint exploded, filling the boiler room with steam; and when it became possible to examine the scene of the accident the dead bodies of Nist and Foulds were found somewhere in the room. How they came to be there does not appear from the testimony. We have the bare fact, unexplained, that they lost their lives near enough to the scene of the explosion to be exposed to its destructive effects.

Under these circumstances, the Car Company insists upon two assignments of error—one of them to the following sentence from the charge of the court:

"On the part of the plaintiffs, however, it is claimed that these men went there; that they made this joint; and that when the joint exploded they were actually working there under instructions, or at the suggestion of a man who had been sent there to take care of that joint."

This sentence, however, is taken out of its context, and when it is read with what precedes and what follows we regard it as unobjectionable. Indeed, even if it be taken by itself, we see no reason to criticise it. Cochran was examined at length, but he was not asked the question whether he had left any suggestion for Nist and Foulds, and under the circumstances it was certainly not improbable that if they returned to the joint their return might be accounted for as the plaintiffs claimed.

The company relies mainly upon the argument that the jury should have received binding directions in its favor, because Nist and Foulds were chargeable with contributory negligence. It is contended that they took an obvious and dangerous risk, and took it of their own volition, without order or suggestion from their superiors; that they abandoned a place of safety and exposed themselves to a danger that was evidently threatening; and, since this appeared without contradiction, the request for binding instructions should have been granted. In our opinion the argument assumes too much. As we have already indicated, it is largely a matter of conjecture how they came to be where their bodies were found. All that we know with certainty is that the explosion took place, that they were in the boiler house at the time, and that they were afterwards found dead. How near to the joint they were does not appear in the record, neither was it proved how they were killed, whether by wounds inflicted by pieces of the broken joint, or by the scalding effect of escaping steam. The principal evidence on the subject is the following extract from the testimony of one witness:

"Q. When you got to the boiler house, what did you find?

"A. Found nothing but a lot of steam blowing out, was all you could see.

"Q. Anybody coming out of the boiler house?

"A. Coming out, them that could get out, and doors there to let them out.

"Q. Did any of you men who were there try to get into the boiler house?

"A. We did try to get in, but it wasn't safe to go in.

"Q. Did you go in at all?

"A. We went in after the steam had got down so that we could get in.

"Q. Did you see Mr. Nist and Mr. Foulds immediately after this explosion?

"A. Seen them after the steam had let down so we could get inside to see anything at all; seen them lying side by side.

"Q. Did you see them in the boiler house, or after they were carried out?

"A. When they were inside there.

"(Defendant admits that these two men were killed as the result of this explosion.)"

In addition to this, one other witness testified as follows:

"Q. Where was that joint to which you refer?

"A. Why, it was right on the steam line. The joint was right on the steam line.

"Q. Where was it with reference to where Mr. Nist and Mr. Foulds were injured or killed?

"A. Where was it?

"Q. Yes?

"A. It was on the steam line, the joint was.

"Q. Are you speaking about the joint at which Mr. Nist was killed?

"A. Yes, sir.

"Q. You are?"

"A. I am speaking of that joint."

But it does not appear from this incidental allusion whether the witness was testifying from his own knowledge or from what he had heard, and his answers therefore throw little if any light upon a point that cannot be considered unimportant. It may be that the situation of the bodies was so well known to counsel, the jury, and the court that the need of proving it definitely was overlooked by both sides. If this is the fact, it is a matter for regret; for we are necessarily confined to the record as we have it, and we might often go astray if we ventured to assume what is neither proved nor clearly to be inferred. Moreover, there was conflicting testimony on the point whether the leaking steam meant that the joint as a whole was in great danger, or whether it did not mean merely that the gasket (which is one part of the joint) might blow out. The latter occurrence, in the opinion of some of the witnesses, was not a very important matter, and was not likely to result in serious harm. Taking the whole situation as it was presented to the court below, we do not see how the defendant's prayer for binding instructions could have been properly granted. It was for the jury to say how the fatal injuries were inflicted, how threatening the danger was, and whether the decedents were negligent in voluntarily exposing themselves to a peril that was obvious and might result in much injury. A trial judge cannot infer contributory negligence from disputed facts. He can only pronounce upon it as a matter of law, when the facts are plain and practically uncontroverted, and the inferences cannot fairly be escaped.

In each case the judgment is affirmed.

REIZENSTEIN v. KOOPMAN et al.

GOLDSMITH v. SAME.

(Circuit Court, S. D. New York. April 14, 1909.)

PATENTS (§ 218*)—ROYALTIES—RIGHTS.

On an accounting between partners in the ownership of a patent under a license contract with one of the partners by which he was authorized to grant sublicenses, accounting to the partnership for a stated royalty on each of the patented articles sold by the sublicensee, where a sublicensee paid an agreed sum for the license privilege which entitled him to sell a stated number of the articles without further payment, the partnership is entitled to the royalty on such number, without regard to the number actually sold.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 218.*]

In Equity. Suits by Emile Reizenstein and Edwin M. Goldsmith, respectively, against Elias B. Koopman and another. On exceptions to master's report. Exceptions overruled.

See, also, 152 Fed. 173, 81 C. C. A. 465.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Harrison B. Weil (Eugene Treadwell and Isaac Hassler, of counsel), for complainants.

Parker & Aaron (Herman Aaron, of counsel), for defendant Koopman.

HAZEL, District Judge. This action arose from a breach of fiduciary relations existing between the complainants Goldsmith and Reizenstein, the defendant Koopman, and others, as copartners. It was proven at the hearing that the defendants Koopman and Upton perpetrated a fraud upon the complainants, and accordingly the Circuit Court made its decree canceling an assignment executed by them by which in terms they assigned to the defendant Koopman, for himself and his associates acting with him, their interests in the patented invention which is the subject of this controversy, together with the gains and profits arising from a license agreement which had been made by the joint owners of the patent with John H. Brigham, who was one of the copartners. It appeared that the defendant Koopman, without the knowledge of complainants, was jointly interested in said license agreement, with the fraudulent intent to secure secretly a certain contract with Wright & Butler, Limited, of London, England, to the exclusion of the complainants, whereby \$20,000 was paid for sublicense rights. 140 Fed. 616, affirmed 152 Fed. 173, 81 C. C. A. 465. The master was directed by the court to make and state an account of the number of coin holders sold in foreign countries, except Canada, by or through said Brigham, the defendant Koopman, and others associated with him, or by concerns abroad, under license, "and for the sale of which banks royalty was paid." The master found, upon the evidence before him, that there had been sold by the licensee to J. G. Rollins & Co., Limited, 729,292, and to Wright & Butler, Limited, 1,087,888, pocket banks or coin holders; that such sales were made under the license agreement to Brigham, which in substance provided that there should be paid to the owners of the patent a royalty of one cent on each bank sold. The complainants under the license agreement were each entitled to receive one-quarter cent on each bank sold.

The exceptions filed herein relate to the inclusion by the master of 57,600 patented pocket banks or coin holders claimed by the complainant to have been sold to J. G. Rollins & Company, Limited, and also to an excess of 464,808 sold to Wright & Butler, Limited. The defendant claims that pocket banks were not in fact sold to Rollins & Co., but they were merely consigned to it with the understanding that they would be sold on commission for Brigham, the licensee. It appears that the banks were insured by Rollins & Co., and subsequently, while in its possession, they were destroyed by fire. The insurance policy which was issued to Rollins & Co. was subsequently delivered by it to Brigham, the insurance money was collected by it, and the amount paid to Brigham, who secretly acted for himself and associates, to the fraudulent exclusion of the complainants. The contention now is that the defendant Koopman should not be required to account for royalties on the burnt banks, for the reason that they had not been

sold to Rollins & Co. On the proofs, however, I think the banks must be considered as having been sold by Brigham, acting for himself, the defendant Koopman, and their associates. The entries in the books of the New York Introduction Company, under which name the business of selling the banks was in part conducted, and of Rollins & Co., indicate an absolute sale to the latter company, which accounted to the defendants for the banks at the rate of $5\frac{1}{2}$ cents per coin holder, that being the selling price and the amount recovered from the insurance company. Such being the facts, it is a fair presumption that the parties to the transaction regarded that these particular banks had actually been sold. There are journal entries showing the return by Rollins & Co. of certain other banks to the New York Introduction Company; but, as the burnt banks were accounted for upon the basis of a sale and transfer, the master properly held the defendant accountable for such sale, and the complainants are entitled to receive their share of the proceeds in accordance with the license agreement.

In relation to the Wright & Butler transaction it appears that the arrangement was that the sublicensee was to pay and did pay \$20,000 for the license rights and privileges enjoyed by Brigham. In addition thereto it is conceded that Wright & Butler also paid a royalty of \$4,813.63 on 287,000 banks sold and delivered by the New York Introduction Company. Defendant contends that it is shown by the book entries in evidence that only 623,000 banks were invoiced or actually sold to Wright & Butler, and that the amount of \$20,000 paid under the sublicense contract was not a royalty on sales, and hence the master erred in requiring the defendant to account therefor. This position, however, is not maintainable. Under the license agreement Brigham obtained the right to grant sublicenses in consideration that he would pay to the owners of the patent a royalty of one cent on each bank sold. The fair intendment of the parties was that the royalty should become payable either on actual sales or upon such as were licensed to be manufactured or sold. That such was the intention evidently was recognized in the Koopman agreement (Exhibit H) with the sublicensees, for there it is stated that the \$20,000 were to be paid to the licensee for his surrender of the right to sell banks in the United Kingdom, and that the amount of \$20,000 was computed at the rate of $2\frac{1}{2}$ cents upon the sale of 800,000 banks, which the sublicensee guaranteed to sell. In view of the conceded facts, the point that the complainant must show affirmatively that 800,000 banks were actually sold by Wright & Butler is without force. It is enough that Koopman and his associates received the sum of \$20,000 upon the guaranty to sell the banks. Such amount received was a royalty within the meaning of the license agreement, for which the defendant must account at the rate of one-fourth of the royalties to each complainant, together with interest.

No sufficient reason is assigned by the defendant for sustaining the exceptions to the report of the master, and they are therefore overruled, with costs.

INTERNATIONAL CURTIS MARINE TURBINE CO. et al. v. WILLIAM CRAMP & SONS SHIP & ENGINE BLDG. CO.

(Circuit Court, E. D. Pennsylvania. February 15, 1910.)

No. 263.

WITNESSES (§ 16*)—PRODUCTION OF DOCUMENTS—PUBLIC POLICY—NAVY DEPARTMENT PLANS.

Where, in a suit to restrain contractors for torpedo boat destroyers containing certain turbine engines alleged to infringe complainant's patents, complainant's witnesses, who had examined the plans and specifications on file in the Navy Department, testified that the turbines called for constituted an infringement of complainant's patents, and in answer to a subpoena duces tecum to compel defendant to produce copies of the plans and specifications, defendant contended that such disclosure was objected to by the Navy Department as detrimental to the interests of the United States, in that it would divulge military secrets, while complainant insisted that the Navy Department objected merely because it was detrimental to the interest of the United States for the department to disturb the cordial relations existing between it and the contractors, and that the furnishing of the copies by defendant voluntarily or by process of the court was not objected to, the matter will be continued until a statement of the Navy Department can be filed showing the grounds of its objection.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 16.*]

In Equity. Suit by the International Curtis Marine Turbine Company and others against William Cramp & Sons Ship & Engine Building Company. On motion to produce documents. Continued for departmental information.

C. B. Fraley, Richard N. Dyer, and Frederick P. Fish, for complainants.

C. V. Edwards, Abraham M. Beitler, and Samuel Dickson, for respondent.

HOLLAND, District Judge. Some time in the summer of 1908 the United States government invited proposals for the building of torpedo boat destroyers provided with steam turbines for propulsion. The defendant bid and was awarded the contract to construct two of these vessels, and on October 1, 1908, signed articles of agreement with the government for the building of the same. Plans and specifications upon which the defendant submitted its bid and upon which it was awarded the contract were filed in the Navy Department at Washington. These were examined by permission of the officials in the Navy Department by the complainant's engineers and counsel; but they were not permitted to make copies of them. The conclusion at which the complainant's representatives arrived, after the examination of the plans and specifications on file, was that the defendant company, in constructing the steam turbines for the propulsion of these torpedo boat destroyers, was infringing the complainant's patents relating to elastic-fluid turbines, commonly known as "steam turbines," and thereupon this bill was filed, alleging, in substance, that the defendant offered in writing, accompanied by certain plans and specifications, to build for the government elastic-fluid turbines embodying inventions

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

contained in the complainant's patents, and that their proposal had been accepted by the government, and that they were about to proceed to build these turbines and infringe the complainant's patents.

Macdonald and Smith, who examined the plans and specifications on file at the Navy Department, have testified that the turbines built by the defendant company, as disclosed by their plans and specifications, are an infringement of the complainant's patents. A subpoena duces tecum was issued and served upon the president of the defendant company to produce copies of the plans and specifications upon which the turbines built by it for the government were constructed. In answer to this subpoena, the plans and specifications were produced sealed in an envelope, and the witness refused to open them upon the ground (1) that it would be compelling defendant to divulge trade secrets. It appears, as we have stated, that MacDonald and Smith, who examined the plans and specifications at the Navy Department, have testified that the turbines constructed from these plans and specifications infringe complainant's patents. It further appears that the defendant has contracted to build what are known as the "Zoelly turbines," which are known to complainant's engineers and to the general public through various publications.

As the complainant has offered considerable evidence tending to show that the defendant's turbines, as manufactured by it, infringe the complainant's patents, they would be entitled to an inspection of these plans and specifications, and to have them produced for the purpose of offering them in evidence, to enable the court to fully understand just what the defendant is making. But we do not definitely dispose of this branch of the matter before us at this time, as there is a more serious question raised by the defendant, to wit, that it "would be detrimental to the interest of the United States" to compel the defendant to submit these plans and specifications in evidence.

The defendant insists that the government has objected for the reason that, if these plans and specifications are in evidence and spread upon the records in this court, it will divulge military secrets to the detriment of the government; while, upon the other hand, the complainant contends that the Navy Department simply holds that it "would be detrimental to the interest of the United States * * * for the department" to furnish the copies, as it does not wish to disturb the cordial relations existing between it and contractors by appearing to be willing to furnish copies of contractors' plans and specifications to their competitors, and that the furnishing of copies by defendant voluntarily, or by process of court, is not objected to by the department.

If the complainant's claim as to the position of the Navy Department be correct, we see no reason now why it should not have these plans and specifications to offer in evidence; but the court is not convinced that this is the reason for the government's objection, and, in order that there shall be no mistake in regard to the exact facts on this point, it seems to me the Navy Department should be informed of the rule on defendant to produce these documents, and should be requested by defendant to state the grounds of its objection, so that the court may know whether these plans and specifications may be put in evidence

without, in the judgment of the department, causing the discovery of military or other secrets detrimental to the public interest.

The motion will be continued until March 1, 1910, to enable the defendant to file a statement of the Navy Department stating its grounds of objection, after which date either party may again be heard on the rule.

GORHAM MFG. CO. v. WEINTRAUB et al.†

(Circuit Court, S. D. New York. January 31, 1910.)

1. COURTS (§ 322*) — FEDERAL COURTS — JURISDICTION—DIVERSITY OF CITIZENSHIP—ALLEGATIONS IN PLEADING.

That the bill merely recites facts showing diversity of citizenship of the parties, instead of making distinct traversable averments thereof, is not ground for denying relief, where the affidavits of the defendant do not in any way dispute the diversity of citizenship.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 876-881, 887; Dec. Dig. § 322.*]

Diverse citizenship as a ground of federal jurisdiction, see note to *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullaghan*, 27 C. C. A. 298.]

2. TRADE-MARKS AND TRADE-NAMES (§ 22*)—MARKS SUBJECT OF OWNERSHIP—PRIORITY OF USE.

A manufacturer of silverware is not debarred from establishing as its trade-mark in this country a combination of devices of an anchor, lion, and the letter G, by the fact that each of these is a hallmark used on English silver, and that, used in combination, they would indicate to a buyer of English silver that the piece was sterling ware made in the city of Birmingham in 1831.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 25; Dec. Dig. § 22.*]

3. CONTEMPT (§ 9*)—ACTS CONSTITUTING—PUBLICATIONS RELATING TO PENDING PROCEEDING.

A notice by complainant, a manufacturer of silverware, to the trade, that complainant is asserting the validity of its trade-mark, and is endeavoring to sustain it in court, and that the defendants were stayed from infringing it by an order of the court issued simultaneously with the order to show cause, is proper, and does not constitute contempt of court.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 15-18; Dec. Dig. § 9.*]

Action by the Gorham Manufacturing Company against Frederick Weintraub and another. Heard on motion for preliminary injunction. Granted.

Hugo Mock, for complainant.

Benno Loewy, for defendants.

LACOMBE, Circuit Judge. This is a suit to restrain alleged infringement of trade-mark. The bill recites that complainant is a citizen of Rhode Island, and defendants citizens of New York. It is contended that diversity of citizenship is not sufficiently alleged, because distinct traversable averments thereof are not presented. If the affidavits in any way disputed such diversity, the objection might be important; but since the assertion is not disputed, and an averment alleg-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

†For opinion on motion to amend complaint, see 176 Fed. 1024.

ing diversity would be granted as of course, where there is no dispute as to respective citizenship, the objection is not persuasive to denying relief, if on the facts complainant is entitled to it, to sustain a common-law trade-mark.

Irrespective of what complainant's predecessors may have done, it is not disputed that since 1863 complainant itself has used upon its sterling silverware a mark consisting of an anchor, lion, and the letter G. And the record indicates that the trade in such goods has for many years recognized these conjoined marks, when impressed on silverware manufactured in this country, as indicating origin in complainant's workshops. Nor does it appear that during that period, since 1863, any other manufacturer has made or sold silver or plated ware manufactured in this country with the same combination mark.

The defendants contend that, since each of the three devices—anchor, lion, and G—had a certain significance when affixed to English-made silverware, complainant could not in this country establish as its trade-mark the combination of the three. The defense is presented with such wealth of learning in the silversmith's art, fortified with elaborate quotations from English statutes regulating hallmarks on gold and silver ware for centuries, and with recognized text-books dealing with the subject and giving the interpretation of every English mark that has survived on every piece of English silver which the authors have been able to find, that the study of the record has been singularly attractive.

Nevertheless, in the ultimate analysis, the single question is whether a maker of silverware in this country is precluded from selecting as his trade-mark an impression which is made up of three of these marks, although, when conjoined, they would indicate to a buyer of English silver that the particular piece was sterling ware made in the city of Birmingham in 1831. It is thought that he is not thus precluded, and that, when he has used the particular combination on his ware made in this country for upwards of 40 years, and the same has been accepted by the trade as his identifying mark, without imitation by any one, he is entitled to an injunction, at least until final hearing. The security given by complainant (\$2,500) is abundant to protect defendant against any possible loss, especially as defendants assert that they use other combinations of old hallmarks, and have almost an infinitude of such combinations which they can freely use, without infringing on the trade-mark of any American manufacturer.

From the standpoint of the collector of old silver, it might well be desirable that no reproduction of any old hallmark, English or Continental, should ever be affixed to silver or plated ware made here; but there is no authority for any such ruling.

Since the argument defendant has submitted a circular notice sent by complainant to the trade, contending that, since it was issued after argument, it was improper, and should be considered a contempt of court. It merely states that complainant is asserting the validity of its trade-mark, and is endeavoring to sustain it in court, and that these defendants were stayed from infringing it by an order of this court

issued simultaneously with the order to show cause. There seems to be no impropriety in giving such notice to the trade.

If the security bond is so phrased that it might be contended that the decision of this motion terminates its obligation, it should be renewed to extend till decision on final hearing.

Injunction granted.

CLARK BROS. CO. v. TENNESSEE LUMBER MFG. CO.

(Circuit Court, E. D. Pennsylvania. March 9, 1910.)

No. 714.

CONTRACTS (§ 285*)—AGREEMENT FOR ARBITRATION—AWARD BY TWO ARBITRATORS.

Where a contract provided that in case of dispute the matter should be left to the decision of arbitrators, one to be selected by each party, and that the two should have power to select a third, and that the decision should be binding, an award was not required to be unanimous, but was binding if joined in by two of the arbitrators.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 285.*]

At Law. Action by Clark Brothers Company against the Tennessee Lumber Manufacturing Company. Rule for judgment for want of a sufficient affidavit of defense. Rule absolute.

John E. Sibble and D. I. Ball, for plaintiff.

Wesley K. Woodbury and John G. Johnson, for defendant.

J. B. McPHERSON, District Judge. There are three counts in the plaintiff's statement, but this rule asks for judgment upon the first count only, which is based solely upon an award made by two out of the three arbitrators who heard the controversy. They were appointed in accordance with clause 7 of the contract between the parties, and a copy of the agreement (which provides for the building of a sawmill) is attached to the statement. It is true that the drawings and detailed specifications are omitted, but the attached copy sufficiently complies with the requirements of the Pennsylvania act of 1887, which directs that a statement of claim shall be accompanied by copies of all notes, contracts, book entries, etc., upon which the plaintiff's action is founded. To support the claim contained in the first count, it would have been wholly superfluous to set out the specifications of this building agreement. Neither they nor the drawings could throw any light whatever on this phase of the controversy; and I do not believe that the act of 1887 was intended to compel the performance of what would approach the absurd.

The clause providing for arbitration is as follows:

"Should any dispute arise respecting the true construction or meaning of the proposition, specifications, or drawings, or respecting the true value of any extra work, or of work, machinery, appliances, or equipment omitted, or as to whether said mill is fully completed and in first-class running order, then said matters shall be left to the decision of arbitrators, one to be selected by

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the party of the first part, another by the party of the second part, and they two shall have the power to name a third arbitrator, and the decision of said arbitrators shall be binding on the parties hereto."

What happened was this: The parties were in serious dispute over several matters arising out of the contract, and on February 11, 1907, each party chose an arbitrator. On February 12th these two, acting under the power contained in the foregoing clause, selected a third arbitrator "to sit and act with us upon the hearing of this arbitration." These three persons accordingly heard all the evidence submitted by the parties and an elaborate argument thereon, and upon June 28, 1909, one of the arbitrators originally chosen united with the third arbitrator in making an award in favor of the plaintiff. The defendant attacks the finding upon the ground that it was not agreed to by the three arbitrators, asserting that the seventh clause requires that all who hear must agree before a binding award can be made. As it seems to me, this proposition need not be discussed. It appears to be decided against the defendant by the following authorities: *Hobson v. McArthur*, 16 Pet. 182, 10 L. Ed. 930; *Quay v. Westcott*, 60 Pa. 163; and *Weaver v. Powel*, 148 Pa. 372, 23 Atl. 1070. I refer to the opinions in these cases for the reasoning that fully justifies the plaintiff's contention that the foregoing clause by clear implication authorizes any two of the arbitrators to make a binding and final award. To construe the clause to mean that all must agree if a third be appointed is to adopt what seems to be a most improbable construction; for it requires us to suppose that, instead of providing a way to escape a deadlock, the parties deliberately made a deadlock much more probable, if not practically inevitable.

The rule is made absolute, and it is directed that judgment be entered in favor of the plaintiff upon the first count of the statement for \$14,184.52, with interest from June 28, 1909.

SUN KWONG ON v. UNITED STATES.

(Circuit Court, S. D. New York. November 13, 1909.)

No. 5,574.

CUSTOMS DUTIES (§ 45*)—CLASSIFICATION—EDIBLE FUNGUS—SIMILITUDE.

An edible fungus, that grows on the bark of trees and has been merely dried and packed loose, bears a greater similitude to vegetables in their natural state, enumerated in *Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 257*, 30 Stat. 171 (U. S. Comp. St. 1901, p. 1650), than to mushrooms prepared, enumerated in paragraph 241, 30 Stat. 170 (U. S. Comp. St. 1901, p. 1649), and is therefore dutiable under the former paragraph.

[Ed. Note.—For other cases, see *Customs Duties*, Cent. Dig. § 149; Dec. Dig. § 45.*]

On Application for Review of a Decision by the Board of United States General Appraisers.

The opinion filed by the Board of General Appraisers reads as follows:

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

WAITE, General Appraiser. The merchandise is an edible fungus, which, according to the testimony, grows on the bark of trees in China. It has been dried in the sun and packed loose in wooden cases for importation. It was assessed as a vegetable in its natural state under paragraph 257, tariff act of 1897, and is claimed to be dutiable at 2½ cents per pound, by similitude to mushrooms, under paragraph 241, with an additional claim for free entry under paragraph 617. The latter contention we do not consider necessary to discuss. See G. A. 6,184 (T. D. 23,812). The claim under paragraph 241 is evidently the one upon which the importers rely.

According to the testimony, this fungus is used by the Chinese as mushrooms are used, being usually cooked with meat. In this respect, however, its use seems to be the same as that of many of their curious vegetable substances, which witnesses generally state are prepared with meat. In claiming that this commodity should be dutiable under paragraph 241 by similitude to mushrooms, the importers probably rely on the case of *Von Bremen v. United States*, 168 Fed. 889, 94 C. C. A. 301, T. D. 29,501, where it was held that truffles in tins were classifiable under paragraph 241 by similitude to "mushrooms, prepared or preserved, in tins." However, the fungus here in question has not been so packed, but has been merely dried and packed loose in wooden cases; and, if to be considered similar to mushrooms at all, it more resembles the dried variety, which were similarly packed in barrels, and were held in the *Zammati Case*, 153 Fed. 880, 82 C. C. A. 626, T. D. 23,054, to be dutiable as vegetables in their natural state. The fungus before us has been so classified by the collector, and we are of the opinion his decision is correct. Note G. A. 6,184, *supra*.

The protest is overruled.

Kammerlohr & Duffy (Joseph G. Kammerlohr, of counsel), for importers.

D. Frank Lloyd, Dep. Asst. Atty. Gen. (Thomas M. Lane, Asst. Counsel, of counsel), for the United States.

PLATT, District Judge. The merchandise in dispute is an edible fungus, which, according to the testimony, grows on the bark of trees in China. It was assessed for duty at 25 per cent. ad valorem under paragraph 257, tariff act of 1897, as a vegetable in its natural state. The appellants claim it is properly dutiable at only 2½ cents per pound, by similitude to mushrooms, under paragraph 241, or, alternatively, as free under paragraph 617.

I was bothered for a moment as to whether this merchandise can be properly classified as a vegetable; but, upon reflection and an examination of the decisions, I am satisfied that it ought to be so treated for tariff purposes. On the similitude question, the reasoning of the Board is persuasive.

Decision affirmed.

E. B. ESTES & SONS v. UNITED STATES.

(Circuit Court, S. D. New York. November 12, 1909.)

No. 5,394.

CUSTOMS DUTIES (§ 27*)—CLASSIFICATION—MANICURE STICKS—"MANUFACTURES OF WOOD."

Manicure sticks, being completed articles of wood, several inches long, pointed at one end and beveled off at the other to form a cutting edge, are "manufactures of wood," and dutiable as such under Tariff Act July 24, 1897, c. 11, § 1, Schedule D, par. 208, 30 Stat. 168 (U. S. Comp. St. 1901, p. 1647).

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. §§ 60-65; Dec. Dig. § 27.*

For other definitions, see Words and Phrases, vol. 5, p. 4363.]

On Application for Review of a Decision by the Board of United States General Appraisers.

The decision rendered by the Board of Appraisers, which is reported as G. A. 6,828 (T. D. 29,358), affirmed the assessment of duty by the collector of customs at the port of New York. The Board's opinion reads as follows:

MCCLELLAND, General Appraiser. The merchandise which is the subject of these protests is invoiced as "toothpicks," and was returned by the appraiser as manufactures of wood. * * * The appraiser, in his special report on the protests, states that "the articles are not toothpicks, but manicure sticks, consisting of pieces of wood $4\frac{1}{4}$ inches long, pointed at one end and beveled off at the blunt end to form a cutting edge, designed for use to manicure finger nails." This statement of the condition and character of the merchandise is confirmed by the testimony of the official examiner who passed the same, and is not controverted by protestants.

Counsel for protestants cite U. S. v. Knipscher (C. C.) 152 Fed. 590, T. D. 27,855, and Hartranft v. Wiegmann, 121 U. S. 609, 7 Sup. Ct. 1240, 30 L. Ed. 1012, in support of the claim that these sticks are not "manufactures of wood"; but we think there is nothing in the reasoning or conclusion in either case to sustain their contention. Here we have articles of very general use, with a distinct trade-name, deliberately fashioned into shape and ready for use. We find them to be manufactures of wood, and hold that duty was properly assessed.

The protests are accordingly overruled.

Kammerlohr & Duffy (John G. Duffy, of counsel), for importers.

D. Frank Lloyd, Deputy Asst. Atty. Gen. (William K. Payne, Asst. Atty., of counsel), for the United States.

MARTIN, District Judge. The articles in question are concededly manicure sticks. They were assessed for duty at 35 per cent. ad valorem under Tariff Act July 24, 1897, c. 11, § 1, Schedule D, par. 208, 30 Stat. 168 (U. S. Comp. St. 1901, p. 1647), as "manufactures of wood." The importers claim classification under paragraph 198, 30 Stat. 167 (U. S. Comp. St. 1901, p. 1646), at 20 per cent., as wood unmanufactured, or at 15 per cent., under the same paragraph, as

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

cabinet wood, or at 20 per cent., under paragraph 200, 30 Stat. 167 (U. S. Comp. St. 1901, p. 1646), as sticks, or free of duty, under section 2, Free List, par. 700, 30 Stat. 202 (U. S. Comp. St. 1901, p. 1689).

I concur in the finding of the Board that this is a manufactured product. Decision affirmed.

Ex parte WONG YOU et al.

(District Court, N. D. New York. March 16, 1910.)

1. ALIENS (§ 21*)—GENERAL IMMIGRATION ACT—APPLICABILITY TO CHINESE.

The Chinese exclusion acts are to be read in pari materia with Immigration Act Feb. 20, 1907, c. 1134, 34 Stat. 898 (U. S. Comp. St. Supp. 1909, p. 447), so far as they apply to Chinese aliens seeking to enter the United States; the immigration act being equally applicable to Chinese aliens surreptitiously entering the country as to other aliens.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 74; Dec. Dig. § 21.*

Citizenship of Chinese, see notes to *Gee Fook Sing v. United States*, 1 C. C. A. 212; *Lee Sing Far v. United States*, 35 C. C. A. 332.]

2. ALIENS (§ 31*)—UNLAWFUL ENTRY—DEPORTATION.

Immigration Act Feb. 20, 1907, c. 1134, § 20, 34 Stat. 904 (U. S. Comp. St. Supp. 1909, p. 459), provides that an alien entering the United States in violation of law shall be deported to the country whence he came. Section 21 requires the Secretary of Commerce and Labor to cause such alien to be returned to the country whence he came, as provided by section 20. Section 35 declares that the deportation shall be to the trans-Atlantic or trans-Pacific ports from which the aliens embarked for the United States, or, if such embarkation was for foreign contiguous territory, to the foreign port at which the alien embarked for such territory. *Held*, that where Chinese embarked from Hong Kong, China, for a Canadian port, remaining in Canada for various lengths of time, their original intention being to enter the United States, which they ultimately did from Canada illegally and surreptitiously, they were properly returned to Hong Kong, and not to Canada.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 92; Dec. Dig. § 31.*]

3. ALIENS (§ 32*)—CHINESE—EXCLUSION—IMMIGRATION INSPECTOR—JURISDICTION.

An immigration inspector has jurisdiction to exclude Chinese aliens found and arrested in the act of entering the United States, whether they formally applied for admission or not.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 32.*]

4. ALIENS (§ 31*)—CHINESE—EXCLUSION—DEPORTATION.

Where alien Chinese are foiled in an effort to enter the United States illegally over the Canadian boundary, they are not subject to deportation to China, but only to be turned back to Canada.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 92; Dec. Dig. § 31.*]

Application by Wong You and others for writs of habeas corpus to procure their release from custody under orders for deportation made under immigration laws, on the ground that they were alien Chinese held in the United States under deportation proceedings. Writs dismissed, and petitioners remanded.

H. E. Owen, for the United States.

B. W. Berry, for petitioners.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

RAY, District Judge. As to Hoen Chee, or Horn Chee, the writ has been dismissed, and the petitioner remanded, as his case has not been passed upon by the Commissioner of Commerce and Labor.

Wong You and Wong Cheen, or Wong Chun, were taken into custody on the 22d day of October, 1909, at Utica, N. Y., and Wong Mon Sue, or Wong Yip, and Ju Fong were taken into custody November 28, 1909, at Rouses Point, N. Y., on the allegation they and each of them were alien Chinese persons and had entered the United States surreptitiously from the Dominion of Canada at a point not designated as a port of entry and without having produced a certificate of admission or having been examined or inspected as required by the immigration laws and regulations of the United States, and had unlawfully entered and were unlawfully in the United States in violation of section 36 of the act entitled "An act to regulate the immigration of aliens into the United States," approved February 20, 1907 (Act Feb. 20, 1907, c. 1134, 34 Stat. 908 [U. S. Comp. St. Supp. 1909, p. 466]); such entry having been made a few days prior to the dates mentioned. When so taken into custody, these Chinese aliens had not settled down and become a part of the resident population of the United States, not having reached their respective place of destination in the United States. Soon thereafter warrants for the arrest of said persons were issued by the Secretary of Commerce and Labor under the provisions of the immigration laws of the United States and the rules and regulations of the said Department of Commerce and Labor, and they were arrested and held thereunder and given opportunity for a full and a fair hearing and opportunity to show cause why they should not be deported under the provisions of said immigration laws and to have counsel. A full and fair hearing was had, and all evidence offered was taken and duly considered, and thereupon it was held and decided that said Chinese persons were aliens and had very recently entered the United States surreptitiously and in violation and defiance of law, as aforesaid, and were therefore unlawfully in the United States in violation of law. All the proceedings and testimony were duly transmitted to the Secretary of Commerce and Labor. The law as to a hearing was in all respects complied with, and the Acting Secretary of Commerce and Labor held that such Chinese persons were aliens, and that each of them entered the United States in violation of section 36 of the immigration laws, viz., act of Congress approved February 20, 1907, and rule 24 of the immigration regulations, and were in the United States, when arrested, in violation of law and unlawfully and had entered unlawfully.

On the 17th day of November, 1909, the Secretary of Commerce and Labor made and issued a warrant of deportation under said act (sections 36, 20, and 21) as to Wong You, Wong Cheen, or Wong Chun, and on the 4th day of January, 1910, made and issued a like warrant as to Wong Mon Sue, or Wong Yip, and Ju Fong. At the time the writ of habeas corpus was issued herein said named persons, so ordered deported, were in the custody of S. R. Horton, Chinese inspector and inspector of immigration, under such orders and judgments of deportation to whom they had been delivered for the execution of

same. The warrants for the deportation of Wong Cheen, or Wong Chun, and Wong You recite that such persons are aliens; that they entered the United States in violation of section 36 of the said act (immigration laws, approved February 20, 1907), and rule 24 of the immigration regulations, and without being inspected under any of the provisions of said act, and commands that they be deported and returned "to China, the country whence he came." In the case of Wong Mon Sue, or Wong Yip, and Ju Fong, the recitations of the warrant are substantially the same; but it does not in terms command or direct that such persons be deported or returned to China, but "to the country whence he came." However, the commissioner is directed to purchase transportation for them from Malone, N. Y., to China.

It will be noted that these proceedings have been had under the provisions of the immigration laws and immigration rules and regulations.

The petitioners claim that these proceedings had and warrants of deportation issued are null and void, and were made or granted without jurisdiction; that the immigration laws (the act referred to) have no application to Chinese aliens; that such aliens, when found in the United States, regardless of how or when they came, must be arrested and dealt with under the provisions of the Chinese exclusion acts and taken before a United States judge or commissioner, who alone may deport Chinese aliens; that, in any event, as these Chinese aliens, concededly, came from the Dominion of Canada into the United States, they must be returned to Canada; and that the warrants of deportation are void and made without jurisdiction, in that they command a deportation or return to China and not to Canada, which it is claimed is the country whence they came.

The hearings given, or trials had, were in all respects full and fair. There has been no unfair or arbitrary or unlawful action or conduct, provided the Department of Commerce and Labor had jurisdiction to deal with these persons at all under the immigration laws, and deport them to China or to any place. I do not doubt the right and power of the Department of Commerce and Labor to deal with these persons, Chinese aliens, under and in conformity with the provisions of the said immigration laws and the rules and regulations which are in aid thereof and supplementary thereto and authorized thereby.

- (1) These persons are aliens.
- (2) They entered the United States surreptitiously, not at a port of entry, and without inspection or examination. They entered in defiance and in violation of law. They came with the intention of remaining.
- (3) They placed themselves in the United States by violating our laws, by their own unlawful acts, and cannot, therefore, be heard to say they are not here in violation of law, or unlawfully.
- (4) They came into the United States in violation of the immigration act or laws and, being aliens, were and are subject to its provisions.
- (5) Chinese aliens are not exempt from the provisions of the immigration laws, rules, and regulations.

(6) The two acts may be enforced together and are not inconsistent with each other. The immigration act does not repeal the Chinese exclusion laws or any part thereof.

In *Ex parte Li Dick* (D. C.) 174 Fed. 674, the court had occasion to pass upon and decide all the questions raised here, except that of the place or country to which such alien Chinese persons so unlawfully entering and found within the United States in violation of the immigration laws shall be deported. I adhere to what was there actually decided and will not repeat it here. I also discussed the other question, but left it undecided, as it was not necessarily involved. What was said on the subject was by way of suggestion that the immigration laws are fully applicable to such cases and fully operative in all cases, except that, if in such a case as this the Dominion of Canada is held to be "the country whence he (the alien) came," and Canada will not receive the person ordered deported, then the exclusion laws must be resorted to.

Chinese aliens may come to the United States and enter in violation of our immigration laws by several different routes; as, for instance, one may embark at Hong Kong for the United States direct and land surreptitiously and enter unlawfully at San Francisco. In such case there is no question that China is "the country whence he came" and to which he must be deported. Another may embark at Hong Kong for the United States as his destination, but land at Vancouver, the destination of the vessel, and then come by rail to Montreal, remain a month, and then cross the border into the United States surreptitiously and in violation of law, as was done in the *Li Dick* Case, *supra*. If the United States was his intended destination when he left China, is there any substantial reason why China should not be held to be "the country whence he came"? True, he did not come direct and land in the United States, but he came from China to the United States as he intended to do, passing through Canada on his way. Another embarks from China for Canada with no intention of coming to the United States. He lands in Canada, complies with its laws, and remains two or five years, when he makes up his mind to come to the United States, and does so, entering surreptitiously and in violation of our immigration laws. Is China or the Dominion of Canada "the country whence he came"? Before considering these questions in their legal bearings and the statutes applicable, we will ascertain the exact status of these petitioners, as shown by the evidence.

Wong You embarked at Hong Kong for Canada intending to come to the United States, that being his destination; but he intended and expected to first land in the Dominion of Canada and then stop a little time at Montreal. He did remain at Montreal about two months without changing his purpose to come to the United States, and then continued his intended journey to the United States by automobile, entering surreptitiously at a point distant from a port of entry and without inspection and in violation of law and was taken into custody at Utica, Northern District of New York, within a day or so, and before he had actually settled down so as to become a part of our resident population. He was in fact unlawfully in the United States, having come

across the borders in violation of law. He was not in the act of entering, as were the Chinese aliens considered in *Ex parte Chow Chok* (C. C.) 161 Fed. 627, affirmed by 163 Fed. 1021, 90 C. C. A. 230.

Wong Cheen, or Wong Chun, embarked at Hong Kong for Canada, where he landed and remained about a year before surreptitiously entering the United States with Wong You. It does not affirmatively appear, by admission or direct evidence, that he intended, when he embarked at Hong Kong, to come to the United States, neither does it appear that he did not; and we are to ascertain his intent and purpose from what he actually did. He entered the United States, as stated, with a relative from his native village in China, who left China intending to come to the United States, and who did come, "picking up" Wong Chun on the way. I think it a fair inference from all the facts that Wong Chun left China for the United States, embarking for Canada and landing there, and was temporarily in Canada, en route, awaiting the arrival of his relative and a favorable opportunity to enter the United States surreptitiously and in violation of law which he in fact did. Time in such a case is somewhat material; but Wong Chun did nothing while in Canada tending to show that his purpose or intent was other than to do what he eventually did do—surreptitiously enter the United States in violation of our immigration laws.

Wong Yip, or Wong Mon Sue, left the United States about three years ago and went to China with the intention of returning to the United States. He returned by way of Canada, embarking from a port in China, and then surreptitiously entered the United States, from Canada, not at a port of entry, intending to evade inspection and examination, which he did. His is a plain case of coming from China into the United States, by way of Canada on a continuous journey, in violation and defiance of law. He was not of a class free to come and go.

Ju Fong, or Jue Chong, applied for admission into the United States and was rejected and returned to Montreal on or about the 21st day of October, 1909. He thereupon paid the head tax required in Canada, and thus gained the right to be and remain in Canada. He was not naturalized and did not become a subject of the Kingdom of Great Britain and Ireland. If this action on the part of Ju Fong was in pursuance of a scheme on his part to obtain entrance into the United States surreptitiously and in violation of the immigration laws and rules of the United States, and in pursuance of such scheme and in execution thereof he did so enter the United States, his must be regarded as a continuous journey from China, where he embarked for Canada, to the United States. It was but a repetition of his efforts to enter in pursuance of his intention formed on leaving China, the first of which failed. All of these persons came into the United States from contiguous foreign territory by land, but their so coming was part of a continuous journey from China to the United States with intent to immigrate to the United States, and they came with intent to remain here and become, not citizens, but a part of our resident population.

Section 20 of the immigration laws, already referred to, provides:

"That any alien who shall enter the United States in violation of law, * * * shall upon the warrant of the Secretary of Commerce and Labor, be taken into custody and deported to the country whence he came at any time within three years after the date of his entry into the United States."

Section 21 of the act provides:

/"That in case the Secretary of Commerce and Labor shall be satisfied that an alien has been found in the United States in violation of this act, or that an alien is subject to deportation under the provisions of this act, or of any law of the United States, he shall cause such alien within the period of three years after landing, or entry therein, to be taken into custody and returned to the country whence he came as provided by section 20 of this act," etc.

Section 22 provides that the Commissioner General of Immigration shall, under the direction of the Secretary of Commerce and Labor, have charge of the administration of all laws relating to the immigration of aliens into the United States, and he is to make and enforce rules and regulations relating thereto, not inconsistent with law.

Section 32 provides that such Commissioner General, subject to approval by the Secretary of Commerce and Labor, "shall prescribe rules for the entry and inspection of aliens along the borders of Canada and Mexico, so as not to unnecessarily delay, impede or annoy passengers," etc.

Ports of entry for aliens have been designated by law, and examination and inspection provided for, and it is unlawful for an alien to enter the United States except at a port of entry and on complying with the law as to inspection, etc. Subdivision "d" of rule 31 says the following may be deported:

"(d) Aliens who are found to have entered the United States at any other place than at the seaports thereof or at one of the ports or places designated in rules 24 and 26 hereof, and aliens found to have entered at a seaport, but at any time or place other than as designated by the immigration officers. (Secs. 18, 38.)"

Rule 38 reads:

"Rule 38. Deportation, where to. The deportation of aliens as prescribed in rules 30 to 36 hereof shall be to the foreign trans-Atlantic or trans-Pacific port from which such aliens embarked for the United States; or, if such embarkation was for foreign contiguous territory, to the foreign port at which they embarked for such contiguous territory. (Sec. 35.)"

Section 36 of the immigration law reads as follows:

"Sec. 36. That all aliens who shall enter the United States except at the seaports thereof, or at such place or places as the Secretary of Commerce and Labor may from time to time designate, shall be adjudged to have entered the country unlawfully and shall be deported as provided by sections twenty and twenty-one of this act: Provided, that nothing contained in this section shall affect the power conferred by section thirty-two of this act upon the Commissioner General of Immigration to prescribe rules for the entry and inspection of aliens along the borders of Canada and Mexico."

The provisions of law referred to make it unlawful to enter surreptitiously and in evasion of the law, and when an alien so unlawfully enters he is, of course, unlawfully in the United States. There is no question that an alien of any nationality who so enters violates the immigration laws referred to, and that all such aliens, unless it be a Chinese alien, are subject to deportation under the provisions of those

laws, on the warrant of the Secretary of Commerce and Labor. However, he is to be returned to "the country whence he came."

If, then, a Swiss emigrant, intending to come to the United States and remain and live here, leaves Switzerland and passes through France, making a month's tarry at Paris, on his way to a seaport, and then, at such seaport in France, embarks for New York in the United States, and on arrival at that port unlawfully enters in violation of law, is he, if arrested, tried and ordered deported, to be taken or returned to France, or to Switzerland?

Section 35 of the immigration act provides as follows:

"Sec. 35. That the deportation of aliens arrested within the United States after entry and found to be illegally therein, provided for in this act, shall be to the trans-Atlantic or trans-Pacific ports from which said aliens embarked for the United States; or, if such embarkation was for foreign contiguous territory, to the foreign port at which said aliens embarked for such territory."

The Swiss alien just mentioned, having embarked at a port in France for the United States, must be returned or deported to the port in France at which he embarked, as that would be "the trans-Atlantic port from which" such alien "embarked for the United States." Now, suppose such Swiss alien embarked at the French port for Canada, contiguous foreign territory, and there landed, and then surreptitiously entered the United States from Canada in pursuance of his intent and purpose formed on leaving Switzerland in violation of law, and was thereafter arrested, tried, and ordered deported, can there be any question that he is to be taken or deported to the French port at which he embarked for the United States? I think not. To hold otherwise would be to disregard the express mandate of section 35, just quoted. It is evident, I think, in the light of this section, that the words "deported to the country whence he came," and "returned to the country whence he came," as found in sections 20 and 21, are to be construed and held as meaning the country in which is situated the trans-Atlantic or trans-Pacific port from which the alien embarked for the United States in all cases where such alien did embark at some trans-Atlantic or trans-Pacific port for the United States, regardless of the country which he left for the purpose of coming to the United States, and also regardless of the countries through which he passed on his way to such port of embarkation, and also regardless of the fact that he embarked for and landed in foreign contiguous territory and then unlawfully entered the United States from such foreign contiguous territory. Or we may say that section 35 is to be construed as a proviso, or exception to the provisions of sections 20 and 21, and as qualifying those provisions as to the place to which deportation shall be made in certain cases, viz., those mentioned in section 35. If we hold that the words "the country whence he came" mean, in all cases, the immediate foreign country from which the alien came unlawfully into the United States, we disregard and nullify section 35. If we hold that the words "the country whence he came" mean, in all cases, the country in which the alien was domiciled, or of which he was a citizen when he formed the intent or purpose of coming to the United States and which country he left for the United States, making a continuous journey, but embarking for the United States at some trans-Atlantic or trans-Pacific

port, not in the country of his domicile or of which he was a citizen, we also disregard and nullify the provisions of said section 35 in such a case as that supposed—the Swiss alien, and many others. I am of the opinion that sections 20, 21, and 35 of the immigration laws are to be read and construed together; section 35 qualifying and limiting the two former sections. By this construction we do no violence to either section, but give effect to each and all of them.

These four Chinese aliens whose cases are now being considered embarked from Hong Kong, China, a trans-Pacific port, for the Dominion of Canada, which is foreign contiguous territory, and there landed. Their destination, however, was the United States, and to the United States they came after landing in Canada and without having become actually and bona fide domiciled there, or citizens of that foreign country. It so happens that they are citizens of China, the country in which they lived and formed the intent of coming to the United States, and from which they embarked for the purpose of coming to the United States by way of Canada. They are to be deported to Hong Kong, in China, not because they are citizens of China, or for the reason they left China for the United States by way of Canada, but for the reason that they embarked for foreign contiguous territory from a trans-Pacific port, intending to come to the United States through or by way of such foreign contiguous territory, and entered the United States unlawfully. Section 35, quoted says, "arrested within the United States after entry and found to be illegally therein," etc. It has been suggested that there is significance in the words "after entry," and that these words suggest a regular entry into the United States in the regular way, but that some fraud was practiced in obtaining such entry so that the person is illegally in the United States, and that the section is applicable to such cases only. I see no force in such contention. I think the section applies to all aliens, coming within its provisions, found to be illegally in the United States because of the fact they entered in violation of the immigration laws. To come within the provisions of section 35, the alien person or persons must have embarked for the United States from some trans-Atlantic or trans-Pacific port, or from one of such ports to foreign territory contiguous to the United States, and must, after landing, have entered the United States in violation of the immigration laws and have been found therein (within three years of his entry), in which case he is to be "adjudged to have entered the country unlawfully and shall be deported as provided by sections twenty and twenty-one of this act," as qualified by section 35, which must be read in connection therewith.

In construing a statute it is to be taken as a whole. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word, and that every part of a statute must be construed in connection with the whole, so as to make all the parts harmonize, if possible, and give meaning to each. *Washington Market Co. v. Hoffman*, 101 U. S. 112, 25 L. Ed. 782. Statutes are to be so construed, if practicable, that one section will not defeat or destroy another, but explain and support it. *Bernier v. Bernier*, 147 U. S. 242, 13 Sup. Ct. 244, 37 L. Ed. 152. The intention of the Legislature,

when properly ascertained, must govern in the construction of every statute, and single sentences and single provisions are not to be selected and construed by themselves; but the whole statute must be examined, and all its provisions construed together. *Pollard v. Bailey*, 20 Wall. 520, 22 L. Ed. 376. When we read sections 20, 21, and 35 all together and in connection with the others, there is no doubt of the intent and effect. Section 20 uses the words "who shall enter the United States in violation of law." Section 21 uses the words "has been found in the United States in violation of this act." Section 35 says "found to be illegally therein." Section 36 says "shall be adjudged to have entered the country unlawfully." I think that where an alien of any nationality, including a Chinese alien, is found in the United States in violation of the immigration laws, and is found to have gained entrance by violating those laws and the rules duly made, which have the force of law, he is to be adjudged to have entered the country unlawfully and deported on the warrant of the Secretary of Commerce and Labor to the country whence he came, viz., Brazil, if he was a resident and domiciled there and came by land; or to France if he came from Switzerland by way of France and then embarked for the United States and landed there, or embarked for Canada and came thence into the United States; or to China, if he embarked at a port in China for the United States and landed in the United States, or embarked at a port in China for any contiguous foreign territory, as Canada or Mexico, and came thence into the United States pursuant to a design to do so formed at or before leaving China or even on the voyage.

In the *Chow Chok Case* (C. C.) 161 Fed. 627, affirmed by the Circuit Court of Appeals, the Chinese aliens were apprehended in the very act of crossing the border from Canada into the United States, taken before a Chinese inspector, and admission denied. On habeas corpus this court held that such persons were not found unlawfully in the United States within the meaning of the Chinese exclusion laws, as they were in the act of entering when taken into custody, and that the inspector had jurisdiction, and the persons were remanded. Instead of treating them as persons merely seeking admission and refusing them admission and turning them back to Canada, the inspector sought to deport them to China, and they were taken to Hoboken, N. J., for the purpose of taking them to China. On habeas corpus in the District of New Jersey, Third Circuit, it was held that the decision of this court was *res adjudicata*, and they must be returned to Canada, not having been found unlawfully in the United States. *Lui Lum et al. v. United States*, 166 Fed. 106, 92 C. C. A. 90.

I find no point actually decided in those cases in conflict with the views here expressed. The inspector had jurisdiction to exclude Chinese aliens found and arrested in the very act of entering the United States, whether they formally applied for admission or not. Being denied admission, they were to be turned back and prevented from entering, and the fact that they were foiled in an effort to enter the United States in violation of our laws did not subject them to the penalty of being sent to China. If a Chinese alien comes to a regular

port of entry on the Canada border and asks admission, or is taken there to determine his right to enter, and is denied admission, he is simply turned back. He has not subjected himself to any penalty, or forfeiture, or punishment, and cannot be subjected to any. Here we have a different situation. These Chinese persons were actually within the United States, on our territory distant from the border, and had gained such points in the United States before being apprehended, and, on the evidence, it has been duly adjudicated by the inspector and the Department of Commerce and Labor that such persons were and are unlawfully in the United States, having entered in violation of law; that is, in violation of our immigration laws. This finding was based on sufficient and competent evidence and cannot be disturbed by the courts. *Chin Yow v. United States*, 208 U. S. 8, 28 Sup. Ct. 201, 52 L. Ed. 369. The result is that deportation follows, and that deportation is regulated and determined as to country to which made, by section 35 of the immigration act of February 20, 1907, hereinbefore quoted.

The writ is dismissed, and the petitioners remanded.

UNITED STATES v. LOUISVILLE & N. R. CO.

(District Court, N. D. Alabama, N. D. March 15, 1910.)

1. CONSTITUTIONAL LAW (§ 62*)—DISTRIBUTION OF POWERS—LEGISLATIVE POWER—DELEGATION TO EXECUTIVE OF POWER TO DESIGNATE CRIMES.

A crime may only be created by a public act, the language of which is sufficient in itself to completely declare and define the crime and fix its punishment, Congress having no power to delegate to the President or to the head of any executive department authority to declare what facts shall constitute an offense, though it is competent for Congress to commit to the executive the power to determine when the occasion provided by the law itself for its going into effect has occurred, and whether the facts which the law makes conditions to its operation or to a partial or temporary suspension of its operation exist, and also to provide the details of the law's administration.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 94-102; Dec. Dig. § 62.*]

2. CONSTITUTIONAL LAW (§ 62*)—DISTRIBUTION OF POWERS—DELEGATION TO EXECUTIVE OF POWER TO DESIGNATE CRIMES—QUARANTINE REGULATIONS.

Act Cong. March 3, 1905, c. 1496, § 4, 33 Stat. 1264 (U. S. Comp. St. Supp. 1909, p. 1186), provides that cattle and other live stock may be moved from quarantined territory of one state to another state in compliance with the rules and regulations established by the Secretary of Agriculture, and that it shall be unlawful to move them otherwise; and section 6 declares that any one violating section 4 shall be guilty of a misdemeanor, and fixes the punishment therefor. *Held*, that the offense denounced by section 4 is defined merely by rules and regulations thereafter to be established by the Department of Agriculture, and hence no offense was created by such section under the rule that Congress has no power to intrust to the executive power to declare by a departmental rule or regulation that to be unlawful and to constitute a crime which would otherwise not be so, nor itself to declare a violation of rules or regulations, thereafter to be promulgated by the executive, a criminal offense.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 94-102; Dec. Dig. § 62.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. CONSTITUTIONAL LAW (§ 62*)—DISTRIBUTION OF POWERS—DELEGATION TO EXECUTIVE OF POWER TO DESIGNATE CRIMES—QUARANTINE REGULATIONS.

Act Cong. March 3, 1905, c. 1496, § 1, 33 Stat. 1264 (U. S. Comp. St. Supp. 1909, p. 1185), authorizes the Secretary of Agriculture to establish quarantine limits for the transportation of live stock, and section 2 prohibits transportation companies from receiving for transportation, or transporting from any quarantined territory in one state to another state, "any cattle or live stock except as hereinafter provided," and section 6 makes a violation of section 2 a misdemeanor. The exception referred to in section 2 is that, in the event the Secretary shall deem that public safety permits, he shall establish rules and regulations under which live stock may be lawfully moved from quarantined territory in one state to another state. *Held*, that the exception was not to be construed as broad as the prohibition, and equivalent to a general prohibition against all shipments accompanied by a general permission of all shipments on compliance with departmental rules, but rather as containing a general prohibition, together with a limited and conditional exception, applicable only to such epidemics determined by the secretary to be of such a character as to justify shipments under particular safeguards; and hence section 2 was not invalid as attempting to create an offense for violation of the departmental rule.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 94-102; Dec. Dig. § 62.*]

4. ANIMALS (§ 81*)—TRANSPORTATION—QUARANTINE REGULATIONS.

Amendment No. 2 of order No. 143 of the regulations of the Agricultural Department, covering shipments of cattle from quarantined territory, only modified, and did not revoke, order No. 143, by revoking regulations 13 and 14 and substituting two new regulations therefor.

[Ed. Note.—For other cases, see Animals, Cent. Dig. § 81; Dec. Dig. § 81.*]

The Louisville & Nashville Railroad Company was indicted for violating the live stock quarantine act, and demurred to the indictment. Demurrer overruled.

O. D. Street, U. S. Atty.

John C. Eyster, for defendant.

GRUBB, District Judge. The indictment charges the defendant with a violation of Act March 3, 1905, c. 1496, 33 Stat. 1264 (U. S. Comp. St. Supp. 1909, p. 1185), providing for the establishment of live stock quarantines by the Secretary of Agriculture, and the prohibition of live stock shipments from quarantined territory in one state into another state, except when rules and regulations permitting such shipments have been established by the secretary, and then except in accordance with such rules and regulations. The demurrer to the indictment attacks the constitutionality of the law under which it is framed, upon the ground that its effect is to delegate legislative authority to the executive, and because no complete offense is defined by the terms of the statute.

The act contains six sections. The first authorizes the secretary to quarantine any state or territory, or any portion thereof, when he has determined that live stock within it are infected with any contagious diseases, and to give notice thereof to transportation companies. The second prohibits, among other things, transportation companies from receiving for transportation or transporting from any quarantined

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

territory in one state to another state "any cattle or live stock, except as hereinafter provided." The third section makes it the duty of the secretary, when the public safety will permit, to make and promulgate rules and regulations governing the shipment of cattle and other live stock from quarantined territory in one state to another state, and to give notice of such rules and regulations in the same way as notice of the establishment of the quarantine is required to be given. The fourth section provides that cattle and other live stock may be moved from the quarantined territory of one state to another state in compliance with the rules and regulations so established, and that it shall be unlawful to move them otherwise. The fifth section provides penalties for assaults upon officers of the quarantine service. The sixth and last section declares any one violating section 2 or 4 of the act guilty of a misdemeanor and fixes the punishment therefor.

The indictment alleges the establishment of the quarantine in Alabama by the secretary and the giving of the required notice; the establishment of regulations governing shipments from the quarantined territory to other states, and the giving notice thereof; that one of such regulations provided for the placarding of cars and waybills in cases of such live stock shipments with the words "southern cattle"; and that the defendant received live stock in Alabama and transported them to Tennessee without so placarding its waybill and cars.

A crime can be created only by a public act, and the language of the act must be sufficient to completely declare and define the crime and affix the punishment. It is not competent for Congress to delegate to the President or the head of an executive department the power to declare what facts shall constitute an offence. It is competent for Congress to commit to the executive the power to determine when the occasion, provided by the law itself for its going into effect, has occurred, and whether the facts, which the law makes conditions to its operation or to a partial or temporary suspension of its operation, exist, and also to provide for the details of the law's administration. It is not competent for Congress to intrust to the executive the power to declare by a departmental rule or regulation that to be unlawful, in the sense of criminal, which would otherwise be lawful; nor, itself, to declare a violation of rules or regulations, thereafter to be promulgated by the executive, a criminal offense. The crime must be created by the act of Congress, alone, for the public are not required to look beyond the act in their endeavor to ascertain what is criminal, and the discretion of fixing what facts import criminality is exclusively that of the lawmaker as distinguished from the executive. The effect of departmental regulations, not ratified by act of Congress, is confined to civil matters, and cannot be made the predicate of criminal offenses. These are the principles announced by many cases in the federal courts, some of which are here cited: *Field v. Clark*, 143 U. S. 649, 12 Sup. Ct. 495, 36 L. Ed. 294; *U. S. v. Eaton*, 144 U. S. 677, 12 Sup. Ct. 764, 36 L. Ed. 591; *Caha v. U. S.*, 152 U. S. 218, 14 Sup. Ct. 513, 38 L. Ed. 415; *Buttfield v. Stranahan*, 192 U. S. 470, 24 Sup. Ct. 349, 48 L. Ed. 525; *In re*

Kollock, 165 U. S. 526, 17 Sup. Ct. 444, 41 L. Ed. 813; *St. Louis, I. M. & S. R. R. Co. v. Taylor*, 210 U. S. 281, 28 Sup. Ct. 616, 52 L. Ed. 1061; *Red C. Oil Mfg. Co. v. Board of Agriculture (C. C.)* 172 Fed. 712; *Southern Pac. Co. v. U. S.*, 171 Fed. 360, 96 C. C. A. 252; *U. S. v. Grimaud (D. C.)* 170 Fed. 205; *U. S. v. Matthews (D. C.)* 146 Fed. 306; *Dastervignes v. U. S.*, 122 Fed. 30, 58 C. C. A. 346; *U. S. v. Deguirro (D. C.)* 152 Fed. 568; *U. S. v. Shannon (C. C.)* 151 Fed. 863; *U. S. v. Maid (D. C.)* 116 Fed. 650; *U. S. v. Blasingame (D. C.)* 116 Fed. 654.

The sixth section of the act in question declares the violation of section 2 and of section 4 of the act to be a misdemeanor as therein stated. Section 4 declares the transportation of live stock from a quarantined territory in one state into another state in a manner not in compliance with the shipping rules and regulations of the Department of Agriculture to be unlawful. The crime, so far as based on section 4, when considered by itself, is defined merely by rules and regulations thereafter to be established by the Department of Agriculture. In the case of *United States v. Grimaud (D. C.)* 170 Fed. 205, the validity of a law, which provided that violations of rules and regulations to be established by the Secretary of the Interior, with relation to the occupancy and use of forest reservations, should be punishable as a crime, and a regulation of the department thereunder prohibiting the grazing of sheep on such reservation, unless permitted by the secretary, was involved. The court said (page 207):

"There can be no pretense that Congress itself has defined as a crime the act for which defendants are here indicted, namely, grazing sheep, without permission, in a forest reserve. The statute itself does not forbid or make any reference whatever to sheep grazing, nor in the remotest degree suggest that Congress had it at all in mind, and, according to the government's own theory, it did not become a crime until nine years after the passage of the statute, which the government claims made it criminal, and then only because of the promulgation of an administrative rule which it contravenes. The mere statement of the theory, it seems to me, condemns it, and, after much reflection, I have now no hesitancy in holding that the statute, in so far as it affixes punishment to infractions of executive rules and regulations thereafter to be promulgated, is incomplete and wholly inadequate to form the basis of a criminal prosecution."

And again, on page 209, the court said:

"There can be no controversy whatever about the principle itself; the only room for dispute lies in its application. In the case at bar, the statute does not declare the grazing of sheep, without permission, to be a crime, nor does it make the slightest reference to that matter, but declares that whatever the Secretary of the Interior may thereafter prohibit shall be a misdemeanor. Congress merely prescribes a penalty, and then leaves it to the Secretary of the Interior to determine what acts shall be so punishable. Thus it will be seen that the very essence of the alleged crime, namely, what act shall constitute it, is not fixed by Congress, but wholly confided to the discretion of an administrative officer. If this does not necessarily involve a delegation of legislative power, it is difficult to conceive of a statute challengeable on that ground."

In the case of *U. S. v. Eaton*, 144 U. S. 677, 687, 12 Sup. Ct. 764, 767 (36 L. Ed. 591), the sufficiency of a departmental regulation, requiring the dealer to keep a record sale book and make report of sales to the Commissioner of Internal Revenue, to support a conviction

tion under a law providing that the department should make all needful regulations to carry out the law, and that all violations of the law should be punished as offenses, was involved. The court said:

"Much more does this principle apply to a case where it is sought substantially to prescribe a criminal offense by the regulation of a department. It is a principle of criminal law that an offense which may be the subject of criminal procedure is an act committed or omitted 'in violation of a public law, either forbidding or commanding it.' 4 American & English Encyclopedia of Law, 642; 4 Bl. Com. 5.

"It would be a very dangerous principle to hold that a thing prescribed by the Commissioner of Internal Revenue, as a needful regulation under the oleomargarine act, for carrying it into effect, could be considered as a thing 'required by law' in the carrying on or conducting of the business of a wholesale dealer in oleomargarine, in such manner as to become a criminal offense punishable under section 18 of the act. [Act Aug. 2, 1886, c. 840, 24 Stat. 212 (U. S. Comp. St. 1901, p. 2234).] * * *

"Regulations prescribed by the President and by the heads of departments, under authority granted by Congress, may be regulations prescribed by law, so as to lawfully support acts done under them and in accordance with them, and may thus have, in a proper sense, the force of law; but it does not follow that a thing required by them is a thing so required by law as to make the neglect to do the thing a criminal offense in a citizen, where a statute does not distinctly make the neglect in question a criminal offense."

The illegality of the act forbidden by section 4 lies in a nonconformance with department rules and regulations, and is within the influence of the decisions quoted from; and, if the indictment were based solely upon a violation of this section, the demurrer would seem to be well taken.

Section 2, however, forbids the shipment of live stock from a quarantined territory in one state to another state, "except as hereinafter provided." And a violation of section 2 is declared by section 6 to be a misdemeanor, and the punishment, as such, is fixed by that section. Section 2, in connection with section 6, accordingly defines the unlawful act, declares it to be a crime, and fixes the punishment, and this is completely done by the public act itself, without resort to departmental regulations, and is, in this respect, like that passed upon in the case of *In re Kollock*, supra. The shipment is declared to be unlawful, however, only, "except as hereinafter provided," and the exception is that, in the event the secretary shall deem the public safety permits, he shall establish rules and regulations, under which live stock may lawfully move from the quarantined territory of one state to another state.

If the statute, in its entirety, be so construed as to make the exception in its application as broad as the prohibition, it would amount to nothing more in substance than the fourth section alone. It would then in one section prohibit all interstate shipments from quarantined territory, and in another permit all such shipments, when made in compliance with the regulations of the department. With that construction, the violation of law must in every instance consist, not in the shipment itself, but in the failure to comply with some departmental regulation relating to it; and the criminal act, if any, created by the statute, would be in effect the violation of a regulation au-

thorized by the act to be made, after its passage, by the department. The act, so construed, would be open to the same constitutional objection as is the fourth section taken by itself.

The exception, however, is not as broad as the prohibition. By section 2 interstate shipments from quarantined territory are forbidden, except as afterwards provided by the act. Congress legislated, having in view the probable occurrence of epidemics of varying seriousness and intensity. The epidemic to be guarded against might in some instances be so severe and the disease of so serious a character as to require the absolute cessation of shipments from the quarantined territory; while, in other instances, the mildness of the disease or the infrequency of the cases might justify continued shipments, but under precautionary measures.

In legislating on the subject, Congress could not have before it the facts relating to each epidemic to be provided for, and could not make rules in advance to fit the exigency of each varying case as it arose. It therefore provided a general prohibition of shipments from quarantined territory, and further provided that the secretary, as each epidemic arose, should have the power, if he determined that the public safety justified it, to permit shipments for certain purposes and under certain conditions to be determined by rules and regulations to be established by him for that specific epidemic.

The act, when so construed, is not the equivalent of a general prohibition against all shipments, accompanied by a general permission of such shipments upon compliance with departmental rules, the effect of which would be to create a crime out of a violation of departmental rules to be afterwards promulgated; but contains a general prohibition, together with a limited and conditional exception, applicable only to such epidemics as are determined by the secretary to be of so mild a character as to permit of shipments under certain safe guards consistent with the public safety. The act confers on the secretary the power to determine in each epidemic (1) whether shipments can be made consistently with public safety at all; and, if so (2), upon what conditions. All epidemics, as to which the secretary fails to make this determination, are governed by the general prohibition of the statute. As to others, the secretary is invested by the act with the power conditionally to suspend the operation of the prohibition by permitting shipments for certain purposes and under certain safeguards formulated by departmental rules. Shipments which fail to comply with such rules are not excepted from the general prohibition of the statute, and become violations of the act under it. As to shipments alone which comply with the regulations of the department, the operation of the act is suspended. Having ascertained that the public safety permits conditional shipments, the secretary has no discretion to withhold permission to make them, but the terms of the act makes it his duty to grant it.

The power of Congress to commit to the President or the head of a department the authority to determine whether facts exist, upon which the operation of a provision of a law is to be suspended in a particular instance or occasion as provided in it, and thereupon to

declare the operation of the law suspended in such instance, has been upheld in the case of *Field v. Clark*, 143 U. S. 649, 12 Sup. Ct. 495, 36 L. Ed. 294. That this is the effect of the power vested in the secretary by the act in question is plain. Section 3 provides "that it shall be the duty of the Secretary of Agriculture, and he is hereby authorized and directed, when the public safety will permit, to make and promulgate rules and regulations which shall permit and govern * * * the method and manner of delivery and shipment of cattle or other live stock from a quarantined state," etc., also to give notice of such rules and regulations. Section 4 provides that live stock may lawfully be moved from quarantined territory in compliance with such rules and regulations, made by the secretary pursuant to section 3 of the act, but not otherwise.

Under this construction, the statute itself, as distinguished from departmental rules and regulations, defines the act made criminal by it, viz., the shipping of live stock from a quarantined territory in one state to another state, and also fixes the punishment to be administered. The statute, therefore, in and of itself, completely creates the offense; the effect of the subsequent provisions, authorizing the secretary to permit shipments when the public safety permits, under certain conditions, constituting merely a suspensory power in specific instances, conditioned upon the observance by the shipper of certain safeguards to be prescribed by the rules of the department.

The statute, so construed, fully informs the public from its own provisions of the character of the act made criminal and of the punishment prescribed therefor, and does not vest in the executive discretion to determine what facts shall constitute a crime, or to make that unlawful and criminal which would otherwise be lawful. It merely permits the executive to determine the existence of a status, to which the act itself attaches the effect of suspending partially and temporarily its own operation, to declare the existence thereof and to execute the law, as prescribed in the act, appropriate to the existence of the status so determined and declared by him. This is properly an executive, and not a legislative, function.

The indictment alleges the establishment of the quarantine and notice thereof to defendant, personally and by publication, as required by law; that rules and regulations permitting shipments from the quarantined territory to other states were established by the secretary, of which notice was also given defendant, personally and by publication, as required by the act; that defendant received for transportation the shipment in question, without having complied with such rules and regulations or some of them. These allegations sufficiently show that the shipment came within the general prohibition of the statute, and was not relieved therefrom by a full compliance with the permissive regulations of the department, the condition upon which, alone, the exception becomes operative.

The effect of amendment No. 2 of order No. 143 of the regulations of the Department of Agriculture was only to modify the regulations of March 22, 1907, constituting original order No. 143, and not to

revoke them; the modification consisting of a revocation of regulations 13 and 14, and a substitute of two new regulations therefor, leaving the regulations, as modified, still effective at the time of the shipment, of which complaint is made.

UNITED STATES v. CANTRALL et al.

(Circuit Court, D. Oregon. February 21, 1910.)

No. 3,511.

1. WATERS AND WATER COURSES (§ 222*)—RECLAMATION ACT—SECRETARY OF INTERIOR—AUTHORITY.

Reclamation Act June 17, 1902, c. 1093, § 4, 32 Stat. 389 (U. S. Comp. St. Supp. 1909, p. 598), provides for the establishment of reclamation projects to be paid for by entrymen of the land, and section 6 authorizes and directs the Secretary of the Interior to use the reclamation fund for the operation and maintenance of reservoirs and works constructed under the act, provided that, when the payments are made for the major portion of the lands irrigated from the waters of any of the works, then the management and operation thereof shall pass to the owners of the land to be maintained at their expense, provided that the title shall remain in the government until otherwise provided. *Held*, that the Secretary of the Interior, being authorized to tax and determine the charges, was authorized to divide the same into two parts, one for construction, and the other for maintenance and operation; and hence he was authorized to impose reasonable assessments on land irrigated prior to the time when payment of the major portion of the cost of construction had been made, and the works passed under management of the owners of the irrigated land.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 222.*]

2. WATERS AND WATER COURSES (§ 222*)—IRRIGATION PROJECT—CHARGES LEVIED BY SECRETARY OF INTERIOR.

Where, by a contract between the United States and landowners tributary to a federal irrigation system, such landowners agreed to pay to the United States the charges duly levied against their lands for the construction and maintenance of the system, they were only liable for such reasonable charges as the government was authorized to collect, proportionate to their share of the cost of maintaining and operating the system, and not such as might be arbitrarily fixed in advance by such secretary or other governmental officer.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 222.*]

3. EVIDENCE (§ 441*)—WRITTEN CONTRACT—PAROL NEGOTIATIONS.

All oral negotiations preceding a written contract are conclusively presumed to be embodied in the writing, especially where the contract shows on its face that it was not to become binding until approved by the Secretary of the Interior, after which approval statements and representations made by the government's local engineer as to the construction of the contract or as to defendant's liability thereunder were immaterial.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2030; Dec. Dig. § 441.*]

4. UNITED STATES (§ 180*)—SET-OFF AGAINST UNITED STATES—STATUTES.

Since a set-off is a creation of statute, and does not exist at common law, if it is available at all in an action brought by the United States, it

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

must appear that the claim has been presented to an accounting officer of the treasury and disallowed, as required by Rev. St. § 951 (U. S. Comp. St. 1901, p. 695), or that it is within one of the exceptions specified in such section.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 118; Dec. Dig. § 130.*]

Action by the United States against Roscoe E. Cantrall and others. On plaintiffs' motion to strike out portions of the answer and on demurrer to the second defense. Demurrer and motion to strike out sustained.

John McCourt, U. S. Atty.
Charles R. Hardy, for defendants.

BEAN, District Judge. This is an action brought by the United States against Roscoe E. Cantrall, Nanna M. Cantrall, and Cordelia L. Ankeny, on a contract made and entered into by and between the plaintiff and the defendants and one Henry E. Ankeny, now deceased.

It appears from the complaint that on the 15th day of May, 1905, the Secretary of the Interior, by virtue of the authority conferred upon him by the national reclamation act, determined to be practicable an irrigation project in Klamath county, proposing thereby to reclaim and irrigate about 200,000 acres of land, and that at the time of the commencement of this action, May, 1909, approximately 37 per cent. of the project had been completed. Within the boundaries of the proposed project, for some years prior to the adoption thereof, the Klamath Falls Irrigation Company, a private corporation, had been engaged in irrigating the lands of the defendants and others. In order to carry out the proposed project, and to protect the vested rights of the defendants and other persons interested in the Klamath Falls Irrigation Company, the Secretary of the Interior on or about the 28th day of April, 1905, entered into a preliminary contract with the corporation, by which it was stipulated that, in case the project should subsequently be approved, the government would purchase its property and rights for the sum of \$50,000, and assume and take its place in furnishing water for irrigation to the lands of the defendants and other persons theretofore served by it, and that at the proper time the United States would issue to such parties evidence in due form of the right to the use of water upon certain described lands, amounting in the aggregate to about 1,700 acres, from the irrigation system to be constructed by the United States "subject to all the provisions of the reclamation act, excepting the charges for the cost of constructing" and "the requirements concerning residence upon the lands." The parties to take such water rights "subject to all the other provisions of the reclamation act, including the obligations to pay the charges duly levied against such lands for the management and operation of the irrigation system," and that, after receiving title to and control of the ditch of the Klamath Falls Irrigation Company, the United States was to deliver each year water for irrigation during the usual irrigation season to the lands described in such agreement,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes

in accordance with the terms thereof. The agreement was not to become binding upon the United States until approved by the Secretary of the Interior. It was conditionally approved by that officer on April 28, 1905. On the 10th day of April, 1906, the defendants and Henry E. Ankeny, who were the principal stockholders of the Klamath Falls Irrigation Company, executed a written instrument, under their hands and seals, whereby they ratified such contract and assented to the terms and conditions thereof, and in which they expressly stipulated and agreed "to pay the charges duly levied against such lands for the management and operation of the irrigation system" to be constructed by the United States, but not the charges for the cost of constructing such system. On July 28, 1906, in pursuance of the contracts referred to, the Klamath Falls Irrigation Company duly conveyed and transferred to the United States all of its irrigation ditches, canals, and water rights, and the United States accepted such deed and paid the stipulated consideration therefor. Prior to May, 1907, the Klamath project was so far completed by the United States that it was enabled to deliver water for the irrigation of the lands of the defendants, together with a large quantity of other lands, and, at the request of the defendants, did deliver during the irrigation season of 1907 water for irrigating 1,000 acres of the lands mentioned in the contracts, for which the Secretary of the Interior made and levied a charge of \$1.50 per acre for the land so irrigated, which was reasonable and proportional cost chargeable to such lands for maintaining and operating the system during such year. Demand was made of the defendants for the payment of \$1,500 in accordance with such levy, and payment thereof refused.

Defendants have filed an answer in which they admit the making of the contracts as set out in the complaint, but deny the other material allegations thereof, and for a further and separate answer and defense plead, in substance: First. That one T. H. Humphreys was the agent and representative of the plaintiff in the making of the contracts referred to in the complaint, and that he represented to the defendants that no charge could or would be made for the operation or maintenance of the irrigation system while the same was in course of construction and before the operation thereof passed to the owners of the lands irrigated thereby, in accordance with the provisions of section 6 of the reclamation act (Act June 17, 1902, c. 1093, 32 Stat. 389 [U. S. Comp. St. Supp. 1909, p. 599]) and it was so understood and agreed between the parties to such contract at the time it was made and entered into. Second. That no charge was made for the operation and maintenance of the system during the year 1907 to any other person using water therefrom except the defendants, but that a charge of \$1.50 per acre was made against all other lands using water from such system as a water rental, and that the charge made against the defendants was and is unlawful and contrary to the terms of the contracts and the representations of Humphreys, and that, by reason thereof, the plaintiff should not be heard to say that the defendants are liable for the same, and are and should be held to be estopped from saying that the defendants should pay the same or any

part thereof to the plaintiff. For a further and separate defense, and by way of counterclaim, it is alleged that in the spring of 1908, and before the irrigation season of that year, the plaintiff by its officers and agents in charge and control of the irrigation system wrongfully and unlawfully demanded of the defendants the sum of \$1,500 in advance for the year 1908 as a pretended charge for maintenance and operation at the rate of \$1.50 per acre, and contrary to the terms and conditions of the contracts between the plaintiff and the defendants; that the defendant refused to pay such sum, whereupon the plaintiff, by its agents and officers, wrongfully and unlawfully and contrary to the terms and conditions of the contracts, shut off the water from the lands of the defendants, and refused to permit them to use water from such system to irrigate their lands for the season of 1908, unless they would pay in advance the sum of \$1,500 for said pretended claim for expenses and cost of maintenance, and thereupon, in order to save their crops, they were forced to yield to said demand, and did on or about the ——— day of May, 1908, pay the fiscal agent of the plaintiff the said sum of \$1,500 under protest, in advance, for the pretended claim for expenses of maintenance and operation for the year 1908; that said sum was wrongfully and unlawfully extorted from defendants, and paid by them under protest, for which they demand judgment against the plaintiff, together with interest at the rate of 6 per cent. per annum from the date of the filing of the answer until paid.

The plaintiff moved to strike out that portion of the answer in which the statements and representations of Humphreys are set out, and demurred to the second defense on the ground that the facts therein stated constitute no defense or set-off to this action.

When the matter came on for hearing, the defendants challenged the sufficiency of the complaint on the ground that it does not state facts sufficient to constitute a cause of action, for the reason that in the contracts sued on it is stipulated that the defendant shall only pay the charges duly levied against them for the maintenance and operation of the system, and that, under the national reclamation act, the Secretary of the Interior has no power or authority to levy or collect such charges during the time the system is in process of construction, and before its management passes to the owners of the lands irrigated thereby. This presents the first question for consideration.

By section 4 of the national reclamation act (32 St. at Large, 389) it is provided:

"That upon the determination by the Secretary of the Interior that any irrigation project is practicable, he may cause to be let contracts for the construction of the same, in such portions or sections as it may be practicable to construct and complete as parts of the whole project, providing the necessary funds for such portions or sections are available in the Reclamation fund, and thereupon he shall give public notice of the lands irrigable under such project, and limit of area per entry, which limit shall represent the acreage, which, in the opinion of the Secretary, may be reasonably required for the support of a family upon the lands in question; also of the charges which shall be made per acre, upon the said entries and upon lands in private ownership which may be irrigated by the waters of the said irrigation project, and the number of annual installments, not exceeding ten, in which such charges shall be paid,

and the time when such payments shall commence. The said charges shall be determined with a view of returning to the reclamation fund the estimated cost of construction of the project, and shall be proportioned equitably."

By section 6 the Secretary is—

"authorized and directed to use the reclamation fund for the operation and maintenance of all reservoirs and irrigation works constructed under the provisions of this act: Provided that when the payments required by this act are made for the major portion of the lands irrigated from the waters of any of the works herein provided for, then the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby, to be maintained at their expense under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior: Provided, that the title to and the management and operation of the reservoirs and works necessary for their protection and operation shall remain in the government until otherwise provided by Congress."

The argument is that section 6 requires the cost of the maintenance and operation of all reservoirs and irrigation works constructed under the provisions of the act to be paid from the reclamation fund, until the management thereof shall pass to the owners of the lands irrigated thereby, and that the Secretary is not authorized to make any charge against the land irrigated for the maintenance and operation of any portion of the system which may be completed and used for irrigation purposes prior to that time. This I take to be an unwarranted interpretation of the act. It provides that, after a contract is made for the construction of the irrigation system or some portion thereof, the Secretary of the Interior shall give public notice of the lands irrigable under the system, the limit of the area per entry, and the charges which shall be made upon such entries, and the lands in private ownership which may be irrigated therefrom.

There is no express restriction upon the authority of the Secretary in making such charges upon entries and lands in private ownership within the meaning of the law, except that they shall be determined with a view of returning to the "reclamation fund the entire cost of construction," and that they "shall be apportioned equitably." The matter is left entirely to the judgment of that officer, and he may fix the charges at such reasonable sums as he may deem advisable and necessary to carry out the provisions of the act, and to return to the reclamation fund the estimated cost of the project; the object being to keep the fund intact, and to make each project pay for itself. It is manifest that Congress did not intend that a completed portion of the system should not be used for irrigation prior to the time the required payments are made for the major portions of the lands within the project, or that water should be furnished by the government free of cost to the settlers. The purpose of the act is to encourage the settlement and cultivation of arid public lands, and it contemplates that such lands may be entered upon as soon as the irrigation system is so far completed that water may be furnished thereby for irrigation purposes. When, therefore, it empowered the Secretary of the Interior to fix and determine the charges against the land, it must have intended that he should thereby cover the cost of maintenance and operation while in control of the United States, as well as construction. I cannot find anything in the language which makes it

unlawful for the Secretary to divide the charges made by him against the land into two parts, one for construction and the other for maintenance and operation. It is true he is authorized by section 6 to use the reclamation fund for the operation and maintenance of the system until the management thereof passes to the landowners, but he is at the same time required by section 4 to levy such a charge against the land as will return to the fund the estimated cost thereof. Unless, therefore, he has authority to cover the cost of operation and maintenance by charge upon the lands, the system must lie dormant and unused until the major portion of the entrymen shall pay the charges for cost of construction in full, or in time the fund will be exhausted and depleted, a result evidently not intended by Congress. Such a construction of the act is not required by its language, and would be inconsistent with its general intent and purposes.

The objection to the complaint is not well taken. It does not follow, however, that the maintenance charges fixed by the Secretary of the Interior are conclusive as against the defendants. This action is on an express contract entered into between them and the government. The liability and duty of both parties to the agreement are measured by the terms of the contract. By it the defendants agreed to pay to the United States the charges duly levied against their lands for the purposes stated. This necessarily means charges which the government is authorized to collect, and such as are reasonable, and the proportionate share of the cost of maintaining and operating the system, properly chargeable to their lands, and not such as may be arbitrarily fixed in advance by the other contracting party.

The motion to strike out parts of the answer should be sustained. It is a rule of law that all oral negotiations preceding a written contract are conclusively presumed to be embodied in the writing itself, and especially is this true in this case where the contract shows on its face that it was not to become binding until approved by the Secretary of the Interior. It was the agreement as finally approved by that officer that embodied the terms of the contract between the government and the defendants, and any statements or representations made by the local engineer as to its construction, or as to the liability of the defendants thereunder, were a mere matter of opinion, and not binding upon the complainant.

The demurrer to the second separate defense must also be sustained. It will be noted that the matter therein set out is pleaded in the form of a set-off or counterclaim, with demand for judgment against the United States. Section 951, Rev. St. (U. S. Comp. St. 1901, p. 695), provides that:

"In suits brought by the United States against individuals, no claim for a credit shall be admitted, upon trial except such as appear, to have been presented to the accounting officers of the treasury, for their examination, and to have been by them disallowed, in whole or in part, unless it is proved to the satisfaction of the court that the defendant is at the time of the trial, in possession of vouchers not before in his power to procure, and that he was prevented from exhibiting a claim for such credit at the treasury by absence from the United States or by some unavoidable accident."

A set-off is a creation of the statute, and did not exist at common law. In an action brought by the United States, if it exists at all,

it is conferred by St., § 951, and, before it can be asserted in a court, it must appear that the claim has been presented to an accounting officer of the Treasury and disallowed, or the pleadings must bring the case within some of the exceptions specified in the statute. *Schaumburg v. U. S.*, 103 U. S. 667, 26 L. Ed. 599; *U. S. v. Eckford*, 73 U. S. 484, 18 L. Ed. 920; *Reeside v. Secy. Treasury of U. S.*, 11 Howard, 272, 13 L. Ed. 693; *U. S. v. Patterson (C. C.)* 91 Fed. 854; *Yates v. U. S.*, 90 Fed. 57, 32 C. C. A. 507.

In re CLARK et al.

(District Court, N. D. New York. February 25, 1910.)

1. JUDGMENT (§ 72*)—STIPULATION—SCOPE.

Where a judgment is entered on a stipulation, it cannot be broader than the stipulation itself.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 72.*]

2. JUDGMENT (§ 91*)—SCOPE—STIPULATION.

Where, in a suit to set aside a mortgage for fraud, the parties stipulated that, the court having directed findings and judgment for plaintiff, and the parties having agreed on a settlement, formal judgment should be entered, adjudging the mortgage void, and that defendants were estopped in equity from asserting as against plaintiff the mortgage mentioned in their answer, and that plaintiff was entitled to the surplus moneys in the hands of the county treasurer; the property having been sold under a prior mortgage. *Held*, that a judgment entered on such stipulation adjudicated only that the mortgage was void, and that the mortgagees were estopped in equity to assert the same and to claim the surplus moneys as against plaintiff, and did not determine that the mortgagees' claim, or any part of it, which the mortgage was given to secure, was invalid.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 91.*]

3. BANKRUPTCY (§ 328*)—CLAIMS—FILING—TIME.

Mortgagors were adjudged bankrupts September 21, 1907. On October 28, 1908, the trustee sued to set aside the mortgage as in fraud of creditors, resulting in a judgment for plaintiff entered October 7, 1909, on a decision on a stipulation dated September 27, 1909. On October 2, 1909, the mortgagees filed their claim as a debt against the bankrupt's estate, which was amended on December 15th. *Held*, that the proof of claim should be deemed to have been filed October 2, 1909, though perfected at a later date, and, having been filed within 60 days after the stipulation was made and the right to enter judgment perfected, it was in time.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 518; Dec. Dig. § 328.*]

4. BANKRUPTCY (§ 311*)—PREFERENTIAL MORTGAGE—VACATION OF PREFERENCE—FILING CLAIMS.

If a preferential mortgage is annulled in bankruptcy proceedings, the creditor preferred may thereafter prove his claim to secure which the mortgage was given, and have it allowed.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 497-500; Dec. Dig. § 311.*]

5. BANKRUPTCY (§ 328*)—CLAIMS—FILING—TIME—LIQUIDATION.

Bankr. Act July 1, 1898, c. 541, § 57n, 30 Stat. 544 (U. S. Comp. St. 1901, p. 3444), provides that claims shall not be proved against a bankrupt's estate subsequent to one year after adjudication, or, if they are liquidated by litigation, and the final judgment therein is rendered within 30 days before or after the expiration of such time, then within 60 days

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

after rendition of such judgment. *Held* that, the holder of a mortgage against a bankrupt being entitled to rely on his security independent of the bankruptcy proceedings until such security is attacked, the fact that the bankrupt's trustee waited until more than a year after the adjudication before suing to set aside the mortgage did not preclude the mortgagee from filing a claim against the bankrupt's estate on the debt secured within 60 days after the right to enter judgment vacating the mortgage was perfected, as such section does not impose any time limitation where claims are liquidated by litigation.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 328.*]

6. BANKRUPTCY (§ 311*)—CLAIMS—PREFERENCES.

Bankr. Act July 1, 1898, c. 541, § 57g, 30 Stat. 544 (U. S. Comp. St. 1901, p. 3444), providing that the claims of creditors who have received preferences voidable under section 60b, or to whom conveyances, transfers, assignments, or incumbrances, void or voidable under section 67e, have been made or given, shall not be allowed unless such creditors shall surrender such preferences, conveyances, transfers, assignments, or incumbrances, does not refer to preferences alone, but to conveyances, transfers, assignments, and incumbrances, and to claims of creditors to whom void preferences and voidable conveyances and transfers have been given, which are not to be allowed unless the preferences, conveyances, and transfers are surrendered.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 311.*]

In the matter of the bankruptcy of Orlando S. Clark and Herbert R. Clark, as individuals and as copartners doing business under the name of the "H. R. Clark Plaster Works." On petition for review of an order made by John M. Brainard, Referee in Bankruptcy, disallowing and expunging the claim of Frank S. Smith and Alice J. C. Smith for \$4,662.40. Order reversed.

Turner & Kerr, for trustee.

Irving Bacon, for claimants.

RAY, District Judge. July 10, 1907, an involuntary petition in bankruptcy was filed against Orlando S. Clark and Herbert R. Clark, individually and as copartners under the firm name of the "H. R. Clark Plaster Works." September 3, 1907, an amended petition was filed, and September 21, 1907, an adjudication was duly made pursuant to the prayer of the petition, and the matter was referred to John M. Brainard, referee.

November 26, 1906, Orlando S. Clark executed and delivered to Frank S. Smith and Alice J. C. Smith a bond in the sum of \$4,662.40, condition to pay said sum with interest as follows: The sum of \$200 of said principal and interest on the sum owing every year for five years when the whole of said principal and interest shall be due and payable. This bond recited that:

"Said sum above specified being the amount due and owing said parties of the second part by the party of the first part to this date on account of loans of money made to him at different times for which he has given his certain promissory notes."

On the same day, and to secure the payment of the said bond or the sum of money therein agreed to be paid, the said Orlando S. Clark and S. Augusta Clark, his wife, executed, acknowledged, and delivered

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ered to said Frank S. Smith and Alice J. C. Smith, who was the wife of said Frank S. Smith, a mortgage upon their real estate therein described, conditions to pay the sum of money mentioned in said bond as therein and thereby agreed to be paid. This mortgage was recorded in the office of the clerk of the county of Cayuga, N. Y., on the 4th day of May, 1907, and not before; that is, about two months prior to the filing of the petition in bankruptcy.

On or about the 6th day of June, 1908, Nelson L. Drummond duly qualified as trustee of the estates of the bankrupts by executing and filing his bond as such which was approved June 8, 1908. Thereafter, on the 28th day of October, 1908, the said trustee, Nelson L. Drummond, commenced an action in the Supreme Court of the state of New York against said Frank S. Smith, Alice J. C. Smith, Orlando S. Clark, and S. Augusta Clark for a judgment adjudging said mortgage to be fraudulent, null, and void as against the creditors of said Orlando S. Clark and said copartnership and as to the plaintiff, the said trustee, and canceling and setting same aside.

The complaint in that action alleged that the mortgage and bond were given with the fraudulent intent, purpose, and design of both and all of the parties thereto to hinder, delay, and defraud the creditors of the said Orlando S. Clark and of the said copartnership in the collection of their just dues and claims out of the property of the said Orlando S. Clark, and that there was no just or full consideration for said mortgage and bond, and that the consideration therefor expressed therein was and is largely fictitious, and that the true consideration was less than one-half of the amount expressed in the mortgage and bond, and that a note for \$3,000, given to make up the amount, was without any consideration whatever. The complaint also alleged that the mortgage was executed and delivered and received by the mortgagees when the mortgagor was insolvent to the knowledge of the mortgagees, and that same was received by them with such knowledge, and that same constituted a voidable preference under the bankruptcy law, and was executed, delivered, and received with knowledge of the insolvency of the mortgagor, etc.

The action in the Supreme Court of the state of New York was duly tried before the Honorable A. E. Sutherland, Justice of the Supreme Court, on issues framed by the answer of the defendants Smith, and resulted in a judgment in favor of the plaintiff, Nelson L. Drummond, as trustee, against the defendants, entered in Cayuga county clerk's office, October 7, 1909, adjudging that the said mortgage be "and the same hereby is adjudged void as against plaintiff, and as to him the same is set aside; and it is further adjudged that the defendants Smith be, and they hereby are, estopped from claiming or receiving any portion of said surplus moneys derived from said premises on account of the mortgage set up in their answer or otherwise, and that the plaintiff as trustee in bankruptcy is entitled to the whole of said surplus moneys; and further adjudged that the county treasurer be, and he hereby is, directed to pay over to the plaintiff all of said surplus moneys upon the presentation to him of a certified copy of this judgment less his legal fees."

This judgment was entered on a stipulation made by the attorneys for the respective parties, and which stipulation, so far as material, reads as follows:

"And the court having handed down a decision directing findings and judgment in favor of plaintiff for the whole of said surplus moneys without any deduction therefrom in favor of said defendants Smith, and the parties having agreed upon a settlement of this action, and that to facilitate such settlement a formal judgment shall be entered, it is now hereby stipulated that judgment may be entered upon this stipulation adjudging said mortgage mentioned in the complaint void, and that the defendants Smith are estopped in equity from asserting as against plaintiff the mortgage mentioned in their answer, and that plaintiff is entitled to, and that the treasurer of Cayuga county pay over to him, all of said surplus moneys, and that upon such payment this action be discontinued, and that thereupon a stipulation of discontinuance without costs shall be given by the attorneys for the parties respectively upon which an order in the usual form may be entered, and providing also for a cancellation of the lis pendens on file as aforesaid."

The judgment is somewhat broader than the stipulation. The judgment must be deemed to have been entered on the stipulation and cannot be broader than the stipulation itself. It is therefore evident that nothing was adjudicated between the parties except that the mortgage was void, and that the defendants Smith were estopped in equity from asserting as against the plaintiff, said trustee, the mortgage mentioned, and that the said plaintiff was entitled to the whole of such surplus moneys.

The premises described in the mortgage had in the meantime been sold upon a prior mortgage and the surplus moneys paid into court.

This judgment recites, after stating the object of the action, and referring to the mortgage and describing the premises, as follows:

"And the issues in said action having been tried at an equity term of this court held in and for the county of Cayuga in April, 1909, and the court having decided the issues raised by the answer of the defendants Smith in favor of plaintiff and directed findings and a judgment in plaintiff's favor, * * *

adjudged," etc.

Thereafter and on the 2d day of October, 1909, the said Frank S. Smith and Alice J. C. Smith filed their claim for \$4,662.40, and interest, basing the same on and attaching thereto the said bond and the notes referred to therein. December 15, 1909, an amended claim was filed under an order of the referee.

The claim is for the same debt or debts mentioned in the said bond the payment of which was secured by the said mortgage which was set aside by the Supreme Court as above stated. The judgment in the Supreme Court does not establish, or purport to establish, the amount actually due and owing the Smiths on the notes and bond referred to. It was not pretended that no sum was due and owing the Smiths; but it was claimed that the consideration mentioned was in part fictitious, and this fact seems to have been established by the judgment were it not for the stipulation.

The application of the trustee to have the claim disallowed and expunged was based in the main on the claim that neither the proof of claim nor the amended proof of claim were filed within one year from the date of the adjudication in bankruptcy, to wit, September 21, 1907,

and that no action or proceeding was taken or commenced either by or against said claimants within one year after said adjudication to liquidate said claim by litigation or the validity of said mortgage; also, that the claim is based upon promissory notes and a personal bond, and same was provable at any time after said adjudication as a secured claim, and that it was not liquidated by litigation, and the litigation referred to in said amended proof was confined to the collateral security; also, that the proof of said claim filed October 2, 1909, was made and filed prior to the rendering of judgment in said action to set aside the mortgage, and the amended proof was filed December 15, 1909, and was made and filed more than 60 days after the rendition of said judgment.

As appears, the judgment was actually entered October 7, 1909, and the original claim shows on its face that it was filed October 2, 1909, 5 days before the judgment was actually entered; and the amended claim shows on its face that it was filed December 15, 1909, more than 60 days after the judgment was actually entered.

Default had been made in one or more of the payments according to the terms of the bond and mortgage before the expiration of the year following the adjudication. The Smiths commenced no action to foreclose and brought no suit upon the bond or notes, nor did they file any claim within the year. Evidently they elected to stand upon their security, the mortgage, and did so. The mortgage, if valid, was adequate security for the full amount of the claim. If no attack was made upon the mortgage, then the Smiths were fully secured and in due time could have foreclosed and realized. No obligation rested upon them to commence a foreclosure within the year, and under the laws of the state of New York they could not have maintained an action to have the mortgage declared or adjudicated valid. The trustee might have commenced an action to set aside the mortgage as fraudulent and void or as a fraudulent preference within the year following the adjudication; but he elected not to do so, and did not.

It does not appear when the court actually made its decision; but it does appear from the stipulation for judgment and settlement of the action upon which the judgment was entered that this stipulation and settlement was made September 27, 1909. The stipulation is dated that day. If this settlement and stipulation had not been made, the defendants Smith could have appealed and protracted the litigation. I do not think that the delay in entering the judgment after the stipulation was made affected the rights of the Smiths to file their claim. The judgment was based on both the decision and the stipulation, as the decision induced the stipulation, and on the 27th day of September, 1909, the rights of the plaintiff, this trustee, to have the mortgage formally set aside and canceled, had fully ripened. It would be too technical in my judgment to hold that the claimants Smith were bound to take notice of the day judgment was actually entered in the clerk's office by the plaintiff. They filed their claim within 60 days after the stipulation was made and the right to enter judgment was perfected. The claim is deemed to have been filed October 2, 1909, although perfected at a later date.

This brings us to the consideration of the main question in the case, the one relied upon by the trustee at the argument, viz.: Could the claimants Smith file their claim on this bond and the notes mentioned therein within 60 days of the termination of that litigation by the stipulation mentioned; the litigation not having been instituted by the trustee until more than one year from the date of adjudication?

If a preferential mortgage is annulled and set aside at the suit of the trustee, the creditor, so preferred, may thereafter prove his claim to secure which the mortgage was given and have it allowed. *Keppel v. Tiffin Savings Bank*, 197 U. S. 356, 25 Sup. Ct. 443, 49 L. Ed. 790; *Page v. Rogers*, 211 U. S. 575, 581, 29 Sup. Ct. 159, 53 L. Ed. 332.

In view of these decisions, I do not see why a creditor may not prove his claim and have it allowed in a case where his mortgage is set aside and annulled on the ground that it was executed and delivered with intent to hinder, delay, and defraud creditors. If in such suit the court should adjudge that the bond to secure which the mortgage was given was wholly without consideration, that would be binding and a complete answer to the claim when filed. But such is not this case. We have no adjudication that Clark did not owe Smith the amount of the notes, or some part thereof. The mortgage by stipulation and judgment was declared void as to the plaintiff, this trustee, and he was held entitled to the proceeds of the real estate remaining after the satisfaction of the first mortgage. This may have proceeded on the ground the mortgage was executed, delivered, and accepted as a preference in violation of the bankruptcy act, or on the ground it was made, executed, delivered, and accepted for the purpose of hindering, delaying, and defrauding creditors. It cannot be assumed there was no consideration whatever. We have no such judgment or finding or stipulation.

I find nothing in the bankruptcy act to the effect that, where claims are liquidated by litigation, the suit or litigation must be commenced within one year after the adjudication in order that the claimant may thereafter prove his claim in case the litigation goes against him. Clearly the trustee may institute suit at any time before the statute of limitations has barred his right so to do.

Subdivision "n," of section 57 of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3444]), provides that:

"Claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication; or, if they are liquidated by adjudication and the final judgment therein is rendered within thirty days before, or after the expiration of such time, then within sixty days after the rendition of such judgment."

This judgment was rendered after the expiration of one year from the date of adjudication. It is immaterial when the litigation, in which the liquidation as to the validity of the mortgage was had, was commenced. It was commenced; the creditor stood upon the mortgage as valid, as he had the right to do without incurring any penalty or forfeiture, as none is prescribed in the bankruptcy act; and, when defeated and compelled to surrender his security, he had the right to

prove his claim, and, if established, to have it allowed. *Keppel v. Tiffin Savings Bank*, 197 U. S. 356, 360-373, 25 Sup. Ct. 443, 49 L. Ed. 790; *Page v. Rogers*, 211 U. S. 575, 581, 29 Sup. Ct. 159, 53 L. Ed. 332.

If the creditor with a preference may stand on his security until driven therefrom by a judgment in a litigation, and then prove his claim, it is quite clear that the trustee cannot, in the absence of some express provision of law, deprive him of the right to prove his claim in such event by delaying the bringing of suit. The trustee cannot penalize the creditor by any such action. Suppose the appointment of a trustee is delayed one year and three months after adjudication, and he thereafter successfully attacks a mortgage held by a secured creditor on the ground it was a preference, can or cannot the creditor then prove his claim? Where is the statute saying he cannot? Subdivision "n" of section 57, quoted, as construed by the Supreme Court, says he can; that is, it imposes no time limitation on the commencement of the proceedings wherein the claim is "liquidated by litigation." If the creditor may stand upon his security, until driven therefrom by litigation attacking it, and then prove his claim, as the Supreme Court of the United States says he may, we must find some limitation in the law itself as to when such litigation shall be commenced in order that the creditor may so prove his claim in such event, or there is none. The courts cannot legislate or prescribe a time within which such liquidation by litigation shall be commenced. So long as a secured creditor having ample security stands upon his security, he has no occasion to prove his claim in bankruptcy. It is when he has partial security only that he comes in and proves his claim and shows his security and seeks to have the claim allowed for the balance.

Counsel for the trustee urges that it is apparent from the decision of the Supreme Court of the state of New York—and the opinion constituting the only decision filed is handed up—that the mortgage was tainted by fraud, and that therefore it was absolutely void, and that the claimants cannot have advantage or benefit in any manner growing out of such fraudulent transaction. He cites *Baldwin v. Short*, 125 N. Y. 553, 26 N. E. 928, *Bailey v. Burton*, 8 Wend. (N. Y.) 339, and *Russell v. Winne*, 37 N. Y. 591, 97 Am. Dec. 755. Turning to the opinion or decision referred to, and which was filed December 23, 1909, it appears that the court did not undertake to decide whether or not any portion of the consideration for the bond and mortgage was fictitious. The learned judge said:

"I shall not attempt to decide whether any portion of the alleged consideration was fictitious or not. It is enough to set aside the instrument so far as the trustee in bankruptcy is concerned that it was given and accepted when the mortgagor was insolvent with the intention of creating an unlawful preference, and that the mortgagees were aware of the insolvency and shared in that purpose, and that it was withheld from the record until within four months of the filing of the petition for the purpose of deluding and defrauding creditors into a continuation of their business dealings with the mortgagor, Orlando S. Clark, and his partner, Herbert R. Clark."

This was the ground of the decision of the court. In short, it was a preference in fraud of the bankruptcy act, as all preferences are.

It was voidable at the election of the trustee, who could act on his own motion in execution of his duty, or who could be set in motion by any creditor on application to the court.

Section 57g provides:

"The claims of creditors who have received preferences, voidable under section sixty, subdivision b, or to whom conveyances, transfers, assignments, or incumbrances, void or voidable under section sixty-seven, subdivision e, have been made or given, shall not be allowed unless such creditors shall surrender such preferences, conveyances, transfers, assignments, or incumbrances."

This section has been so fully considered by the Supreme Court in *Keppel v. Tiffin Savings Bank*, *supra*, that nothing important can be added. Reading the sections therein referred to with section 57g, and we find that this case is within the provisions and cases referred to.

Section 57g does not refer to preferences alone, but to conveyances, transfers, assignments, and incumbrances also, and the claims of creditors to whom voidable preferences and voidable conveyances and transfers have been given are not to be allowed unless such preferences, conveyances, transfers, etc., are surrendered. The decisions of the Supreme Court referred to apply to the whole of section 57g, and not to the language referring to preferences alone. Preferences are voidable by the trustee at his suit when the person receiving it or to be benefited thereby, or his agent acting therein, had reasonable cause to believe that it was intended thereby to give a preference. If he had no such "reasonable cause to believe," it is not voidable. I am unable to comprehend the receipt of a voidable preference in good faith or the holding onto a voidable preference in good faith. If a person receives a preferential payment or security, and has the "reasonable cause to believe that it was intended thereby to give a preference," he certainly acts in violation of the law, which he is presumed to know, and there is an utter absence of good faith. It is true, of course, that some court may hold he had the "reasonable cause to believe" when he did not, and the creditor has the right to stand on what he asserts and claims the truth to be; but, when the decision is adverse, then the law presumes he was wrong, and that he did not act in good faith in accepting the preference. If the court finds that the creditor acted in good faith in receiving the preference, then it must find that he did not have reasonable cause to believe that it was intended thereby to give a preference, and, in the absence of such reasonable cause to believe, etc., the preference cannot be recovered. Here the Smiths claimed that no preference was intended, etc., and they had the right to contest the question. The court found against them, as it did in the cases cited. There is no difference in principle. Referring to section 57g, the Supreme Court, in *Keppel v. Tiffin Savings Bank*, *supra*, said (197 U. S. 361, 25 Sup. Ct. 445 [49 L. Ed. 790]):

"We think it clear that the fundamental purpose of the provision in question was to secure an equality of distribution of the assets of a bankrupt estate. * * * Equality of distribution being the purpose intended to be effected by the provision, to interpret it as forbidding a creditor from proving his claim after a surrender of his preference, because such surrender was not

voluntary, would frustrate the object of the provision. since it would give the bankrupt estate the benefit of the surrender or cancellation of the preference, and yet deprive the creditor of any right to participate, thus creating an inequality."

And, again, at page 363 of 197 U. S., at page 446 of 25 Sup. Ct. (49 L. Ed. 790), the court says:

"We are of opinion that, originally considered, the surrender clause of the statute was intended simply to prevent a creditor from creating inequality in the distribution of the assets of the estate by retaining a preference and at the same time collecting dividends from the estate by the proof of his claim against it, and consequently that whenever the preference has been abandoned or yielded up, and thereby the danger of inequality has been prevented, such creditor is entitled to stand on an equal footing with other creditors and prove his claims."

And at page 362 of 197 U. S., at page 445 of 25 Sup. Ct. (49 L. Ed. 790), the court says:

"The word 'surrender,' however, does not exclude compelled action, but, to the contrary, generally implies such action."

It is settled that:

"A penalty is not to be readily implied, and, on the contrary, that a person or corporation is not to be subjected to a penalty unless the words of the statute plainly impose it." *Tiffany v. National Bank*, 18 Wall. 409, 410, 21 L. Ed. 862, cited and approved, *Keppel v. Tiffin Savings Bank*, 197 U. S. 362, 25 Sup. Ct. 445, 49 L. Ed. 790.

The claimants Smith presented their claim, having been compelled to surrender their preference or mortgage, after such compulsion had been imposed by the decision of the court and were entitled so to do and to have it allowed at such sum as was due and owing on the notes, as there is no penalty or forfeiture imposed by the act in such a case.

The order of the referee disallowing and expunging the claim is reversed; but the trustee may within 10 days interpose an answer denying or bringing in question the validity of the notes and the amount due and owing thereon in case he is so advised. If no answer is interposed, there will be an order allowing the claim.

UNITED STATES v. BOSTON ELEVATED RY. CO. et al.

(Circuit Court, D. Massachusetts. March 10, 1910.)

No. 663.

1. MUNICIPAL CORPORATIONS (§ 690*)—RIGHTS IN STREET—LICENSE—TERMINATION.

Where the owner of a building let to the government for a post office was granted permission by the city to excavate and occupy part of a basement room lying under the sidewalk, the owner's license to continue so to use the street was terminated by a subsequent notice from the mayor to remove everything belonging to him under the sidewalk within the street line which interfered with a street railway company's construction of a subway under authority granted by Acts Mass. 1906, c. 520, authorizing it to locate and construct the subway wherever it might deem best within the limits of the street, subject only to the approval of the railroad commissioners.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1490; Dec. Dig. § 690.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. UNITED STATES (§ 57*)—OCCUPATION OF PREMISES FOR GOVERNMENTAL PURPOSES—EVICTION BY OWNER.

The owner of premises, by virtue of his title, may evict and dispossess officers of the government, though occupying and using the premises by governmental authority and in the performance of governmental functions.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 40; Dec. Dig. § 57.*]

3. POST OFFICE (§ 6*)—"ESTABLISH."

Const. art. 1, § 8, cl. 7, authorizes Congress to establish post offices and post roads, and Rev. St. § 3829 (U. S. Comp. St. 1901, p. 2608), empowers the Postmaster General to establish post offices at all such places on post roads established by law as he may deem expedient. *Held*, that the government's mere occupation of a rented building on a post road for a post office did not constitute the establishment of a post office in the sense of accomplishing of itself any appropriation or dedication of the site selected to public use, or any interference with existing rights therein.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 6; Dec. Dig. § 6.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2469-2473.]

4. EMINENT DOMAIN (§ 47*)—PROPERTY TAKEN FOR PUBLIC USE—CONDEMNATION—FEDERAL USES.

In general, property devoted to one public use may be taken for another public use; the right to take for federal uses being paramount.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 107; Dec. Dig. § 47.*]

5. EMINENT DOMAIN (§ 69*)—CONDEMNATION OF LAND—POST OFFICES—PAYMENT OF COMPENSATION.

The United States cannot obtain a site for a post office by condemnation except on paying just compensation to the owners of the rights extinguished, whether public, semipublic, or private.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 171; Dec. Dig. § 69.*]

6. POST OFFICE (§ 6*)—USE OF PREMISES—EFFECT.

Occupation of rented premises by the post office department for a post office does not of itself give the government any rights in the premises greater than were obtained by the establishment of the post office in them, nor is such fact material of itself in determining the precise nature of the rights obtained.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 6; Dec. Dig. § 6.*]

7. POST OFFICE (§ 6*)—SITE FOR POST OFFICE—RIGHTS OF GOVERNMENT.

Laws Mass. 1906, c. 520, conferring on a street railway company the right to locate and construct its subway anywhere within the limits of a street, took effect by acceptance of the company August 23, 1906. The plans of the company showing the location at the point in question were filed January 28, 1907. These plans were finally approved April 30, 1909, with some alterations, not however affecting the point in question. In June and October, 1908, the owner of abutting property obtained a license from the city to use the space under the sidewalk, which would necessarily be encroached on by the subway when built. On October 7, 1908, the owner rented the premises, including the space under the sidewalk, to the government for a post office. *Held*, that the United States was chargeable with notice of the railroad's rights in the premises so that it could not maintain a bill to enjoin the railroad from interfering with the space beneath the sidewalk.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 6; Dec. Dig. § 6.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Equity. Bill by the United States against the Boston Elevated Railway Company and others. Bill dismissed.

Asa P. French, U. S. Atty.

Gaston, Snow & Saltonstall and Thomas Hunt, for defendants. *

DODGE, District Judge. This case has been heard upon the bill and the answers filed by the two defendants. At the hearing an agreed statement of facts was submitted, and evidence was also introduced by the complainant and the defendants respectively. Upon a motion made by the complainant for a preliminary injunction, a restraining order was issued January 25, 1910, which has since remained in force, pending a hearing upon an order to show cause why a temporary injunction should not issue. The hearing upon bill and answers having presented all the questions which would be involved in a hearing under the order to show cause, the restraining order will, if the complainant maintains its bill, become a permanent injunction.

The parties assert conflicting rights in certain premises within the limits of Brattle street in Cambridge, lying below the sidewalk, on the southerly or easterly side of that street. Certain rooms on the ground floor of a building there, fronting on Brattle street, and in connection therewith a basement room in the same building below, are occupied and used by the Cambridge post office, and have been so occupied and used by it for post office purposes since August 25, 1909; the Postmaster General having previously established a post office there on October 7, 1908, as is admitted. The basement room referred to is for the most part within and underneath the building and outside the street limits, but at one end it extends beyond the front line of the building into the limits of Brattle street, underneath the sidewalk, and is lighted in part through sidewalk lights within the street limits. The defendants are engaged in constructing a subway, under authority granted to the defendant railway company by the state of Massachusetts. The subway is to run at this point beneath the surface of Brattle street, but within its limits, and, as planned, it will permanently occupy a part of that space beneath the sidewalk, and within the street limits, into which the basement room referred to extends. Such occupation will reduce the floor area of the room, at present about 1,125 square feet, by about 80 square feet. It will also somewhat interfere with the light which the room now receives through the sidewalk, though the subway is to be, in section, of such a shape that the area of the sidewalk lights will not be reduced. The process of construction will also, while it lasts, inevitably interfere to some extent with the present use of the room by the post office authorities.

The United States as complainant alleges that it is essential to the effective and convenient operation of the postal service that in the exercise of its constitutional duty it should not be prevented from or disturbed in the use of the premises referred to or any part thereof. It contends that any invasion of or interference with those premises by the defendants, after the establishment of a post office in them and while they are being occupied and used for the purposes of the postal service as at present, will be unlawful; and it seeks to have the inva-

sion and interference which the defendants propose and threaten by their intended construction of the subway at this point, in the manner described, enjoined by the court upon that ground.

No alleged want of jurisdiction in the court to inquire into the lawfulness of the government's possession has in this case to be considered. The government has come into court of its own accord to apply for the protection sought by its bill and is, therefore, undertaking to prove the lawfulness of the possession which it asks the court to defend.

Brattle street is an ancient public highway and a post road. The authority given the defendant railway company to build a subway under it is contained in an act passed by the Massachusetts Legislature which was approved by the Governor, June 23, 1906, and is published as chapter 520 of the Acts of 1906. It has taken effect by acceptance as provided in section 32, and has therefore been in effect at least since August 23, 1906. The defendant Hugh Nawn Contracting Company is performing the physical work of the construction in virtue of a contract with the railway company and under its direction and control. The act referred to, in sections 1 and 4, gives the defendant company full authority to locate and construct the subway wherever it may deem best within the limits of Brattle street, subject, however, to the approval of the Railroad Commissioners.

The defendants contend that their proposed construction of the subway, inasmuch as it has been duly authorized by law and is to be wholly confined within the limits of Brattle street, will not, even if it encroach upon that part of the basement room referred to which lies under Brattle street, invade or enter upon premises in which the complainant has any rights as against them, and that it cannot, therefore, be forbidden as unlawful by the court.

The United States has no ownership in any portion of the premises occupied and used by the Cambridge post office as above. It has never acquired or attempted to acquire them or any part of them, either by condemnation or purchase. Its occupation and use of them are, so far as they are supported by any title to them, under and by virtue of an agreement with Edwin H. Abbot of Cambridge. He, for the purposes of this decision, there being no suggestion of title in anyone else, may be assumed to be their owner, although no proof of his title has been offered. June 30, 1908, Mr. and Mrs. Abbot tendered to the Post Office Department a written agreement to lease the space on the ground floor of the building and the basement room, for 10 years, upon terms and conditions stated. By a letter dated October 7, 1908, the department accepted their agreement, subject to the provisions of the form of lease used by the department in such cases, and notified Mr. Abbot that a lease would be drawn up and sent for execution when the premises should be reported by a department representative as fitted up according to the agreed terms. No actual execution of any lease has been shown. The agreement and acceptance referred to are Exhibits G and H annexed to the agreed statement of facts. On August 25, 1909, possession of the premises was given to and taken by the department, which has ever since retained it.

Mr. Abbot's right to excavate and occupy that part of the basement room lying under the sidewalk rests upon permission granted him by the city of Cambridge, as set forth in orders made by its board of aldermen June 2, June 9, and October 13, 1908. Copies of these are Exhibits C, E, and F annexed to the agreed statement of facts. Under date of August 26, 1909, the mayor of Cambridge, upon a petition by the defendant railway company, and acting in accordance with section 10 of chapter 520, Acts 1906, above referred to, notified Mr. Abbot in writing to remove everything belonging to him under the sidewalk and within Brattle street, which interfered with the construction of the subway as proposed, within 30 days. Exhibit K annexed to the agreed statement of facts is a copy of this notice. The government argues that Mr. Abbot's property under the sidewalk was not of like kind with the kinds of property specifically mentioned in section 10, and that the mayor's notice was inoperative to require its removal. But it seems to me that all property which the company should "deem to interfere" with the construction of the subway, as it did this property, is within the provisions of the section; and that the mayor's notice was an effectual revocation of Mr. Abbot's license to maintain it where it was. His license to occupy that portion of the basement room included in the space described by the notice being thus withdrawn, he was without any rights therein as against the company, from and after the date of the notice.

The defendants concede that the government is to be protected in the occupation not only of any property it may own, but also in the occupation of any property whereof it may be in lawful possession, whether used by it for post office purposes or for any other public purposes whatsoever. But they contend that, before it can claim such protection, the government must prove the lawfulness of its possession, and that mere present occupation and use for public purposes, however lawful in their origin, if without other right or title except such as may result ipso facto from that use, do not establish such lawful possession in the government as against persons otherwise lawfully entitled. They contend that there is nothing in the evidence to show any right or title in the United States to the premises here in question, derived from any source other than Mr. Abbot.

If the government has only Mr. Abbot's rights in the premises, it is without any right to oppose the construction of the subway through so much of them as lie under Brattle street. It claims, however, in virtue of its paramount authority, a right to use the premises and to use every part of them which transcends any right that a mere owner of abutting property could assert. The only facts which it alleges in its bill as establishing the right of the government to the relief asked for are, in substance: The establishment of a post office in the premises by the Postmaster General, the present use of the premises for post office purposes, and the necessity to the operation of the postal service that the government's occupation and use should in no respect be disturbed. And it contends that inasmuch as the Postmaster General has selected the premises and established a post office in them, by virtue of the power and discretion vested in him by law, and this original

occupation of them by the government was lawful, and has since been continued by its officers in the performance of their appointed functions, the government must, for the purposes of this case, now be regarded as in lawful occupation of them and they must be regarded as constituting in every part an instrumentality of the federal government, of which it cannot be lawfully dispossessed, either in whole or in part, so long as its occupation and use of them for post office purposes may continue. As to that part of them lying within the limits of Brattle street, the government further contends that its right to use them must be regarded as expressly authorized by act of Congress and as paramount, because they are within the limits of a post road.

That the owner of premises may, by virtue of his title, evict and dispossess officers of the government, though occupying and using them by government authority and in the performance of governmental functions, the United States is obliged to concede, in view of the decision in *U. S. v. Lee*, 106 U. S. 196, 1 Sup. Ct. 240, 27 L. Ed. 171. But it insists that, unless the continued occupancy of its officers becomes a violation of some prior conflicting right secured by the Constitution to those attempting to oust it, its contentions above summarized must prevail.

For the purposes of this decision, it thus becomes necessary to inquire, in the first place, what rights in land the government may acquire merely by the establishment of a post office, followed by occupation and use for necessary post office purposes; and next whether or not any violation of prior conflicting rights secured by the Constitution will be involved in sustaining the claim of the government as against the claim of the defendants.

In the mere fact that the department has established a post office in the premises I am unable to find any strong support for the government's position. Congress has power under the Constitution (article 1, § 8, cl. 7) to "establish post offices and post roads." It has empowered the Postmaster General to "establish post offices at all such places on post roads established by law as he may deem expedient." Rev. St. § 3829 (U. S. Comp. St. 1901, p. 2608). The power to which these provisions refer is power "to designate the places where mail shall be received and delivered." *Ware v. U. S.*, 4 Wall. 617, 632, 18 L. Ed. 389. A place having been so designated, there is a post office over which a postmaster may be appointed, and the post office thereafter continues to exist until it is discontinued. But no reason appears for believing that such establishment accomplishes of itself any appropriation or dedication of the site selected to public uses, or any interference with existing rights therein. It is said in *Kohl v. U. S.*, 91 U. S. 367, 372, 23 L. Ed. 449:

"When the power to establish post offices and create courts within the states was conferred upon the federal government, included in it was authority to obtain sites for such offices and for courthouses, and to obtain them by such means as were known and appropriate. The right of eminent domain was one of these means well known when the Constitution was adopted, and employed to obtain lands for public uses."

Equally well known means of obtaining sites were, of course, purchase from or agreement with the owner. Admitting then that power

to establish offices includes authority to obtain sites, it does not follow that the authority must necessarily be exercised, or that any of the means referred to must necessarily be used, whenever there is an exercise of the power to establish an office, and still less does it follow that establishment is in itself a means. It seems not impossible that a place might be designated and used as a post office without "obtaining" any site at all. The designation and use might be in advance of proceedings to condemn or of negotiations with the owner. Nor does establishing a post office seem to confine it of necessity during its continuance to the particular site first designated. In order to change the site it does not appear that discontinuance and re-establishment are required. It would seem, indeed, that the Cambridge Post Office can hardly have been first "established" in 1908, and that what was really accomplished by the department's acceptance of Mr. Abbot's offer, on October 7th of that year, may have been rather a change of location of an established post office, though it is called an "establishment" in paragraph 1 of the agreed facts. But, however this may be, I think it clear that if the government does exercise its authority to obtain a site when it establishes an office, the exercise must be by the use of one or the other of the means referred to, that the rights acquired must depend wholly upon the means adopted, and, further, that no greater rights can be acquired than would ordinarily be acquired by the use of the same means, merely by reason of the fact that the government has used them in connection with the establishment of a post office.

The subsequent use and occupation for postal purposes are relied on in connection with the establishment, as supporting the right which the government asserts. The character of this occupation and use shows that all the acts of the department officers have been within the scope of their official duties, but this I do not understand to be denied. It can have no force of itself to give the government any rights in the premises greater than were obtained by the establishment of the office in them, nor any weight of itself in determining the precise nature of the rights obtained.

If the government had purchased these premises from the owner, it would have acquired no greater rights in so much of them as lay under Brattle street than it acquired under its agreement with the owner. It does not seem to be disputed that it might have obtained the whole site, whether within or without Brattle street, by using its right of eminent domain. The general principle is that property devoted to one public use may be taken for another public use, and that the right to take for federal uses is paramount. Had the department chosen to adopt this means, it would have extinguished, so far as it was concerned, all other rights in every part of the premises, whether belonging to the city of Cambridge or the defendant railway company. But it could have resorted to this means of obtaining the site only at the cost of making just compensation to the owners of the rights extinguished, whether public, semipublic, or private. See *St. Louis v. Telegraph Co.*, 148 U. S. 92, 100, 101, 13 Sup. Ct. 485, 37 L. Ed. 380. With the principles according to which the amount of such compensation would have been determined we are not now concerned. Instead

of assuming any such burden, the department contented itself with acquiring for a term the owner's rights in the premises by agreement with him. To hold that establishment of a post office and occupation and use of the site so enlarged the rights obtained from the owner as to make them, for so long as he and the department might agree, practically equal to those which might have been obtained by condemnation, would seem to involve the conclusion that the United States might dispense altogether, in many supposable cases, with condemnation proceedings and with just compensation. The same result might be secured at less trouble and expense, whenever the department could agree with the owner, without regard to incumbrances or easements. The controlling reason for the decision in *U. S. v. Lee*, 106 U. S. 196, 218-221, 1 Sup. Ct. 240, 27 L. Ed. 171, already referred to, was, as appears by the majority opinion, that to allow possession, occupation, and use by the government to prevail of themselves against the owner's rights would be to permit the seizure of property without due process of law, and its devotion to public uses without just compensation, in violation of the fifth amendment.

It is further to be remembered that, because condemnation proceedings are in rem, public notice and hearing are essential to their validity, and the notice must describe the land to be taken. Nothing of the kind being required for the "establishment" of a post office, there was, of course, nothing of the kind in this instance. The boundaries of the site were agreed between Mr. Abbot and the department without opportunity for any assertion of other rights in the land within those boundaries.

That the department may obtain land within the limits of a post road, or rights in such land beyond the right to use it as part of a post road, by means other than those it is obliged to use in the case of land not so situated, I see no reason to believe. If a telegraph company uses such a road under the permission given by Congress in Rev. St. § 5263 (*U. S. Comp. St.* 1901, p. 3579), it cannot displace private rights without the owner's consent. *Pensacola, etc., Co. v. Western Union, etc., Co.*, 96 U. S. 1, 11, 12, 24 L. Ed. 708.

If it would be in any case possible to allow a greater effect than I have allowed to the "establishment" of this post office on October 7, 1908, I think the facts agreed afford strong ground for holding that the department should be presumed to have had no intention of acquiring by it, in this case, any rights adverse to those on which the railway company relies. On the date referred to, the act of 1906 had been in effect by acceptance for more than two years, as has been stated. The railway company had also had on file with the city engineer for more than fifteen months, or since January 28, 1907, the plan marked "Exhibit B," referred to in paragraph 6 of the agreed facts. This was filed in compliance with section 3 of the act, as a prerequisite to beginning construction. The plan shows, on a small scale it is true, but, as it seems to me, with sufficient distinctness, that the railway company would construct the subway so as to make it occupy about half the width of the sidewalk adjoining these premises and encroach upon them substantially as it now proposes, unless the Railroad Commissioners should alter the plan; as they might, according to section 3. I

think the department must be charged with knowledge on October 7, 1908, that the railway company would occupy that part of the post office site offered by Mr. Abbot, in the absence of any alteration of their plan by the Railroad Commission, and with knowledge that Mr. Abbot had no rights which entitled him to resist such occupation. The power of the state of Massachusetts to authorize such occupation, by virtue of the public rights in Brattle street, is not questioned. See *Sears v. Crocker*, 184 Mass. 586, 69 N. E. 327, 100 Am. St. Rep. 577. Mr. Abbot's licenses from the city of Cambridge to occupy light areas under the same sidewalk (Exhibits C, E, and F, above referred to) were not obtained until after the railway company's plan had been on file nearly a year. It is true that there was no final approval of any plan by the Railroad Commissioners until April 30, 1909, and that the plan of June 28, 1907, was in some respects altered before that approval. But the plan was not altered at all so far as it affected these premises, nor in their vicinity. Nor does it appear that any change in the construction proposed under the sidewalk adjoining them was ever asked for or suggested by anybody.

In adopting, as the only means to be used for obtaining a site for this post office, the method of acquiring only such rights in it as the owner could transfer, and in doing so with knowledge that the above steps had been taken to devote, by state authority, so much of the site as lay below the sidewalk and within the proposed subway, to its construction, and thus to divest the owner, to that extent, of any possible rights, I think the department must be taken as having knowingly accepted a site subject to be encroached upon as proposed, when the subway construction had progressed far enough to make the encroachment necessary, and therefore as having contented itself with obtaining only such rights in the premises as such encroachment would not disturb. To hold, therefore, that it may now, by virtue of its possession and occupation, obstruct the work of construction to the extent of excluding the defendants from every part of the premises, will be to accord it rights in them never obtained by due process of law.

I am therefore obliged to hold that the United States has not established its right to the relief prayed for in its bill. This result, so far as I can see, in no way conflicts with the undeniable principle that the instrumentalities of the federal government are not to be burdened, controlled, or interfered with by state legislation, nor with the principle that a state statute must be construed, whenever possible, as not intending any such application of its provisions. The question in this case seems to me to be: To what extent has the part of these premises in dispute become a federal instrumentality? The state legislation here in question having been enacted, and the railway company's designation of space below Brattle street to be used for the purpose thereby authorized having been made, as stated, by the submission of its plan, long before the department took any of the steps claimed to have devoted any part of this post office site to federal uses (though not approved until later), I do not see how any proceedings by the department, not effectual to supersede or suspend public rights under state laws, could accomplish that result as to the part in question.

The proceedings taken were not, in my opinion, effectual for such a purpose.

How far that portion of the basement room which the subway construction will render unavailable is really necessary to the work of the post office is a question upon which conflicting evidence was submitted, subject to the objection of the government that the question is immaterial. The result above reached renders it unnecessary to consider the question at all.

The bill is to be dismissed.

YOUGHIOGHENY & O. COAL CO v. VERSTINE, HIBBARD & CO.

(Circuit Court. W. D. Pennsylvania. March 23, 1910.)

No. 116.

1. SALES (§ 99*)—CONTRACT—BREACH—RESCISSION.

Where plaintiff purchased certain coal from defendant to be delivered in installments, payment for installments delivered each month to be made by 60-day note about the 15th of the month following shipment, plaintiff's failure to send such note covering August shipments prior to September 19th, notwithstanding requests therefor, justify defendant in refusing to make further shipments and rescinding the contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 264; Dec. Dig. § 99.*]

2. SALES (§ 418*)—CONTRACT—BREACH—MEASURE OF DAMAGES.

In an action for the seller's breach of a contract to deliver coal, the buyer's measure of damages is the difference between the contract price and the market price at the time when the installments contracted for should have been delivered.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1174-1201; Dec. Dig. § 418.*]

Action by the Youghioghenny & Ohio Coal Company, a citizen of Ohio, against Verstine, Hibbard & Co., a citizen of Pennsylvania, in assumpsit. Judgment for defendant.

C. F. Taplin, for plaintiff.

John E. Laughlin, for defendant.

ORR, District Judge. The Youghioghenny & Ohio Coal Company brought this action against Verstine, Hibbard & Co. to recover damages for breach of a contract expressed in a letter and a shipping order by plaintiff and an acceptance by the defendant, as follows:

Pittsburgh, Pa., August 29th, 1907.

Verstine, Hibbard & Co., Brookville, Pa.

Gentlemen: Answering your esteemed favor of the 20th inst. and confirming conversation with your Mr. D. F. Hibbard this P. M. we will send you an order for shipment of coal to W. Cuthbert, Fuel & Tie Agent Grand Trunk Ry., Montreal, Quebec, via P. R. R. c/o Grand Trunk at Massena Springs, freight prepaid to Massena Springs. In settlement of which we will send you our 60 day note without interest dated the first of the month following that in which shipment is made. Of course it will be about the 15th of the following month of shipment before the bills can be checked up and note forwarded to you.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't indexes

Kindly make shipments as far as consistent in steel hopper cars. Of course, there are no restrictions on gondolas.

We respectfully ask that you use care in preparing this coal.

You will note the order instructs you to bill the coal "Prepaid," making the Youghiogheny & Ohio Coal Company shippers. The agent at Venango Scales will make draft on us for prepayment of same.

Kindly advise us if you wish to take on 18,000 tons of this for delivery between now and January 1st or to be filled as fast as you can ship it; the entire shipment of course to be delivered by the first of January.

We call your attention to sending postal notices to our Cleveland office, 801 Western Reserve Building and a duplicate to this office 910 House Building, Pittsburgh, Pa. We will take care of sending notices to the Grand Trunk Ry.

Kindly make an extra effort to get off as much as you can within the next ten days, as we have been delayed in getting started.

Very truly yours,

The Youghiogheny & Ohio Coal Co.,

By J. A. Paisley, Sales Agent.

Order No. 4657.

Pittsburgh, Pa., August 29th, 1907.

Verstine, Hibbard & Co., Brookville, Pa.:

Please ship to W. Cuthbert, Fuel & Tie Agent, Grand Trunk Ry., Montreal, Quebec, via P. R. R. c/o Grand Trunk Ry., at Massena Springs, N. Y., freight prepaid to Massena Springs.

Make the Youghiogheny & Ohio Coal Co. shippers.

All run of mine coal possible until further notice.

Price 87- $\frac{1}{2}$ cents per net ton f. o. b. cars at mines.

Confirming telephone conversation with Mr. D. F. Hibbard.

The Youghiogheny & Ohio Coal Co.

Per _____.

Please report shipments promptly to both Cleveland and Pittsburgh offices.

Brookville, Pa., Aug. 30, 1907.

Youghiogheny & Ohio Coal Co., 910 House Bldg., Pittsburgh, Pa.

Gentlemen: We are in receipt of your valued favor of the 19th inst. with order and shipping instructions enclosed, thus confirming previous letter and telephone conversation.

We forward four steel hopper cars on order to-day.

We beg leave to state that we did not understand that the time limit on the 18,000 tons was January 1st. We will, however, make an effort to deliver that amount of tonnage within the time specified.

We feel confident that the quality of coal will prove satisfactory.

Thanking you for the order, we remain,

Yours very truly,

Verstine, Hibbard & Co.,
D. F. Hibbard.

Plaintiff avers performance on its part, but alleges breach by the defendant, in that about the middle of September, 1907, the defendant ceased to make further shipments of coal. The damages are laid at \$3,287.06, being the amount plaintiff alleges it was required to pay in the market for coal called for by the contract in excess of the contract price. The defense is that the plaintiff did not make settlement and send its promissory note for the August shipments prior to September 19, 1907, which neglect, it is alleged, justified the cessation of shipments, and, further, that plaintiff was not required to pay to others for the coal afterwards purchased the amount claimed as damages. By a stipulation filed a jury was waived.

Findings of Fact.

The plaintiff is a corporation of the state of Ohio engaged in the business of mining and shipping coal and of purchasing coal from other operators for resale to the trade. The defendant is a corpora-

tion of Pennsylvania owning and operating a coal mine near Brookville, Pa. A contract was made between them, as claimed by plaintiff, as set out above. So far as appears all negotiations prior to the contract were between J. A. Paisley, sales agent and duly authorized representative of the plaintiff, on the one hand, and D. F. Hibbard, representing the defendant, on the other hand. These two were the only witnesses called.

Immediately in pursuance of the contract defendant shipped in August 207.5 tons of coal to the amount of \$181.17 at the contract price, and continued shipments until September 19, 1907, of 1,058.1 tons more to the amount of \$925.84. In the meantime, plaintiff did not make any settlement for the August shipments, nor send its 60-day note therefor, as called for by the contract.

On September 9, 1907, defendant sent plaintiff an invoice of the August shipments. About September 15, 1907, the defendant asked Paisley, as the representative of the plaintiff, to send the note for the August shipments. Paisley replied: "Go on and ship the coal. I will take that up right away." At the same time, Hibbard told Paisley that the shipments would continue if the promissory note was sent. Paisley admits conversations by telephone about this time. While he denies that any one on behalf of the defendant asked for the promissory note, or threatened to stop shipments, yet he does not disclose the nature of the conversations admitted to have taken place. He also admits the receipt of the invoice for the August shipments.

Defendant continued to ship coal until September 19, 1907, and then stopped because the promissory note had not been sent. Defendant has never received such promissory note and has never been paid for any of the coal shipped under the contract. After defendant ceased shipments, plaintiff bought coal to complete a contract it had with the Grand Trunk Railway Company. To show a measure of damages, plaintiff offered to prove what that contract was and also the voucher of the railroad showing the price paid by it to the plaintiff. These offers were not received, and the plaintiff was limited to proof of the difference between the contract price and the market price; there being no other elements of special damages. Paisley was called on this point. He put the market price at \$1.10 and over per net ton, which is a higher rate than plaintiff claimed in its statement. Hibbard, on the other hand, testified for defendant that the market price ranged from 85 to 90 cents per net ton. He said the coal which would have gone to the plaintiff, if shipments had not ceased, was sold for 85 cents, which was the best price that could be had. The testimony of Paisley was not as convincing as the testimony of Hibbard. The court finds therefore that the market price did not exceed 90 cents per net ton, at which price the same is now fixed.

On October 23 and 30, 1907, defendant wrote to plaintiff asking payment for the coal shipped in August and September. So far as appears the plaintiff paid no attention to such letters.

Conclusions of Law.

The plaintiff has not supported its allegations of performance on its part by proof thereof. Payment should have been made by it at

the time fixed by the contract. Payment was not made and not sufficiently excused. Therefore it is not entitled to recover. *Reybold v. Voorhees*, 30 Pa. 116; *Rugg & Bryan v. Moore*, 110 Pa. 236, 1 Atl. 320; *Easton v. Jones*, 193 Pa. 147, 44 Atl. 264; *Cresswell Ranch & Cattle Co. v. Martindale*, 63 Fed. 84, 11 C. C. A. 33; *National Surety Co. v. Long*, 125 Fed. 887, 893, 60 C. C. A. 623.

Plaintiff, however, urges that:

"In a contract for the delivery of goods in installments and the payment for the installments at stated times, a failure by the buyer to make one of the stipulated payments does not allow the seller to repudiate the contract and refuse to make further shipments thereunder."

That proposition as it stands is not supported by the weight of authority because it omits reference to the intention of the vendee as disclosed by conduct or correspondence. *Mersey Steel & Iron Co. v. Naylor, Benzon & Co.*, 9 Appeal Cases, 434, a leading English case decided by the House of Lords in 1884, is specially relied on by plaintiff because it has been apparently supported by some decisions of the federal courts. In that case the vendee refused to pay for the first installment because of an honest belief that a liquidator in bankruptcy was entitled to receive the payment. That case was cited in *Norrington v. Wright*, 115 U. S. 188, 6 Sup. Ct. 12, 29 L. Ed. 366, to show that, if there were a rule in England that failure by the buyer to pay an installment did not entitle the seller to refuse future deliveries, it was not inconsistent with the principle then emphasized by the Supreme Court that a failure by the seller to deliver merchandise in the manner and at the time mentioned in the contract would prevent a recovery by him.

In the case at bar there appears to have been no excuse for the non-delivery of the note for the August shipments, although request was made expressly by telephone and impliedly by invoice. In some cases it has been held that even an excusable failure to pay may justify a refusal of the other party to go further. *National Machine & Tool Co. v. Standard Shoe Machinery Co.*, 181 Mass. 275, 63 N. E. 900. There the failure to pay even the small sum of \$90 promptly was held to be a breach.

The provision in the contract in the case at bar for the sending of promissory notes without interest must be considered an important one, in view of modern business methods by manufacturers and operators, and suggests the procurement of money by discounting such business paper to assist in carrying on defendant's mining operations. The contract contemplated the sending of the note so that it would reach the plaintiff by the 15th of September. When no note was received by the 19th of the month, it was justified in not making further shipments.

In view of the foregoing, little need be said about the measure of damages. That it is the difference between the contract price and the market price at the time when the installments should have been delivered is clear. *Cherry Valley Iron Works v. Florence Iron River Co.*, 64 Fed. 569, 12 C. C. A. 306, and cases cited in the opinion of the court.

It is unnecessary to consider the other authorities cited by counsel. None are cases where the plaintiff has been allowed to recover when he has not proven as well as alleged performance on his part or sufficiently excused his nonperformance.

Therefore judgment must be entered in favor of the defendant and against the plaintiff.

UNITED STATES v. LONDON.

(District Court, E. D. Oklahoma. April 28, 1909.)

1. CRIMINAL LAW (§ 301*)—PLEAS—WITHDRAWAL—DISCRETION OF COURT.

In a prosecution for conspiracy to defraud the United States, the action of the court in refusing to permit defendant to withdraw his plea of not guilty and file a motion to quash the indictment on the ground that the grand jury was not legally formed was within the discretion of the court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 687; Dec. Dig. § 301.*]

2. CONSTITUTIONAL LAW (§ 199*)—EX POST FACTO LAW—FORMATION OF GRAND JURY.

Where Mansf. Dig. Ark. § 3991 (Ind. T. Ann. St. 1899, § 2671), which applied to Indian Territory before the statehood of Oklahoma, required a grand jury to be composed of only 16 men, and Rev. St. U. S. § 808 (U. S. Comp. St. 1901, p. 626), provides that a grand jury should consist of not less than 16 nor more than 23 persons, so far as it permits a grand jury to consist of more than 16 persons, which acts upon a charge of crime committed before statehood, is violative of Const. U. S. art. 1, § 9, providing that no ex post facto law shall be passed, and, as to such a charge, a jury of more than 16 men is not a legally constituted grand jury.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 199.*]

3. INDICTMENT AND INFORMATION (§ 3*)—NECESSITY OF INDICTMENT—"INFAMOUS CRIME."

Conspiracy to defraud the United States being punishable by imprisonment in the penitentiary is an infamous crime within Const. U. S. Amend. 5, providing that no person shall be held for infamous crime except on a presentment or indictment by a grand jury.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 12; Dec. Dig. § 3.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3573-3577.]

4. WORDS AND PHRASES—"INDICTMENT."

An "indictment" is a presentation to the proper court, under oath, by a grand jury, duly impeached, of a charge describing an offense against the law for which the party charged may be punished.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 4, pp. 3551-3555.]

5. GRAND JURY (§ 2*)—IMPANELING—STATUTORY PROVISION.

Rev. St. U. S. § 808 (U. S. Comp. St. 1901, p. 626), governing the impaneling of grand juries in federal courts in Oklahoma, may be followed as to the manner in which the jury is drawn in dealing with a crime committed before statehood, when Mansf. Dig. Ark. § 3991 (Ind. T. Ann. St. 1899, § 2671), was in force, but a grand jury must consist of no more nor less than 16 men, as provided in the latter statute.

[Ed. Note.—For other cases, see Grand Jury, Dec. Dig. § 2.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

6. CRIMINAL LAW (§ 970*)—ARREST OF JUDGMENT—GROUNDS.

An objection to the legality of the organization of a grand jury being a matter of law arising on the record is properly raised by a motion in arrest of judgment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2448, 2449; Dec. Dig. § 970.*]

Indictment against John London for conspiracy to defraud the United States. Heard on motion for arrest of judgment. Sustained.

J. E. London, for the motion.

District Attorney Gregg, Frank Lee, and Ira D. Oglesby, opposed.

CAMPBELL, District Judge. The defendant, John London, was indicted at the January, 1909, term of this court at Muskogee, together with several others, upon the charge of conspiracy to defraud the United States. The indictment charged that the conspiracy was formed and an overt act committed early in the year 1906. The defendant at the same term was arraigned and entered his plea of not guilty, and at this term of the court the cause was called for trial. Before announcing ready the defendant by counsel filed his motion asking leave to withdraw his plea and file a motion to quash the indictment, setting up the substance of the motion to quash in his motion for leave to withdraw the plea, and also attaching to his motion for leave a copy of the motion to quash. The ground upon which the defendant mainly relied in his motion to quash the indictment was that the indictment was returned by a grand jury at the last term of this court sitting at Muskogee composed of 21 men, when lawfully a grand jury for the purpose of indicting for an offense alleged to have occurred before statehood must be composed of only 16 men, and charging that the grand jury returning the indictment in this case was composed of 21 men, and was not examined, impaneled, and sworn according to the provisions of the law of Arkansas, in force in the Indian Territory at the time of the alleged commission of the crime with which defendants were charged, and that said indictment was returned in violation of the rights of the defendants guaranteed by the Constitution of the United States. The motion for leave to withdraw the plea and file motion to quash was denied by the court, and the defendant went to trial. The jury returned a verdict of guilty. The defendant then filed his motion for new trial, setting up various grounds, most of which had been presented to the court during the trial, fully argued and ruled upon, and, on the hearing of the motion for new trial, counsel for defendant only urged the ground set up in the motion—that the court had erred in refusing to permit the defendant to withdraw his plea and file his motion to quash; that the court's failure to do so was an abuse of discretion. The defendant by counsel also had prepared and by permission of court filed and presented a motion in arrest of judgment, which motion sets up as its main ground the same question sought to be raised in the motion to quash; that is, that as to this defendant, the grand jury composed of 21 men was an illegal grand jury, and that the indictment was there-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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fore a nullity. As to the action of the court in refusing to permit defendant to withdraw his plea and file his motion to quash, I am of the opinion that this was a matter entirely within the discretion of the court, and that the refusal to permit the plea to be withdrawn was not an abuse of such discretion. The motion in arrest of judgment, however, presents a much more serious question.

In the year 1906 when it is charged the offense was committed, the Western district of the Indian Territory was presided over by the United States court for the Indian Territory, which court at that time had jurisdiction of such offenses. The impaneling of grand juries in that court was governed by section 3991 of Mansfield's Digest of the Laws of the State of Arkansas (Ind. T. Ann. St. 1899, § 2671) which together with other laws of said state had been prior thereto extended over the Indian Territory. By said section it was provided that a grand jury of 16 persons shall be selected from those designated as grand jurors, but if any shall be absent, incompetent to serve, or excused the deficit shall be made up by taking a sufficient number of competent alternates present in the order in which their names appear upon the list. In November, 1907, under an enabling act theretofore passed by Congress (Act. June 16, 1906, c. 3335, 34 Stat. 267), the state of Oklahoma was admitted into the Union, and by said enabling act was divided into two judicial districts, the Eastern and Western, and United States Circuit and District Courts were by said act established in each of said districts, with all the jurisdiction and powers of United States Circuit and District Courts generally.

By section 14 of the enabling act (34 Stat. 275 [U. S. Comp. St. Supp. 1909, p. 155]) it is provided:

"That all prosecutions for crimes or offenses hereafter committed in either of said judicial districts as hereby constituted shall be cognizable within the district in which committed, and all prosecutions for crimes or offenses committed before the passage of this act in which indictments have not yet been found or proceedings instituted shall be cognizable within the judicial district as hereby constituted in which such crimes or offenses were committed."

With the change to statehood and the establishment of this, the United States District Court for the Eastern District of Oklahoma, section 808 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 626), as to the impaneling of grand juries, became effective, providing that a grand jury should consist of not less than 16 nor more than 23 persons. It was under this section of the Revised Statutes that the grand jury which indicted the defendant was organized and impaneled. As the records of the court show, the grand jury returning this indictment consisted of 21 men. At this term of the court, Judge John A. Marshall sitting, in the case of *United States v. Charles N. Haskell et al.* (see 169 Fed. 449), a motion to quash the indictment was presented, setting up, among others, the ground alleged in this case, to wit, that while the offense charged in that case was alleged to have been committed prior to statehood, when the law provided for the grand jury of 16 men, the defendants in that case were indicted after statehood by a grand jury of 21 men, which, by the way, was the same grand jury which indicted the defendant in this case. After very exhaustive argument by able counsel and

thorough consideration, Judge Marshall sustained the motion to quash, holding that as to the defendants Haskell et al. the law providing for a grand jury of more than 16 men was *ex post facto*, and that by increasing the number of grand jurors who might consider the charges against them, their rights had been substantially affected, and that decision, so far as it is applicable to this case, will be followed.

The Constitution of the United States (article 1, § 9) provides that no *ex post facto* law shall be passed. It follows that if, as held by Judge Marshall, the law providing for more than 16 members of the grand jury is *ex post facto* as to this defendant, then as to him that provision of the law is unconstitutional and a grand jury consisting of more than 16 men would not as to him be a legally constituted grand jury. It is further provided by the fifth amendment to the Constitution of the United States that no person shall be held for a capital or otherwise infamous crime unless on a presentment or indictment by a grand jury, except in certain cases of which this is not one. The crime charged in this case is an infamous crime, because it is one punishable by imprisonment in the penitentiary (*Parkinson v. U. S.*, 121 U. S. 281, 7 Sup. Ct. 896, 30 L. Ed. 959), and therefore the defendant cannot be prosecuted except upon presentment or indictment by a grand jury. Without such indictment the court acquires no jurisdiction. *Ex parte Bain*, 121 U. S. 1, 7 Sup. Ct. 781, 30 L. Ed. 849. As said in 22 Cyc. 171:

"There can be no conviction or punishment for a crime without a formal and sufficient accusation. In the absence thereof a court acquires no jurisdiction, and if it assumes jurisdiction a trial and conviction are a nullity. The accusation must charge an offense. It must charge the particular offense for which the accused is tried and convicted, and it must be made in the particular form and mode required by law. This is true not only at common law, but also under constitutional and statutory provisions in all jurisdictions."

An indictment is described by the United States Supreme Court as the presentation to the proper court, under oath, by a grand jury duly impaneled, of a charge describing an offense against the law for which the party charged may be punished. *Ex parte Bain*, 121 U. S. 1, 7 Sup. Ct. 781, 30 L. Ed. 849. In 22 Cyc. 191, it is said:

"It is also necessary, as a general rule, provided objection is properly raised, that the grand jury by which the indictment was found shall have been legally organized and constituted. At common law and generally under the statutes they must consist of the number required by law, neither more nor less."

Under the ruling of Judge Marshall, the defendant in this case was entitled to have the matter first presented to a grand jury of not to exceed 16 men. It is not necessary that it should have been drawn in the identical manner prescribed by the laws of Arkansas in force when the crime charged is alleged to have been committed, as this is simply a matter of procedure, and it may be drawn in accordance with the provisions of section 808 of the Revised Statutes providing for not less than 16 nor more than 23 grand jurors, but the grand jury must not consist of more nor less than 16 men.

In the case of *Harding v. State*, 22 Ark. 210, the Supreme Court of Arkansas, in passing upon a motion to quash an indictment for the reason that the jury consisted of seventeen men, said:

"Upon a construction of these provisions (the provisions of the statute providing for a grand jury of 16 men), it was held in *State v. Hawkins*, 5 Eng. [Ark.] 71, that it requires 16 legally constituted men to constitute a grand jury, and though an indictment may be found by the concurrence of not less than 12, yet the panel must consist of 16 lawful men. Adhering to the principle decided in this case, and applying it to that provision of the statute which prohibits the summoning of more than 16 to serve as grand jurors, in connection with those provisions which provide for the selection of that number only, and applying the principle that the requirements of the statute, touching such selection, must be strictly observed, as held in *State v. Cantrell*, 21 Ark. 127, and *Wilburn v. State*, 21 Ark. 198, we can but hold that a grand jury consisting of more than 16 persons is prohibited by our peculiar statutory provisions, and that an indictment found by them should be quashed on a plea in abatement. It will not do to say that the accused cannot be injured if the panel consists of more than 16, because while 12 out of 16 might not concur in finding a bill, 12 out of a greater number might do so. We do not feel authorized to disregard the plain provisions of the statute, it being safe to follow the law, but always dangerous to depart from it."

In volume 1 of Bishop's New Criminal Law, § 1021, it is said:

"When the grand jury is organized so imperfectly as not to be a lawful body, there is no valid indictment."

The grand jury in the case at bar was a lawful body in all respects with regard to offenses committed against the laws of the United States within the district, since statehood, but as to offenses committed before statehood it may be very seriously questioned whether, containing as it did more than 16 men, it was a lawful body as to such offenses. In *Brannigan v. People*, 3 Utah, 488, 24 Pac. 767, it is said:

"The law delights in the life, liberty, and happiness of its subjects, and deems statutes which deprive any one of them of these in a sense odious, and therefore all penal statutes must be construed strictly. * * * No person is to be made subject to them by implication, and all doubts concerning their interpretation are to preponderate in favor of the accused. * * * All indictments must be found and presented by a lawful grand jury."

The defendant now raises the objection to the grand jury by motion in arrest of judgment. This is a matter of law arising on the record, and is therefore properly raised on such motion. *United States v. McKnight* (D. C.) 112 Fed. 982. After careful consideration it is my opinion that the indictment of the defendant by a grand jury of 21 men instead of 16, the number constituting the grand jury when the offense charged is alleged to have been committed, was more than a mere irregularity which he waived by entering his plea and going to trial. Had the objection not been raised until after judgment and sentence, the result might have been different. That I do not now decide. But having raised it on motion in arrest of judgment, I conclude that the objection is well taken, and the motion will be sustained.

FRIBOURG et ux. v. PULLMAN CO.

(Circuit Court, E. D. North Carolina. March 7, 1910.)

No. 556.

1. COURTS (§ 321*)—FEDERAL COURTS—JURISDICTION.

A suit for \$10,000 brought by citizens and residents of France against an Illinois corporation was within the jurisdiction of the federal Circuit Court under Judiciary Act March 3, 1887, c. 373, § 1, 24 Stat. 552, as amended by Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 433 (U. S. Comp. St. 1901, p. 508), conferring on federal courts jurisdiction of a controversy between citizens of a state and foreign states, citizens, or subjects wherein the amount in controversy exceeds \$2,000.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 845-849; Dec. Dig. § 321.*]

2. COURTS (§ 272*)—FEDERAL JURISDICTION—VENUE.

Judiciary Act March 3, 1887, c. 373, § 1, 24 Stat. 552, as amended by Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 433 (U. S. Comp. St. 1901, p. 508), confers federal jurisdiction over a controversy between citizens of a state and foreign states, citizens, or subjects wherein the amount in controversy exceeds \$2,000, but provides that no civil suit shall be brought before either of such courts by any person in any other district than that whereof he is an inhabitant, but when the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or defendant. *Held*, that a suit between citizens of France and an Illinois corporation, where federal jurisdiction depended on diversity of citizenship, could not be brought over defendant's protest in the federal Circuit Court for the district of North Carolina, where neither plaintiff nor defendant resided.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 811; Dec. Dig. § 272.*]

3. COURTS (§ 314*)—FEDERAL COURTS—CITIZENSHIP—JURISDICTION—"CITIZEN."

A corporation cannot be considered a citizen, inhabitant, or resident of a state in which it has not been incorporated for the purpose of determining federal jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 860; Dec. Dig. § 814.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1164-1174; vol. 8, pp. 7602, 7603.

Citizenship of corporations, see notes to *St. Louis, I. M. & S. Ry. Co. v. Newcom*, 6 C. C. A. 174; *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullaghan*, 27 C. C. A. 301.]

Action by Edward Fribourg and wife against the Pullman Company. On motion to dismiss. Granted.

Col. John Hinsdale, for plaintiffs.

James H. Pou, for defendant.

CONNOR, District Judge. Plaintiffs allege that the feme plaintiff is the wife of Edward Fribourg, and that they are both citizens and residents of the republic of France; "that defendant is a corporation created, organized, and existing under and by virtue of the laws of the state of Illinois within the meaning of the laws fixing and determining the jurisdiction of this court"; that defendant is engaged in the business of carrying passengers, as a common carrier, throughout the United States and particularly between Jersey City, in the state

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of New Jersey, and Wilmington, in the state of North Carolina; that defendant, in the prosecution of its business, in the state of North Carolina, maintains offices and has agents and property in said state; it has appointed and executed a power of attorney to Henry W. Miller, Esq., as its agent in said state, upon whom process may be served therein; that on the 2d day of November, 1907, the plaintiffs engaged passage on one of the cars of defendant and secured a berth in said car from Jersey City, N. J., to Wilmington, N. C., paying the sum of \$14 therefor; that while a passenger on said car the feme plaintiff was the owner of and had in her possession on said car valuable jewelry—gold bracelet, gold rings, with pearl and diamond settings, earrings, etc.—of the value of \$10,000; that said jewelry was such as might reasonably be worn by a person of the social position and pecuniary circumstances of feme plaintiff; that while a passenger on said car between the points aforesaid she placed the jewelry in a satchel in her berth; that it was taken therefrom and stolen by the night porter of defendant, while engaged in the performance of his duties on said car; that by reason of the negligence of defendant and the act of its servant feme plaintiff lost said jewelry, and thereby sustained damage to the amount of \$10,000, wherefore she sues in this action, etc. The defendant entered a special appearance for the purpose of moving the court to set aside and vacate the summons and dismiss the action, and for the same purpose filed a special demurrer for that it appeared upon the face of the complaint that plaintiffs are citizens and residents of the republic of France and defendant is a citizen and resident of the state of Illinois. The averment of diverse citizenship of the parties brings the action within the jurisdiction of the court by virtue of the provisions of Act March 3, 1887, c 373, § 1, 24 Stat. 552, as amended by Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 433, conferring jurisdiction upon the Circuit Courts of the United States of "a controversy between citizens of a state and foreign states—citizens or subjects," wherein the amount in controversy exceeds the sum of \$2,000. U. S. Comp. St. 1901, p. 508; 4 Fed. St. Ann. 265, 297.

The contention of the defendant is directed to the venue, and is based upon the following language of the statute:

"But no person shall be arrested in one district for trial in another in any civil action in any Circuit or District Court, and no civil suit shall be brought before either of said courts by any person, by any original process or proceeding in any other district than that whereof he is an inhabitant; but, when the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

The section, when analyzed, provides that in controversies arising (1) under the Constitution, or laws, of the United States, or treaties made, etc., or (2) in which the United States are plaintiffs or petitioners, or (3) in which there shall be a controversy between citizens of different states, or (4) between citizens of the same state claiming lands under grants of different states, or (5) a controversy between citizens of a state and foreign states, citizens, or subjects, etc., the Circuit Courts of the United States shall have jurisdiction, etc. This

language confers and marks the jurisdiction of the court without reference to the venue, or locality, of the court in which the action may be brought.

The next succeeding clause is not a grant of jurisdiction, but a restriction in respect to the venue, and, except as hereinafter noted, is in the language of Judiciary Act Sept. 24, 1789, c. 20, 1 Stat. 73. Prior to, and including, Act March 3, 1875, c. 137, § 1, 18 Stat. 470 (U. S. Comp. St. 1901, p. 508), the venue was confined to the district of which the defendant was an inhabitant, "or in which he shall be found at the time of serving the writ." The act of 1887, as amended by the act of 1888, placed a further restriction upon the venue by omitting the words in quotation and confining it to the district whereof "the defendant is an inhabitant." The statute, as amended, has been construed by the Supreme Court; it has been uniformly held, and that the history of the legislation shows, that the "general object of Congress has been to contract, not to enlarge, the jurisdiction of the Circuit Courts of the United States." *In re Wisner*, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264. Mr. Justice Gray in *Re Keasbey & Mattison*, 160 U. S. 221, 228, 16 Sup. Ct. 273, 275 (40 L. Ed. 402), referring to the language of the act of 1887-88, says:

"The last clause is added by way of proviso to the next preceding clause which, in its present form, forbids any suit to be brought in any other district than that of which the defendant is an inhabitant; and the effect is that, in every suit between citizens of the United States, when the jurisdiction is founded upon any of the grounds mentioned in this section, other than the citizenship of the parties, it must be brought in the district of which the defendant is an inhabitant; but when the jurisdiction is founded only on the fact that the parties are citizens of different states, the suit shall be brought in the district of which either party is an inhabitant. And it is established by the decisions of this court that, within the meaning of this act, a corporation cannot be considered a citizen, an inhabitant, or a resident of a state in which it has not been incorporated; and, consequently, that a corporation incorporated in a state of the Union cannot be compelled to answer to a civil suit, at law or in equity, in a Circuit Court of the United States held in another state, even if the corporation has a usual place of business in that state."

It is clear that the plaintiff can find no basis for her position in this language—neither she, nor the defendant, is a resident or citizen of the Eastern district of North Carolina.

In *Re Hohorst*, 150 U. S. 653, 14 Sup. Ct. 221, 37 L. Ed. 1211, a citizen of New York sued a foreign corporation. The defendant relying upon the restrictive clause in the statute insisted that it could be sued only in the district of which it was an inhabitant. The court held that the defendant did not come within the provisions of the act, for the manifest reason that, if it did so, a foreign, or alien, corporation, or a natural person, citizen of a foreign state, could not be sued at all in the Circuit Court of the United States. Judge Gray says:

"To construe the provision as applicable to all suits between a citizen and an alien, would leave the courts of the United States open to aliens against citizens, and close them to citizens against aliens."

The reason which induced the court to hold that the alien could be sued wherever found does not apply to the plaintiff; on the contrary,

to hold that an alien could sue in any district in which defendant could be found would give to such alien a distinct advantage over a citizen of one of our own states, who must sue either in his own district of residence or that of the defendant. While the construction given the statute in Hohorst's Case is allowable to prevent a result manifestly not intended by the Legislature, no such reason applies when the alien is plaintiff. She may sue the defendant in the district "whereof he is an inhabitant," thus securing the privilege conferred by the Constitution and the statute, and protecting the defendant against being subjected to suits beyond its domicile of creation or residence—the manifest purpose of the statute.

The distinction between a case in which the defendant is a citizen of a foreign state who cannot be an inhabitant of any district, and one like the case at bar, in which the plaintiff invokes the jurisdiction of the court, is made in *Galveston, etc., Ry. Co. v. Gonzales*, 151 U. S. 496, 14 Sup. Ct. 401, 38 L. Ed. 248. It is there held that when the plaintiff is a citizen of a foreign state, etc., the action must be brought in the district whereof the defendant is an inhabitant. While the decision was the subject of a vigorous dissent by Mr. Justice Jackson, concurred in by Mr. Justice Harlow, it is directly in point and of controlling authority in this case. *Rose*, Fed. Proc. 500; 2 *Foster's Fed. Proc.* 70. The plaintiff relies upon the decision of Judge Reed in *Barlow v. Ch. & N. W. R. R. Co. (C. C.)* 172 Fed. 513. A careful examination of the facts and the opinion in that case will show that it is in harmony with the decisions of the Supreme Court. The distinction between jurisdiction and venue will explain any apparent conflict in the decisions. The Circuit Courts are given jurisdiction in a controversy between a citizen of one state and a citizen of a foreign state, etc. This status of the parties is jurisdictional and cannot be waived—the venue is a personal privilege granted to defendant, and may be, either expressly or by failure to take advantage of it in due time and by appropriate means, waived. "In discussing matters of pleading and practice arising under this and similar provisions, it is to be observed that the question thus presented is, generally speaking, not a matter that goes to the essential jurisdiction of the court. If a suit is of such a nature that it can certainly be brought in some federal court, or another—that is, if the subject-matter of the suit, or the character of the parties, is such that a federal court of some state or district has jurisdiction to entertain it—then the question whether that suit should be brought in one particular state, or district, rather than in another, is not a question of jurisdiction at all. It is rather a question of venue, using this word in the sense of the civil division from which the jury must be gathered, and in which the cause, if an equity one, should be tried. True, the term 'jurisdiction' is frequently used in this connection, and as a result some confusion has appeared in the cases. * * * As commonly put, the distinction is one between essential jurisdiction, on the one hand, and an exemption from process, on the other. * * * In the sense in which we now use the word, it may be said that the question of venue and the question of jurisdiction are wholly different and distinct, * * * Jurisdiction cannot be

conferred by consent of the parties and the want of it cannot be waived. The venue is a matter of personal privilege and can therefore be waived by the party concerned." 1 Street's Fed. Eq. Prac. §§ 383-384; *Const. Co. v. Gibney*, 160 U. S. 219, 16 Sup. Ct. 272, 40 L. Ed. 401; *Southern Express Co. v. Todd*, 56 Fed. 104, 5 C. C. A. 432. Keeping this distinction in view, the decision in *Barlow's Case*, supra, is easily understood. The plaintiff was an alien residing in England; the defendant an Illinois corporation. Suit was brought in the state of Iowa. Defendant lodged a copy of the record in the Circuit Court of the United States for the Northern District of Iowa, and moved that it take jurisdiction of the cause, after an unsuccessful motion for removal in the state court. The question decided arose upon a petition to remand to the state court. Judge Reed, after stating the case and quoting the language of the statute and citing *Hohorst's Case*, says:

"Suits between citizens and aliens may be brought in any district where valid service may be obtained upon the defendant, whether he be citizen or alien, subject of course to the right of the defendant, if he be a citizen of one of the states, to reasonably object to being sued by an alien in any other district than that of his residence, the same as he might object if sued by a citizen in a district of which neither the plaintiff nor the defendant was a resident, and, unless he does so object, the cause may rightly proceed to determination in the Circuit Court of the United States, where it was so commenced."

The learned judge cites the decided cases and shows clearly that as the Circuit Court would have had original jurisdiction, the cause being between a citizen of one state and of a foreign state, the defendant, citizen of Illinois, was entitled to have it removed into the federal court. The question of venue was not presented, although not overlooked by the judge. In *Re Tobin*, 214 U. S. 506, 29 Sup. Ct. 702, 53 L. Ed. 1061, a per curiam order was made denying a mandamus compelling the judge to remand to the state court a case wherein the plaintiff was an alien and the defendant a citizen of a state other than that in which suit was brought. This is in harmony with the *Barlow Case*. The sole question presented upon this record and raised by defendant's motion relates to the venue, and not to the jurisdiction. If defendant had entered a general appearance, or otherwise waived the right to dismiss because of the wrong venue, the court would have proceeded to trial and judgment. *Const. Co. v. Gibney*, 160 U. S. 217, 16 Sup. Ct. 272, 40 L. Ed. 401. This, of course, it could not have done, if without jurisdiction. It is manifest that an alien defendant cannot sustain the motion because it is not "an inhabitant" of any district. *Hohorst's Case*, supra; *Galveston Ry. Co. v. Gonzales*, supra. The distinction between jurisdiction and venue, the result of a failure to take advantage of it and the mode of doing so, is recognized by all Codes of Procedure. *Ex parte Schollenberger*, 96 U. S. 369, 24 L. Ed. 853; 22 Enc. Pl. & Prac. 816. The decision in *Barlow v. N. W. R. R. Co.*, supra, does not conflict with the cases cited. The motion to dismiss the action is allowed.

RURAL HOME TELEPHONE CO. v. POWERS et al.

(Circuit Court, W. D. Kentucky, at Owensboro. February 9 and 18, 1910.)

1. REMOVAL OF CAUSES (§ 86*)—SUFFICIENCY OF PETITION—NECESSITY OF ALLEGING FACTS.

A petition for the removal of a cause, on the ground that it is one arising under the Constitution or laws of the United States, must state the facts showing that such is the case, what the federal question is, and how it arises.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 132, 166-179; Dec. Dig. § 86.*]

2. REMOVAL OF CAUSES (§ 19*)—FEDERAL QUESTION—SUIT AGAINST FEDERAL RECEIVER.

The fact alone that a defendant in an action in a state court is a receiver appointed by a federal court does not render the cause removable as one arising under the laws of the United States.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 48; Dec. Dig. § 19.*]

3. REMOVAL OF CAUSES (§ 25*)—FEDERAL QUESTION—QUESTION MUST APPEAR FROM PLAINTIFF'S PLEADING.

To authorize the removal of a cause on the sole ground that it is one arising under the Constitution, laws, or treaties of the United States, that must appear from the plaintiff's statement of his own claim, and, if it does not so appear, the want cannot be supplied by any statement in the petition for removal or in the subsequent pleadings.

[Ed. Note.—For other cases, see Removal of Causes, Dec. Dig. § 25.*]

Action by the Rural Home Telephone Company against Joshua D. Powers, receiver of the Independent Long Distance Telephone & Telegraph Company and others. On motion to remand to state court. Sustained.

Clarence M. Finn, for plaintiff.

Helm Bruce and Miller & Todd, for defendants.

EVANS, District Judge. The third section of the act of August 13, 1888, 25 Stat. 436, c. 866 (U. S. Comp. St. 1901, p. 582), provides:

"That every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice."

The plaintiff, availing himself of the privilege thus given, commenced an action at law in the Daviess circuit court against Powers as receiver and against him as an individual, and against H. C. Jones, to recover damages to the extent of \$15,000 to its property, alleged to have been caused by the willful, malicious, and wrongful conduct of all the defendants in carrying on the business of the Independent Long Distance Telephone & Telegraph Company. It is not claimed that any of the parties to the action are citizens of any state other than Kentucky, and it was conceded at the argument that they were all

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

citizens of that state. Nevertheless, the defendants filed their joint petition in the state court for the removal of the action to this court. The state court denied the right to remove the case, but approved the bond tendered by the defendants with their petition. A transcript of the record was filed in this court, and the plaintiff has moved to remand the action to the state court. The petition for removal is very brief, and, after setting forth the parties, it avers that the action "is a suit of a civil nature at law arising under the Constitution and laws of the United States, in which the matter in dispute, exclusive of interest and costs, exceeds the sum or value of \$2,000."

It is fundamental in removal cases that the petition therefor shall state facts and not conclusions of law. This proposition was stated by the Supreme Court in its opinion in *Gibbs v. Crandall*, 120 U. S., at pages 108, 109, 7 Sup. Ct., at page 498 (30 L. Ed. 590), in this language:

"It is not enough for the party who seeks a removal of his cause to say that the suit is one arising under the Constitution. He must state the facts so as to enable the court to see whether the right he claims does really and substantially depend on a construction of that instrument. This has not been done in this case, and the order remanding the suit is consequently affirmed."

The doctrine is stated in section 168 of Black's *Dillon on Removal of Causes* in this language:

"If the removal of the cause is asked on the ground that it is one arising under the Constitution or laws of the United States, it will not be sufficient for the petitioner merely to aver that it so arises, or that it involves a federal question. In addition to this, the petitioner must set forth the facts which enter into the case with sufficient detail to show exactly what the federal question is, and how it will arise, and that its settlement will be essential to the determination of the cause."

If the petition in the case before us is to be regarded as stating facts, and not as stating mere legal conclusions, its averments must be taken as true, inasmuch as those statements have not been denied. *Dishon v. Cincinnati Railroad Co.*, 133 Fed. 471, 66 C. C. A. 345. But upon the authorities cited, and many others that might be referred to, we hold that the averments of the petition for removal are not sufficient to entitle the defendants to that relief.

What has been said might dispose of the motion to remand; but other propositions have been urged with great force and earnestness by the learned counsel for the defendants and will be briefly discussed. The receiver, Powers, was not appointed by this court, but by an order of the Circuit Court of the United States for the Eastern District of Kentucky in the case there pending of *George C. Bryce v. Independent Long Distance Telephone & Telegraph Company* and others. It does not appear from the petition for removal whether the jurisdiction of that court of the case in which the receiver was appointed was founded upon the diverse citizenship of the parties thereto, or whether the demands asserted in that suit arose under the Constitution or any law of the United States. It might be that it could be objected that the suit, if removed at all, should go to the Eastern District; but we shall assume, without deciding, that such objection, if made, would be untenable, and that a proper removal would bring the case to this

court. Nevertheless, we think the case as now presented is not removable not only upon the ground already stated, but also upon other grounds.

1. From the argument of counsel, we infer that the conclusion stated in the petition for removal that the action is one arising under the Constitution and laws of the United States is drawn altogether from the fact that the receiver was appointed by a court of the United States in a suit pending therein. We had occasion very industriously to consider this question in *Marrs v. Felton*, 102 Fed. 775, and at page 779 it was said:

"It seems to me, for the reason presently to be stated, that the Supreme Court must be regarded as quite certain to hold that such cases arise under the Constitution or laws of the United States only where the receiver is appointed under a statute of the United States, as in cases of national banks or for corporations created by the laws of the United States, such as soldiers' homes and Pacific railroad companies, and not where a federal court merely in the exercise of its general jurisdiction has appointed a receiver for a corporation not existing under federal law."

Sooner than we could expect, the prediction was verified. In *Gableman v. Peoria, etc., Railway Co.*, 179 U. S. 335, 21 Sup. Ct. 171, 45 L. Ed. 220, the precise question was authoritatively decided by the Supreme Court, which held, as correctly expressed in the syllabi, as follows:

"An action against a receiver of a state corporation is not a case arising under the Constitution and laws of the United States simply by reason of the fact that such receiver was appointed by a court of the United States.

"A receiver appointed by a federal court may be sued in that court as well as in the state court, but if in the state court he is not entitled to remove the cause on the sole ground of his appointment by the federal court."

This would seem to be decisive of the case upon this ground also.

2. But the learned counsel for the defendants insist that the decision in the *Gableman* Case has been overruled or essentially modified by the court's decision in the *Matter of Dunn*, 212 U. S. 374, 29 Sup. Ct. 299, 53 L. Ed. 558. The *Gableman* Case was not mentioned in the opinion in the *Dunn* Case, and we think there could be no doubt that in the *Matter of Dunn*, as well as in *Railroad Case v. Cox*, 145 U. S. 595, 12 Sup. Ct. 905, 36 L. Ed. 829, *Texas & Pacific Removal Cases*, 115 U. S. 2, 5 Sup. Ct. 1113, 29 L. Ed. 319, *Butler v. National Soldiers' Home*, 144 U. S. 66, 12 Sup. Ct. 581, 36 L. Ed. 346, and in many others of like character, the jurisdiction of the federal courts was sustained upon the well-settled proposition that any suit brought by or against any corporation created by a law of the United States, out of that fact alone, must be considered as one arising under the Constitution and laws of the United States. The two lines of cases proceed upon obviously different grounds, and have been decided upon obviously different principles. We, therefore, do not see the slightest conflict between the *Gableman* Case, on the one hand, and the *Dunn* Case and other cases cited for the defendants, on the other.

We conclude that there was no ground for the removal of this case, and it must be remanded to the *Daviess* circuit court.

(February 18, 1910.)

The defendants, with leave of the court given under the authority of *Kinney v. Columbia Savings, etc., Ass'n*, 191 U. S. 78, 24 Sup. Ct. 30, 48 L. Ed. 103, have filed an amendment to their petition for removal. As already seen, their original petition was based upon the ground that the action was one arising under the Constitution and laws of the United States. The amended petition still insists upon this, and undertakes in much detail to show how that is the case. The contention of the defendants resolves itself into this: That while Powers was appointed receiver in a case of which the Circuit Court of the United States for the Eastern District of Kentucky had jurisdiction by reason alone of the diverse citizenship of the parties, yet that under the judgment appointing the receiver certain orders were entered which the receiver was obeying, that in rendering this obedience the things were done of which the plaintiff complains, and that these facts make plaintiff's case one which arises under the Constitution and laws of the United States. We cannot, for the reasons heretofore stated, agree with this conclusion of the pleader. Besides, it is an established proposition in the law of removal of cases, as stated in the *Gableman Case*, 179 U. S. 335, 21 Sup. Ct. 171, 45 L. Ed. 220, "that a case cannot be removed from a state court into the Circuit Court of the United States on the sole ground that it is one arising under the Constitution, laws, or treaties of the United States, unless that appears by the plaintiff's statement of his own claim, and, if it does not so appear, the want cannot be supplied by any statement in the petition for removal or in the subsequent pleadings. *Walker v. Collins*, 167 U. S. 57 [17 Sup. Ct. 738, 42 L. Ed. 76]."

In the *Gableman Case*, at page 338 of 179 U. S., at page 172 of 21 Sup. Ct. (45 L. Ed. 220), in speaking of section 3 of the act of 1888, the court said:

"This act abrogated the rule that a receiver could not be sued without leave of the court appointing him, and gave the citizen the unconditional right to bring his action in the local courts and to have the justice and amount of his demand determined by the verdict of a jury. He ceased to be compelled to litigate at a distance or in any other forum or according to any other course of justice than he would be entitled to if the property or business were not being administered by the federal court. The object of the section is manifest, and it is equally plain that that object would be open to be defeated if the receiver could remove the case at his volition. The intention to permit this to be done cannot reasonably be imputed to Congress, and, moreover, such a right would be inconsistent with the general policy of the act."

Cases like *Central Trust Co. v. East Tennessee, etc., R. R. Co.* (C. C.) 59 Fed. 523, and several others cited in argument which seem to rule the other way, were decided prior to the decision in the *Gableman Case*, and, so far as inconsistent with the latter, must be regarded as overruled by it.

The argument of the learned counsel in support of the removal, if made before Congress, might be regarded as showing strong reasons for repealing the third section of the act, or so modifying it as to prevent the suing of a receiver without the leave of the court which appointed him in cases where the receiver, in what he was doing, was

obeying the express orders of such court. The plaintiff's petition does not show that to be the case, and we think, in view of the authority from which we have just quoted, that that state of fact cannot be made to appear for the first time in the defendants' petition for removal. The plaintiff's petition does show, as we take it, that the acts complained of were transactions of the receiver "in carrying on the business connected with such property," in the language of the third section of the act. Besides, Congress must be presumed to have understood that every act or transaction of any receiver in carrying on the business connected with the property in his hands was done under the express orders of the court which appointed him and which conferred upon him all of his powers. Such orders furnish the sole basis of every act of the receiver, and the contention of the receiver here would defeat the plain intent of the legislation.

We have no doubt that the case comes within the decision in the Gableman Case, and that the motion to remand must be sustained.

In re BAILEY.

(District Court, D. Utah. February 21, 1910.)

No. 1,254.

1. BANKRUPTCY (§ 396*)—ASSETS—HOMESTEAD—MORTGAGE.

Since homestead property does not pass to a bankrupt's trustee, the fact that it was mortgaged to certain creditors does not make it assets to be administered in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 396.*]

2. BANKRUPTCY (§ 311*)—PREFERENCES—SURRENDER.

The surrender of a preference contemplated by Bankr. Act July 1, 1898, c. 541, § 57, subd. "g," 30 Stat. 560 (U. S. Comp. St. 1901, p. 3443), must be to the trustee, and not to the bankrupt, nor to any other person.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 311.*]

3. BANKRUPTCY (§ 399*)—MORTGAGES—UNLAWFUL PREFERENCE—EXEMPT AND NONEXEMPT PROPERTY.

A mortgage on both exempt and nonexempt property constituting an unlawful preference, is only voidable by the mortgagor's trustee in bankruptcy as to the nonexempt property.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 399.*]

4. BANKRUPTCY (§ 311*)—MORTGAGES—RELEASE.

A mortgage on a bankrupt's exempt and nonexempt property constituting an unlawful preference, was not required to be released so far as the exempt property was concerned as a condition to the mortgagee's right to prove the debt secured, but only so far as it covered assets of the bankrupt which were a fund for creditors.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 311.*]

5. BANKRUPTCY (§ 310*)—CLAIMS—"SECURED CREDITORS."

A creditor of a bankrupt holding a mortgage on exempt property is not a "secured creditor" within Bankr. Act 1898, § 1(23), providing that secured creditors shall include one who has security for his debt on the property of the bankrupt of a nature to be assignable under the act, or who owns such a debt for which some indorser, surety, or other person sec-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ondarily liable for the bankrupt, has such security on the bankrupt's assets.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 310.*]

For other definitions, see Words and Phrases, vol. 7, p. 6385.]

6. MARSHALING ASSETS AND SECURITIES (§ 3*) — SUPERIOR EQUITIES — HOMESTEAD—EXEMPTIONS.

Where a creditor has a mortgage on the debtor's exempt homestead, and also the right to prove his debt against the debtor's estate in bankruptcy, the debtor's homestead equity is superior to the rights of general creditors, who are not, therefore, entitled to have the assets marshaled and to compel the secured creditor to first exhaust his security before resorting to the general assets, under the rule that assets will not be marshaled to the disadvantage of the holder of an equal equity.

[Ed. Note.—For other cases, see Marshaling Assets and Securities, Cent. Dig. § 3; Dec. Dig. § 3.*]

Bankruptcy proceedings against A. H. Bailey. On petitions to review a referee's order denying the application of general creditors for the rejection of claims or for their subrogation to the claimants' right to certain security. Affirmed.

Joseph Chez, for bankrupt.

Agee & McCracken, for petitioning creditors Florence H. Bailey, Florence J. Hearst, and Ethel L. Turner.

A. E. Pratt, for First Nat. Bank of Ogden.

C. R. Hollingsworth, for trustee.

MARSHALL, District Judge. The bankrupt was entitled to a homestead exemption in the amount of \$2,000. He owned two parcels of land each of the value of \$1,250, and claimed his exemption in the entirety of parcel No. 1, and the further sum of \$750 of the value of parcel No. 2. Within four months next preceding the filing of the petition in bankruptcy, he had executed a mortgage of parcel No. 2 to his wife, Florence H. Bailey, and to Florence J. Hearst and Ethel L. Turner to secure a pre-existing debt of \$600 and interest, and with intent to unlawfully prefer those creditors. The mortgagees proved their claim as general creditors, and tendered a release of the mortgage, admitting the unlawful preference. Their claim was approved by the referee. Subsequently, a general creditor, and also the trustee, filed petitions with the referee to re-examine this claim, and asked that its allowance should be vacated; and that the value of the security should be credited on the claim to the extent of the exempt property mortgaged, or else that the trustee, for the benefit of the general creditors, should be subrogated to the rights of the mortgagee with respect to the exempt property, as a condition to the allowance of the claim as unsecured. The referee denied these petitions; and the present petitions for review seek a reconsideration of his action.

Since the trustee acted in the matter, it is unnecessary to consider whether a general creditor whose rights were not exceptionally affected could ask the re-examination of this claim. Certain principles of law applicable to this situation are beyond dispute, and may be

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

stated briefly. The title to the homestead property did not pass to the trustee. The fact that it was mortgaged to certain creditors did not make it assets to be administered in bankruptcy. *Lockwood v. Exchange Bank*, 190 U. S. 294, 23 Sup. Ct. 751, 47 L. Ed. 1061; *In re Nye*, 133 Fed. 33, 66 C. C. A. 139. The surrender of the preference contemplated by section 57, subd. "g," of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3443]), must be a surrender to the trustee and not to the bankrupt or to any other person. *In re Currier*, Fed. Cas. No. 3,492, 2 Lowell, 436. A mortgage constituting an unlawful preference, where it includes both exempt and nonexempt property, is only voidable by the trustee as to the nonexempt property, and remains a valid mortgage as to the exempt property. *In re Tollett*, 106 Fed. 866, 46 C. C. A. 11, 54 L. R. A. 222; *Vitzthum v. Large* (D. C.) 162 Fed. 685; *In re Eash* (D. C.) 157 Fed. 996. It follows that the mortgage in question was not required to be released so far as the exempt property was concerned as a condition to the proof of claim on the debt secured by it, but it was necessary to surrender it so far as the assets of the bankrupt were a fund for creditors.

The question presented by the petitions for review may then be considered as if the mortgage creditor had only surrendered all claims under their mortgage to priority in the distribution of the bankruptcy estate, but had preserved their mortgage in respect to the exempt property. Under this state of facts, were they to be considered as secured creditors and only entitled to be paid a dividend on the unpaid balance after converting the security held by them and crediting the proceeds on their debt under the provisions of section 57, subd. "h," of the Bankruptcy Act. Section 1(23) of the act defines "secured creditors" as follows:

"'Secured creditors' shall include a creditor who has security for his debt upon the property of the bankrupt of a nature to be assignable under this act, or who owns such a debt for which some indorser, surety, or other persons secondarily liable for the bankrupt has such security upon the bankrupt's assets."

As the exempt property was not of a nature to be assignable under the act, it follows that these creditors, after the surrender of their unlawful preference, were not secured creditors, as the term is there used. There is no express provision of the act which precluded them from proving their entire claim as unsecured creditors against the bankrupt's estate. But it is argued that the equitable principle of marshaling is applicable; that the mortgage creditors had a right to resort to two funds for a satisfaction of their claim, while the general creditors are restricted to the one, and hence, the former will either be required to first exhaust the fund applicable to their debt alone before resorting to the other; or, the general creditors will be subrogated to their right as to such fund. The rule of marshaling rests on equitable principles and will only be applied when equitable, and never to the disadvantage of a holder of an equal equity. So it has been held that "where judgment is recovered against two codefendants, and execution thereon is levied upon the property of one of them,

and the other is adjudged bankrupt, the judgment creditor may prove his claim against the bankrupt as unsecured" (In re Headley [D. C.] 97 Fed. 765); and also, "In a proceeding in bankruptcy, a creditor of the firm, holding security upon the separate property of one of the partners, may prove his entire claim against the joint estate without releasing his security, though the member whose individual assets constitutes the security, owes no individual debts" (In re Thomas, Fed. Cas. No. 13,886); and to the same effect are *Ex parte Whiting*, Fed. Cas. No. 17,573; *Case of Howard*, Fed. Cas. No. 6,750; *In re Holbrook*, Fed. Cas. No. 6,588; *Case of Plummer*, 1 Phil. Ch. 56. Here, I think the estates are to be considered as different. In the ordinary case where the creditor with a right to one fund insists on the marshaling of the securities of the creditor who can resort to two, the creditor so seeking a marshaling has a superior equity to the debtor; but not so as to a homestead exemption. The Legislature, in providing for this exemption, has formulated as a rule of public policy the superiority of right of a debtor to the exempt property over that of his creditors to the payment of their debts. It has said that it is more important that the debtor be not entirely stripped of his property than that his creditors be paid. So that, as to such property, it cannot be said that the general creditor has a superior equity. Many state courts have refused to marshal securities under these circumstances. *Mitchelson v. Smith*, 28 Neb. 583, 44 N. W. 871, 26 Am. St. Rep. 357; *Colby v. Crocker*, 17 Kan. 529; *La Rue v. Gilbert*, 18 Kan. 220; *McLaughlin v. Hart*, 46 Cal. 638; *Wise v. Williams*, 88 Cal. 30, 25 Pac. 1064. The case of *Colby v. Crocker*, supra, was cited with approval by the Circuit Court of Appeals of this circuit in *Re Nye*, 133 Fed. 33, 36, 66 C. C. A. 139, and, in fact, that decision seems to rest on the same principle. I am aware that there are many authorities contra. In *re Sisler* (D. C.) 76 Fed. 402; *Fenley v. Poor*, 121 Fed. 739, 58 C. C. A. 21; *In re Meredith* (D. C.) 144 Fed. 230; *In re Sauthoff*, Fed. Cas. No. 12,379.

The first two of these cases must be considered as overruled by *Lockwood v. Exchange Bank*, supra, and as to the last, Judge Lowell said, in his *Treatise on Bankruptcy*, § 409:

"It was held by a late able judge that, if the bankrupt has given a mortgage upon property which is expressly exempted from the decree, such as a homestead, the general creditors have an equity to require him to apply his security before proving. This decision contravenes the general rule, and its soundness is doubted."

The general rule as to crediting securities is thus stated in section 407 of the same treatise:

"The property which must be credited is only that which, if surrendered, would increase the assets against which the proof is offered; because the practice is only excused by a benefit to the general body of the creditors. This reason is so obvious that the French Code, which speaks in very general terms of all secured creditors, is so interpreted by the best writers. *Alauzet*, No. 2,662."

It follows that the action of the referee must be affirmed and the petitions for review dismissed; and it is so ordered.

HUBBARD v. CHICAGO, M. & ST. P. RY. CO.

(Circuit Court, D. Minnesota. February 24, 1910.)

1. REMOVAL OF CAUSES (§ 11*)—STATUTES—CONSTRUCTION.

Judiciary Act March 3, 1887, c. 373, § 1, 24 Stat. 552, as amended by Act Aug. 13, 1888, c. 866, 25 Stat. 433 (U. S. Comp. St. 1901, p. 509), provides that any suit of a civil nature at law or in equity arising under the Constitution or laws of the United States of which the Circuit Courts of the United States are given original jurisdiction by section 1 may be removed from the state court by the defendant to the Circuit Court of the United States for the proper district. *Held*, that the clause "of which the Circuit Courts of the United States are given original jurisdiction" refers to the general grant of jurisdiction contained in section 1, and not to the particular court in which the action must be brought according to the terms of the last part of such section.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 81; Dec. Dig. § 11.*]

2. REMOVAL OF CAUSES (§ 11*)—COURT TO WHICH REMOVAL SHOULD BE MADE.

The rule that a case cannot be removed to the federal Circuit Court unless it could have been commenced therein refers to the particular Circuit Court to which removal is sought.

[Ed. Note.—For other cases, see Removal of Causes, Dec. Dig. § 11.*]

3. REMOVAL OF CAUSES (§ 11*)—RIGHT TO REMOVAL.

Since by the terms of Judiciary Act March 3, 1887, c. 373, § 1, 24 Stat. 552, as amended by Act Aug. 13, 1888, c. 866, 25 Stat. 433 (U. S. Comp. St. 1901, p. 508), an action for injuries based on Federal Employer's Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1909, p. 1171), between citizens of Wisconsin could only be brought originally in the Circuit Court of the United States sitting in the state of Wisconsin for the district in which the defendant resided, federal jurisdiction depending on the contention that the case was one arising under the laws of the United States, and, such suit having been brought in the state courts of Minnesota, it was not removable by the defendant over plaintiff's protest to the federal Circuit Court in the district of Minnesota.

[Ed. Note.—For other cases, see Removal of Causes, Dec. Dig. § 11.*]

4. COURTS (§ 276*)—FEDERAL COURTS—VENUE.

Where there is in fact a controversy between citizens of different states, the parties can confer jurisdiction on a particular federal Circuit Court, though it is not the circuit court of the residence of either plaintiff or defendant.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 815; Dec. Dig. § 276.*]

5. COURTS (§ 276*)—FEDERAL COURTS—JURISDICTION—CONTESTED BETWEEN CITIZENS—VENUE.

Where a case involves a federal question, the parties may agree to try it in a federal district other than that of which the defendant is an inhabitant, notwithstanding Judiciary Act March 3, 1887, c. 373, § 1, 24 Stat. 552, as amended by Act Aug. 13, 1888, c. 866, 25 Stat. 433 (U. S. Comp. St. 1901, p. 508), providing that cases involving federal questions can be brought only in the district where the defendant resides.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 815; Dec. Dig. § 276.*]

6. REMOVAL OF CAUSES (§ 106*)—FEDERAL JURISDICTION—VENUE—REMAND—WAIVER.

Where a petition for removal was defective on its face in that it stated no facts showing a removable cause, the fact that plaintiff before moving to remand took the deposition of a witness under a notice headed

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"United States Circuit Court, District of Minnesota, Third Division," and that the deposition was filed in such court, no transcript from the state court having at that time been filed therein, did not waive plaintiff's right to have the cause remanded under the rule that where the petition states no ground for removal, a state court is not deprived of its jurisdiction, and that jurisdiction is not conferred on the Circuit Court by the mere filing of a petition and bond.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 216; Dec. Dig. § 106.*]

7. REMOVAL OF CAUSES (§ 90*)—ORDER OF REMOVAL.

Since no order of removal is necessary, where removal of a cause to a federal court is proper, an order of removal by the judge of the state court confers no jurisdiction on the federal court.

[Ed. Note.—For other cases, see Removal of Causes, Dec. Dig. § 90.*]

8. REMOVAL OF CAUSES (§ 25*)—PETITION—FEDERAL QUESTION.

A petition for the removal of a cause as involving a federal question alleging that the cause was one arising under the laws of the United States, to wit, Employer's Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1909, p. 1171), was insufficient, where there was no statement in the complaint, answer, or petition that there was any dispute between the parties as to the construction or effect of the act, the fact that plaintiff may base his right to recover on such act not being sufficient to justify a removal.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 58, 59; Dec. Dig. § 25.*]

At Law. Action by J. A. Hubbard against the Chicago, Milwaukee & St. Paul Railway Company for personal injuries. Motion to remand the cause to the state court. Granted.

Barton & Kay, for plaintiff.

F. W. Root and N. J. Wilcox, for defendant.

WILLARD, District Judge. 'The plaintiff brought this action in the district court of Ramsey county, in the state of Minnesota, to recover the sum of \$35,500 for personal injuries suffered by him by reason, as he alleged, of the negligence of the defendant. The complaint stated that both the plaintiff and the defendant were citizens of the state of Wisconsin, and alleged facts which would seem to bring the case within the provisions of the act of Congress of April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1909, p. 1171)—the employer's liability act. The questions now to be decided are presented by a motion to remand.

Section 1 of the Act of March 3, 1887, c. 373, 24 Stat. 552, relating to the jurisdiction of the Circuit Courts, as amended by the Act of August 13, 1888, c. 866, 25 Stat. 433 (U. S. Comp. St. 1901, p. 508), provides in part as follows:

"That the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the Constitution or laws of the United States. * * * But no person shall be arrested in one district for trial in another in any civil action before a Circuit or District Court; and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

Section 2 of the act provides in part as follows:

"That any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, * * * of which the Circuit Courts of the United States are given original jurisdiction by the preceding section, which may now be pending, or which may hereafter be brought, in any state court, may be removed by the defendant or defendants therein to the Circuit Court of the United States for the proper district."

In this last section the sentence "of which the Circuit Courts of the United States are given original jurisdiction" refers to the general grant of jurisdiction contained in section 1, and not to the particular court in which the action must be brought according to the terms of the last part of said section. *Mexican National R. R. Co. v. Davidson*, 157 U. S. 201, 208, 15 Sup. Ct. 563, 39 L. Ed. 672. But those decisions of the Supreme Court which say that a case cannot be removed to the Circuit Court, unless it could have been commenced therein, refer to the particular Circuit Court to which removal is sought. In *Matter of Dunn*, 212 U. S. 374, 384, 29 Sup. Ct. 299, 301, 53 L. Ed. 558, it is said:

"The right to remove under the statute depends upon whether it could originally have been brought in the Circuit Court of the United States. *Traction Co. v. Mining Co.*, 196 U. S. 239, 245 [25 Sup. Ct. 251, 49 L. Ed. 462]; *Cochran, etc., v. Montgomery County*, 199 U. S. 260 [28 Sup. Ct. 58, 50 L. Ed. 182]. The question is then whether the United States Circuit Court for the proper district (Northern district of Texas) would have had jurisdiction of a suit commenced in that district by the plaintiffs against the railway company and the two individual defendants." In *re Winn*, 213 U. S. 458, 464, 29 Sup. Ct. 515, 53 L. Ed. 873.

This case having been commenced in the district court for Ramsey county in the state of Minnesota, the proper district within the meaning of the provision of section 2 above referred to was the district of Minnesota, and that division therein in which the county of Ramsey is situated. Act of March 3, 1887, c. 373, § 3, 18 Stat. 471, as amended by Act of March 3, 1888, c. 866, 25 Stat. 433 (U. S. Comp. St. 1901, p. 511); Act of Congress April 26, 1890, c. 167, 26 Stat. 72 (U. S. Comp. St. 1901, p. 374), relating to the district of Minnesota. If it could not be removed to the Circuit Court for this district it could not be removed at all. In *re State Insurance Co.*, 18 Wall. 417, 21 L. Ed. 904. The jurisdiction of the national courts depends in this case not upon diverse citizenship, but upon the claim that it is a suit arising under a law of the United States, namely, the Employer's Liability Act of 1908. By the terms of section 1 of the Act of 1887, if the action were to be brought in a Circuit Court of the United States, it could only be brought in the Circuit Court of the state of Wisconsin, in the district where the defendant resides. It could not have been brought originally in the Circuit Court for the district of Minnesota. *Macon Grocery Co. et al. v. Atlantic Coast Line R. R. Co. et al.* (January 17, 1910) 215 U. S. 501, 30 Sup. Ct. 184, 54 L. Ed. —. And when brought in a court of the state of Minnesota it could not be removed to the Circuit Court for the district of Minnesota. *Ex parte Wisner*, 203

U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264; dissenting opinion of Harlan, J., in the case of *Macon Grocery Co. v. Atlantic Coast Line R. R. Co.*, above cited. If the plaintiff had, without in any way recognizing the jurisdiction of the Circuit Court, appeared specially therein and moved to remand the case that motion would have been granted. The defendant, however, claims that the plaintiff has waived his right to remand and has consented to try the case in this court. It is settled that, where there is in fact a controversy between citizens of different states, the parties can confer jurisdiction upon a particular Circuit Court, although that is not the Circuit Court of the residence of either the plaintiff or the defendant. *Western Loan Co. v. Butte & Boston Mining Co.*, 210 U. S. 368, 28 Sup. Ct. 720, 52 L. Ed. 1101. In that case it was held that the defendant company waived the objection that it had been sued in the wrong district.

It has also been held that where a defendant has been sued in a state court, in a district in which he does not reside, by removing the case into the United States Circuit Court sitting in that district he waives his right to have the case brought in the district of his residence. In *re Moore*, 209 U. S. 490, 28 Sup. Ct. 585, 706, 52 L. Ed. 904. It was also held in that case that the plaintiff having followed the suit into the Circuit Court, and having there filed an amended petition and signed a stipulation giving time to the defendant to answer, and having entered into successive stipulations for a continuance of the trial in that court, had thereby consented to accept its jurisdiction. The same thing was also held in the case of *Kreigh v. Westinghouse & Co.*, 214 U. S. 249, 29 Sup. Ct. 619, 53 L. Ed. 984. Section 1 of the Act of 1887 gives jurisdiction to the Circuit Court (1) over cases involving federal questions, and (2) over controversies between citizens of different states. It provides that cases of the first class can be brought only in the district of the defendant, and cases of the second class only in the district of the plaintiff or the defendant. Where there is a controversy between citizens of different states, they can consent to try the case in a district other than the district of either the plaintiff or the defendant. It necessarily follows that where there is a case which involves a federal question, they can agree to try it in a district other than that of the defendant.

The facts relied upon in this case to show such a consent are these: A petition and bond for removal were filed in the state court on the 6th of January, 1910, and on the same day an order of removal was made by the judge of that court. The record, however, was not filed in this court until the 18th day of February, 1910. On February 5, 1910, the plaintiff gave notice to the defendant that it would on the 9th day of February take the deposition of a witness for the plaintiff, on the ground that such witness was about to depart from the state. This notice was signed, "Barton & Kay, Attorneys for Plaintiff." The deposition was taken on the day named before a notary public, and was by him returned with the notice and filed in this court on the 11th day of February. On the same day the plaintiff gave notice of a motion to remand the case to the state court. The notice for the taking of the deposition is headed, "United States Circuit Court, District of Minnesota, Third Division," and it is this fact upon which defendant relies

to show that the plaintiff has waived his right to have the case remanded.

It is important to notice that the petition stated no ground for removal. It was defective on its face. Moreover, it affirmatively appeared from the petition and the complaint, which by the petition was made a part thereof, that the case should be remanded, for it was shown that the right of removal was based upon the existence of a federal question, and that both the plaintiff and the defendant were residents of the state of Wisconsin. When the petition does state upon its face facts which show that the case is removable, the filing of the petition in the state court with the proper bond deprives that court of jurisdiction, and at once confers jurisdiction on the Circuit Court, even before the record is filed therein. *R. R. Co. v. Koontz*, 104 U. S. 5, 26 L. Ed. 643; *Traction Co. v. Mining Co.*, 196 U. S. 239, 25 Sup. Ct. 251, 49 L. Ed. 462. But where the petition states no ground for removal, the state court is not deprived of its jurisdiction, and the mere filing of such a petition cannot confer jurisdiction upon the Circuit Court. See *Donovan v. Wells-Fargo Co.*, 169 Fed. 363, 94 C. C. A. 609, 22 L. R. A. (N. S.) 1250. Nor can an order of the judge of the state court confer such jurisdiction upon the national court. In *re State Insurance Co.*, 18 Wall. 417, 21 L. Ed. 904. Such an order is not necessary where the removal is proper. *Kern v. Huidekoper*, 103 U. S. 485, 490, 26 L. Ed. 354. At the time the notice relied upon was given this court not only did not have jurisdiction of the case, but had not taken any steps to assert such jurisdiction; and while the notice was entitled in this court, yet under the circumstances, this was not such an act as showed unequivocally the purpose of the plaintiff to waive his right to have the case remanded when the record was filed here. The case does not really belong in this court.

There is another ground on which the motion must be granted. While the petition alleges that the case is one arising under the laws of the United States, the only facts appearing are that it is a case which comes within the Employer's Liability Act of 1908. But there is no statement in the complaint, answer, or petition that there is any dispute between the parties as to the construction or effect of that act.

The fact that the plaintiff may base his right to recover thereon is not sufficient to justify a removal. *Nelson v. Southern Ry. Co.* (C. C.) 172 Fed. 478, and cases therein cited.

The motion to remand is granted.

Ex parte LI DICK.

(Circuit Court, N. D. New York. March 16, 1910.)

1. ALIENS (§ 53*)—"ENTRY IN VIOLATION OF LAW"—DEPORTATION.

Failure of an alien to enter at a port of entry and submit to examination and inspection and entering surreptitiously is an "entry in violation of law," so that an alien so entering is found in the United States in violation of the Immigration Act Feb. 20, 1907, c. 1134, § 36, 34 Stat. 908 (U. S. Comp. St. Supp. 1909, p. 466), and is subject to deportation.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 53.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. ALIENS (§ 54*)—DEPORTATION—PORT OF RETURN.

Immigration Act Feb. 20, 1907, c. 1134, § 35, 34 Stat. 908 (U. S. Comp. St. Supp. 1909, p. 466), provides that the deportation of aliens arrested within the United States after entry, and found to be illegally therein, shall be to the trans-Atlantic or trans-Pacific ports from which such aliens embarked for the United States; or, if such embarkation was for foreign contiguous territory, to the foreign port at which such aliens embarked for such territory. *Held* that, where aliens come to the United States by sea from trans-Atlantic or trans-Pacific ports, such section fixes the place, on their illegal entry, to which they shall be returned, namely, to the trans-Atlantic or trans-Pacific port from which they embarked for the United States or contiguous territory, regardless of their native country or the country of their former residence.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 54.*]

3. ALIENS (§ 18*)—REGULATION—ADMISSION AND REJECTION—DEPORTATION.

Congress has power to regulate and control the admission, rejection, and deportation of aliens.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 70-72; Dec. Dig. § 18.*]

4. ALIENS (§ 32*)—IMMIGRATION ACT—APPLICATION TO CHINESE.

Immigration Act Feb. 20, 1907, c. 1134, § 43, 34 Stat. 911 (U. S. Comp. St. Supp. 1909, p. 469), providing that it shall not repeal, alter, or amend existing laws relating to immigration or exclusion of Chinese or of persons of Chinese descent, is to be construed in connection with the Chinese exclusion laws, so that a Chinese person entering the United States surreptitiously and without right to enter may be deported in accordance with the regulations of the Department of Commerce and Labor under the immigration act, and is not entitled to trial and examination before a justice, judge, or commissioner under the exclusion laws.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 32.*]

Li Dick seeks discharge on writ of habeas corpus claiming that he is illegally held and deprived of his liberty on a warrant of deportation made January 29, 1910, by the Acting Secretary of Commerce and Labor commanding John H. Clark, Commissioner of Immigration, to return said Li Dick to "the country whence he came." Writ dismissed.

See, also, 174 Fed. 674.

Meyer Greenberg, for petitioner.

H. E. Owen, Ass't U. S. Atty.

RAY, District Judge. The warrant of deportation, signed by the Acting Secretary of Commerce and Labor, made January 29, 1910, states that from proofs submitted to him, such secretary, after due hearing before Immigrant Inspector H. Edsell, held at Malone, N. Y. (Malone being a port of entry established by law), he has become satisfied "that Li Dick, alien, who landed at the port of Vancouver, B. C., per S. S. Empress of China, on the 26th day of September, 1909, is in this country in violation of the act of Congress approved February 20, 1907 [Act Feb. 20, 1907, c. 1134, 34 Stat. 898 (U. S. Comp. St. Supp. 1909, p. 447)], to wit: That the said alien entered the United States in violation of section 36 of the above act, and rule 24 of the immigration regulations, and without being inspected under any of the various provisions of the said act" and that the period of three years after landing has not elapsed. The warrant

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

then commands the commissioner of immigration "to return the said alien to the country whence he came at the expense of the steamship importing him"; also "authority is granted for the detail of an officer or employé to take charge of this alien and convey him to Vancouver, B. C., for deportation, the expenses involved, including services of an attendant to assist in delivery, at a nominal compensation and expenses both ways being authorized payable from the appropriation expenses of regulating immigration, 1910."

The evidence annexed to the return establishes that Li Dick, a Chinese alien, was apprehended and taken into custody on or about the 22d day of October, 1909, at or near Utica, N. Y., as one who had entered the United States surreptitiously and in violation of our immigration laws and rules and regulations a short time before. October 25, 1909, a warrant was duly issued which is set out in full in *Ex parte Li Dick* (D. C.) 174 Fed. 674, 675, and the case was fully inquired into, and all forms of law were complied with. Pending investigation Li Dick swore out a writ of habeas corpus which was disposed of as set forth in the report of that case, and the writ was dismissed. As this court indicated that Li Dick, if deported, might return and apply for admission on the ground he had obtained a commercial status here prior to his departure for China late in 1908 or early in 1909, and his return and entry to the United States in violation of said immigration laws, the Secretary of Commerce and Labor prior to closing the case fully investigated that question so as not to do a vain thing. Li Dick has told different and conflicting stories in regard to his being in the United States, and his going and coming. It is evident that much perjury has been committed by Li Dick and in his behalf, but it is not difficult from the evidence to find the truth to be that Li Dick is a Chinese alien, and one not entitled to be or remain in the United States or to go and come freely. He was connected with a firm of Chinese merchants at Newark, N. J., prior to his going to China in the latter part of 1908, or early in 1909, but on his departure he made no effort to arrange matters so as to make his return easy, assuming he was a Chinese merchant, and I think the evidence discloses that he had no such status. September 26, 1909, he landed at Vancouver, B. C., which is foreign territory contiguous to the United States, from steamship *Empress of China*, having embarked at a port in China for such foreign contiguous territory, intending to pass through Canada and thence surreptitiously into the United States without examination or inspection, and not at a port of entry, and hence in violation of our immigration laws, rules, and regulations. This he did, coming in by automobile in the night, in company with other Chinese aliens who were entering in the same way.

Section 36 of the immigration laws (Act Feb. 20, 1907), provides:

"Sec. 36. That all aliens who shall enter the United States except at the seaports thereof, or at such place or places as the Secretary of Commerce and Labor may from time to time designate, shall be adjudged to have entered the country unlawfully and shall be deported as provided by sections twenty and twenty-one of this act: Provided, that nothing contained in this section shall affect the power conferred by section thirty-two of this act upon the commissioner general of immigration to prescribe rules for the entry and inspection of aliens along the borders of Canada and Mexico."

Rule 31, relating to the deportation of aliens, provides:

"Rule 31. Deportation, Aliens Subject To.—Aliens of the following classes are subject to arrest, upon the warrant of the Secretary of Commerce and Labor, and to deportation to the country whence they came, at any time within three years after landing or entry: * * *

"(d) Aliens who are found to have entered the United States at any other place than at the seaports thereof or at one of the ports or places designated in rules 24 and 26 hereof, and aliens found to have entered at a seaport, but at any time or place other than as designated by the immigration officers." Sections 18, 38.

Rule 24 fixes ports of entry for aliens on the Canadian border, and says:

"And any alien who enters the United States across such border at any other point shall be deemed to have entered the country unlawfully and shall be arrested and deported under sections 20, 21, and 35 of said act in the manner provided by rule 34 hereof," etc.

Rules 34 and 35 relate to procedure, and were complied with.

Section 20 of the act states that any alien who enters the United States in violation of law shall be taken into custody and "deported to the country whence he came at any time within three years after the date of his entry into the United States," and section 21 says that if the Secretary of Commerce and Labor is satisfied that an alien has been found in the United States in violation of this act, or that an alien is subject to deportation under the provisions of this act or of any law of the United States, he shall cause such alien within the period of three years after landing or entry therein to be taken into custody, and "returned to the country whence he came." The law and rules provide for examination and inspection, and require all aliens to submit thereto as a condition of entry.

Failure to enter at a port of entry, submitting to examination and inspection, and entering surreptitiously, is an entry in violation of law, and an alien who so enters is "found in the United States in violation of this act," viz., the immigration laws, and is subject to deportation. There is no question that a citizen of Canada or Mexico who enters the United States by land and in violation of the immigration laws would be deported to Canada or Mexico. That would be the country whence he came beyond all question. However, many aliens come to the United States by sea from trans-Atlantic and trans-Pacific ports, and some come from their native country, that of their residence, partly by land and partly by sea, some coming to Canada or Mexico by sea, and thence into the United States. The law does not in all cases deport the alien, subject to deportation, to the country of which he was a citizen and a resident when he departed therefrom for the United States. It contains the general provisions found in sections 20 and 21, referred to, and then by section 35 provides for the deportation of aliens coming by sea from a trans-Atlantic or a trans-Pacific port either to the United States direct, or first by sea to foreign contiguous territory, contiguous to the United States, and thence to the United States, thereby fixing and defining what is to be regarded as the country whence they came. That section (section 35) provides as follows:

"Sec. 35. That the deportation of aliens arrested within the United States after entry and found to be illegally therein, provided for in this act, shall be to the trans-Atlantic or trans-Pacific ports from which said aliens embarked for the United States; or, if such embarkation was for foreign contiguous territory, to the foreign port at which said aliens embarked for such territory."

I have just considered and decided this question in *Matter of Application of Wong You* and four others for a writ of habeas corpus, and will not further repeat what is there said.

Congress has the power to regulate and control the admission and rejection and deportation of aliens. By section 35 it returns a certain class to the foreign port from which they embarked for the United States direct or from which they embarked for foreign contiguous territory, and thence came to the United States. The immigration laws are to be read and construed as a whole and effect given to all its provisions. *Washington Market Co. v. Hoffman*, 101 U. S. 112, 25 L. Ed. 782; *Bernier v. Bernier*, 147 U. S. 242, 13 Sup. Ct. 244, 37 L. Ed. 152; *Pollard v. Bailey*, 20 Wall. 520, 22 L. Ed. 376. That Chinese aliens who enter the United States in violation and defiance of our immigration laws and rules, and are therefore found unlawfully in the United States, are not subject to deportation under and in accordance with such immigration laws and by the instrumentalities therein provided, is, in my judgment, an untenable position. The immigration act provides that:

"This act shall not be construed to repeal, alter, or amend existing laws relating to the immigration or exclusion of Chinese persons or persons of Chinese descent."

This is not a declaration that the act and all or any of its provisions are inapplicable to Chinese aliens. If they enter, they must enter at the designated ports of entry. If they enter, they must submit to the examination and inspection provided for all aliens. A Chinese anarchist, or a Chinese afflicted with one of the loathsome or infectious diseases mentioned in the act, is no more entitled to admission than is an Italian or Japanese alien. If a Chinese alien sees fit to enter surreptitiously and in violation of law, he is then illegally in the United States, and Congress has confided to the Department of Commerce and Labor the power and duty of ascertaining the fact and, if shown, of deporting the offender. In *Looe Shee v. North*, 170 Fed. 572, 95 C. C. A. 646, and 24 Op. Atty. Gen. 706, this power, as to Chinese aliens, is upheld. This court considered the question in *Ex parte Li Dick* (D. C.) 174 Fed. 674, and on this point, after a full examination and further consideration, adheres to the proposition that a Chinese alien who surreptitiously enters the United States in violation of the immigration act may be deported under the provisions of that act, and that such an entry so gained does not entitle him to a hearing before a United States judge or commissioner. I do not think the law is in such shape that a Chinese alien who surreptitiously enters, and thereby violates and evades compliance with the immigration law, thereby also evades the Department of Com-

merce and Labor and its jurisdiction to deal with him under the provisions of that act and becomes entitled to a trial and examination before a justice, judge, or a commissioner, under the provisions of the Chinese exclusion laws. The two acts can stand and be enforced together. Two remedies may be provided for the same illegal act, and either, or, in some cases, both, enforced. If Congress had intended to exclude Chinese aliens from the operation of the immigration laws, it would have done so by apt words. It would have been easy to do so. We find no word or expression indicating such a purpose. Again, the Chinese exclusion laws are aimed principally at Chinese laborers, and certain Chinese are not affected by them. The regulations established provide (rule 3) that "Chinese aliens shall be examined as to their right to admission to the United States under the provisions of the law regulating immigration as well as under the laws relating to the exclusion of Chinese," etc., and their status under the immigration laws is first to be ascertained and determined, and then their status under the exclusion laws. Rule 25 provides for the temporary departure of a Chinese merchant domiciled in the United States, and tells what shall be done by him. Li Dick did not comply with this rule or make any pretence of complying. In fact, his statement is, in effect, that he intended to avoid compliance therewith as well as with the immigration laws. Rule 49 expressly provides that Chinese aliens arrested and tried for a violation of the Chinese exclusion laws are to be deported only on the order of a justice, judge, or commissioner. When, however, the arrest, etc., is for a violation of the immigration laws, such aliens are to be deported according to the provisions of that act. I think the Department of Commerce and Labor has been careful to preserve the distinction between violation of the immigration laws and violation of the Chinese exclusion laws as well as the procedure and mode of enforcement, including deportation, and that the distinctions were observed in this case. Li Dick did not come as a Chinese merchant seeking to enter, or as a domiciled Chinese merchant seeking to return, but, being a Chinese alien coming from China to the United States intending to remain and live here, he surreptitiously entered in the night, in violation and defiance of our immigration laws to which he was subject. Under those laws and rules and regulations established for their enforcement, he was properly dealt with. The writ is dismissed, and Li Dick remanded, to be dealt with according to law.

JACOBSON v. CHICAGO, R. I. & P. RY. CO. et al.

(Circuit Court, D. Minnesota. March 1, 1910.)

1. REMOVAL OF CAUSES (§ 61*)—DIVERSITY OF CITIZENSHIP—SEPARABLE CONTROVERSIES—ALLEGATIONS IN PLEADING.

Where the complaint states in good faith that a cause of action against a resident and nonresident of the state is joint, it cannot be removed to a federal court.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 115; Dec. Dig. § 61.*]

Separate controversy as ground for removal of cause to federal court, see notes to Robbins v. Ellenbogen, 18 C. C. A. 86; Mecke v. Valleytown Mineral Co., 35 C. C. A. 155.]

2. REMOVAL OF CAUSES (§ 86*)—DIVERSITY OF CITIZENSHIP—IMPROPER JOINDER—GOOD FAITH.

That a resident employé is joined with a nonresident corporation to keep the cause of action out of the federal courts is not conclusive on the question of plaintiff's good faith as affecting the right of removal.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 79; Dec. Dig. § 36.*]

Fraudulent joinder of parties to prevent removal to federal court, see note to Offner v. Chicago & E. R. Co., 78 C. C. A. 362.]

3. REMOVAL OF CAUSES (§ 47*)—DIVERSITY OF CITIZENSHIP—IMPROPER JOINDER—GOOD FAITH.

The question of fraud or good faith as affecting the right to remove a cause to the federal court is not presented by the plaintiff's claim that the liability of the master and servant is joint, but would arise where defendant denies the truth of the facts stated in the complaint, and so conclusively establishes that the relation of master and servant did not exist, or that the claim of the plaintiff was for other reasons false in fact, that the complaint could not have been presented in good faith.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 79; Dec. Dig. § 47.*]

4. REMOVAL OF CAUSES (§ 36*)—DIVERSITY OF CITIZENSHIP—IMPROPER JOINDER—GOOD FAITH.

In an action against a railroad company for injuries to plaintiff by the giving way of the floor of a platform at a coal dock at a small station, plaintiff's claim that it was the duty of the station agent to inspect and repair the platform, so as to render him jointly liable with the railroad company, cannot be said to be in bad faith, so as to authorize the removal of the case to the federal court.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 79; Dec. Dig. § 36.*]

5. REMOVAL OF CAUSES (§ 36*)—DIVERSITY OF CITIZENSHIP—IMPROPER JOINDER—GOOD FAITH.

The question whether a station agent's nonfeasance in failing to inspect a platform on which plaintiff was working rendered him liable to the plaintiff for plaintiff's injuries is such a doubtful one that a claim of joint liability of the railroad company and agent cannot be said to be made in bad faith, so as to authorize the removal of the cause to the federal court.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 79; Dec. Dig. § 36.*]

Action by Henry P. Jacobson against the Chicago, Rock Island & Pacific Railway Company and another. On motion to remand case to state court. Granted.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

J. M. Lynch and O. H. O'Neill, for plaintiff.
Stringer & Seymour, for defendants.

WILLARD, District Judge. Prior to the case of *Alabama Great Southern Railway Company v. Thompson*, 200 U. S. 206, 26 Sup. Ct. 161, 50 L. Ed. 441, or at least prior to the case of *Chesapeake & Ohio Ry. Co. v. Dixon*, 179 U. S. 131, 21 Sup. Ct. 67, 45 L. Ed. 121, the Circuit Courts, when considering motions to remand to the state courts, had been in the habit of deciding for themselves whether the negligent act of the servant in which the master personally took no part created a joint liability or a separate one. The decisions upon this point were not uniform. It was said in the *Dixon* Case that "the question was a somewhat nice one"; in the *Thompson* Case it was said that "there was much conflict in the authorities." These cases, and particularly the *Thompson* Case, put an end to the practice above referred to, and decided that it was not for the Circuit Court, but for the plaintiff, to say whether the liability was a joint or a several one. If the plaintiff stated in his complaint that it was joint, the case could not be removed to the federal court, although he was wrong in his view of the law. The question whether he was right or wrong was one which he was entitled to have tried in the state court.

There was one condition, however, imposed upon him, and that was that he should act in good faith. It is probably true that in these cases the employes are always joined for the purpose of keeping the actions out of the federal courts. That, however, is not conclusive upon the question of good faith. *Illinois Central Railroad Company v. Sheegog*, 215 U. S. 308, 30 Sup. Ct. 101.¹ If such employes are not fraudulently joined, the case cannot be remanded. In view of the conflict in the authorities, it cannot be said that a plaintiff who claims that the liability of the master and the servant is joint does not present such a claim in good faith. The question of fraud cannot arise upon such a claim only. That question would arise where the defendant denies the truth of the facts stated in the complaint, and so conclusively establishes by the evidence that the relation of master and servant did not exist, or that the claim of the plaintiff was for other reasons false in fact, that the court is forced to the conclusion that the complaint against the employes could not have been presented in good faith. Such were the cases (cited by the defendant) of *Wecker v. National Enameling Company*, 204 U. S. 176, 27 Sup. Ct. 184, 51 L. Ed. 430, *McGuire v. G. N. Ry. Co. (C. C.)* 153 Fed. 434, 439, and *Prince v. Illinois Central R. R. Co. (C. C.)* 98 Fed. 1, 2.

This is an action brought by the plaintiff to recover damages for personal injuries suffered by him while in the employ of the defendant railroad company as a coal shoveler at its station of Inver Grove, Minn. It appears from the evidence presented upon this motion that Inver Grove is a very small station on defendant's line, that the defendant Hutton was the station agent and yardmaster at that place, and there is nothing to indicate that there was any other person in the employ of the defendant company at that station who was superior to Hutton. He employed the plaintiff, directed him where to work, and delivered to him checks for his pay from month to month.

¹ 54 L. Ed. —.

While working as a coal shoveler upon the platform of the so-called coal dock, plaintiff was injured, as he alleges, by the giving way of the floor of the platform. He says that the defendant Hutton instructed him to work there, and that it was the duty of Hutton to inspect the platform and keep it in repair. In his affidavit presented upon the hearing of this motion the plaintiff stated that Hutton was the only one in authority there, that Hutton supplied the plaintiff with everything he required, and that he never received anything from any one except Hutton. He also stated that he had reported at one time to Hutton that the crane was out of repair, and that Hutton caused it to be repaired; that at another time plaintiff reported that the platform was out of repair, and that Hutton examined it and caused it to be repaired; and that no one but Hutton ever made any inspection there.

Hutton in his affidavit denied that the duty of making an inspection of this platform was imposed upon him. He admitted that the plaintiff had at one time reported it as being out of repair, and that he had given notice to the bridge and engineer department, and that they had repaired it. He said that it was his practice, when he noticed anything out of repair in connection with the yard or the station, to report it to the proper officials, but that it was not his duty so to do.

The evidence upon this question as to whether it was or was not the duty of Hutton to inspect this platform does not make so clear a case in favor of the defendants as to indicate that the presentation by the plaintiff of a claim that it was his duty is so unfounded as to be proof of bad faith. It would in fact seem strange if the chief employé in charge of the station was not affirmatively bound by his contract of employment to exercise a general supervision over the station grounds and the appliances used therein, and to report when they were out of repair. The evidence presented by the defendants to the effect that this coal dock and platform were under the charge of the bridge and engineer department and the fuel department is not sufficient to show that the defendant Hutton had no duty in connection with their inspection. The most that can be said in favor of the defendants is that upon the evidence presented it is doubtful whether by the terms of his employment he was or was not charged with the duty of inspecting the platform. That question the plaintiff has a right to have decided in the state court.

But it is said by the defendants that, even if the defendant Hutton was charged with the duty of inspecting this platform, the complainant states no cause of action against him, for it alleges only a duty imposed upon him in favor of his employer, the railroad company, and for a breach of that duty by a failure to inspect no cause of action arises in favor of the plaintiff. In other words, for nonfeasance an action lies only in favor of the master, and not in favor of a third person; the theory being that an employé in such cases owes no duty to such third person. This contention presents a question of law, and it must be determined where that question should be decided. Which court has the right to say whether the complaint states a cause of action or not?

The case of *Alabama Southern Ry. Co. v. Thompson* was decided on the principle that the cause of action was what the plaintiff in good faith said it was. If that is true when the question is whether the liability is joint or several, it must be true also when the question is whether the facts alleged show any liability at all on the part of the defendant employé. If the plaintiff in good faith says that they do, the case cannot be removed. So upon this branch of the case, as upon the other, the point to be determined is whether the plaintiff has acted in good faith in asserting that Hutton is liable to him for failure to inspect. An examination of the authorities will show that this is a doubtful question. See the cases cited in the note to *Mayer v. Thompson-Hutchison Building Company*, from *Alabama*, reported in 28 L. R. A. 433.

A plaintiff, who claims that under such circumstances as appear in this case mere nonfeasance creates a liability in his favor, cannot be said to make such claim in bad faith, even though the court should be of the opinion that the complaint would be held bad on a demurrer presented by the employé. In the *Alabama Southern Railway Company Case* the court said on page 215 of 200 U. S., on page 163 of 26 Sup. Ct. (50 L. Ed. 441):

"And while the *Powers Case* [169 U. S. 92, 18 Sup. Ct. 264, 42 L. Ed. 673] was decided on the ground of the right to remove after the local defendants had been dismissed from the action by the plaintiff, it is patent from the language just quoted from the opinion that, conceding the misjoinder of causes of action appeared on the face of the petition, that fact was not decisive of the right of the nonresident defendant to remove the action to the federal court."

The motion to remand is granted.

In re G. & K. TRUNK CO.

(District Court, W. D. Pennsylvania. February 28, 1910.)

No. 5,029.

1. SALES (§ 454*)—CONDITIONAL SALE—DISTINCTION FROM BAILMENT.

A contract for the delivery of showcases, by which title is retained until the price and all costs have been paid, is one of conditional sale, and not of bailment.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 1324-1334; Dec. Dig. § 454.*]

What constitutes a contract of conditional sale, see note to *Dunlop v. Mercer*, 86 C. C. A. 448.]

2. SALES (§ 472*)—CONDITIONAL SALES—EFFECT AS TO THIRD PERSONS.

In Pennsylvania a contract of conditional sale is void as to third persons.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 1366-1376; Dec. Dig. § 472.*]

3. BANKRUPTCY (§ 140*)—ADMINISTRATION OF ESTATE—TITLE OF TRUSTEE.

Where a bankrupt at the commencement of the proceedings is in possession of property under a contract of conditional sale made and to be performed in Pennsylvania, the trustee in bankruptcy, and not the vendor, is entitled to the property.

[Ed. Note.—For other cases, see *Bankruptcy*, Dec. Dig. § 140.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In the matter of the bankruptcy of the G. & K. Trunk Company. Petition by the Diamond Showcase Company to have certain cases declared to be its property. Petition dismissed.

Charles A. Locke, for trustee.

Roger Knox, for Diamond Showcase Co.

M. R. Trauerman, for purchaser.

ORR, District Judge. This is a petition of the Diamond Showcase Company to have certain showcases declared to be its property, and to require one who purchased the same from the receiver of the bankrupt to return the same to the petitioner. The showcases were delivered to the bankrupt under the following contract:

The Diamond Showcase Co.

Main Office and Factory, Cleveland, Ohio.

(Town) Pittsburg, Pa., Jan. 25, 1909.

The Diamond Showcase Co., Cleveland, Ohio—Gentlemen: Please enter our order for the following described (all glass) showcases, upon the terms, conditions, and at the prices enumerated below, to be set up at our store on or about April 1st, 1909.

It is understood that the showcases and fixtures herein proposed to be delivered and furnished are not now in existence, but are to be manufactured in performance of the contract arising on the acceptance hereof, and the same shall remain personal property after erection, and the title thereto shall not pass to the purchaser until the price and all costs representing the same, or any part thereof, shall have been fully paid.

Delivery is subject to delays, strikes, lockouts, fire, or exceptional actions of the elements, and any other causes beyond the control of this company.

There are no oral agreements outside this proposal.

No lamps furnished. Wires not connected to system at building.

Number of cases: 8.

Style: 10.

Shelves: 10" & 14" P. P. in 6° cases 10" & 14" wood 8° case.

Fixtures: Brackets.

Backs: Panel birch. German mirrors.

Floor: Parquet oak.

Doors: Opening 3 doors in 6° cases, 4 doors in 8° cases.

Base: 8" Creole, Ga., marble.

Electric wiring: Swing electric arms 2 in 6° & 3 in 8°.

Top: Glass.

Moulding: Mahogany inside.

Lettering: None.

Finish: Floor natural, mahogany on balance.

Outside marble measurements:	7	Width	72	Depth	26	Height	42.
	1		96	x	26	x	42.

Price: \$646.00.

There is no dating on this bill. 78.00 on delivery.

Terms: 10 days net from date of shipment; Bal. in notes.

Salesman: H. A. Marble.

G. & K. Trunk Co.

[Signed] Per J. D. Kabel.

The contract was made and was to be performed in Pennsylvania. It is a contract of conditional sale, and not of bailment. See Ott v. Sweatman, 166 Pa. 217, 31 Atl. 102, where many cases are cited and the distinction is carefully drawn between the two classes of contracts. In Stephens v. Gifford, 137 Pa. 219, 20 Atl. 542, 21 Am. St. Rep. 868, Mr. Justice Williams says:

"It is of the essence of a contract of bailment that the article bailed is to be returned in its own or some altered form to the bailor, so that he may have his own again."

This is quoted with approval in *Morgan-Gardner Elec. Co. v. Brown et al.*, 193 Pa. 351, 44 Atl. 459. The latter case is quite similar to the case at bar. There the contract provided for the delivery of goods by one person to another, with a retention of the legal title until certain promissory notes given for the goods should be paid, and without a provision for the return of the goods if the notes were not paid. The transaction was held to be a conditional sale, and not a bailment, although the contract was called a lease in the paper itself.

From the earliest times in Pennsylvania a contract of conditional sale has been held to be void as to third persons. *Ott v. Sweatman*, supra. A bona fide pawnee of an iron safe, pawned by the conditional vendee, was protected against the claim of the vendor in *Farrell v. Matthews*, 1 Phila. 557. A bona fide purchaser of a piano conditionally sold was similarly protected in *Dearborn v. Raysor*, 132 Pa. 231, 20 Atl. 690. Creditors of a conditional vendee were also protected because, as Judge Rogers said in *Rose et al. v. Story*, 1 Barr, 190, 44 Am. Dec. 121:

"By transferring the possession to the vendee under such a contract, a false credit is given to the vendee, and therefore, in respect of third persons, as he is the apparent, so he is to be considered as the real, owner."

Such contracts having been held void as to third persons, the corollary follows that they were good between the parties; and this has given rise to some uncertainty in the decisions since the passage of the bankrupt law. The uncertainty is not wholly limited to the decisions in the federal courts; but an examination of the decisions of the courts of Pennsylvania show that the latter have been busy in determining the rights of creditors of the conditional vendee. The result reached by the courts of that state seems to be that, if the property has been redelivered to the vendor before the rights of creditors attach, the vendor may retain it. *Hineman v. Matthews*, 138 Pa. 204, 20 Atl. 843, 10 L. R. A. 233. If, however, the possession be still in the conditional vendee when such rights have attached, then the vendor cannot reclaim the goods. That such rights have been so adjudicated because the creditors have issued writs of execution or attachment must not be taken as a reason why such rights may not attach in other ways. In a late case it has been held that a creditors' bill and the appointment of a receiver of a conditional vendee give the receiver the rights of a levying creditor. *Duplex Printing Press Co. v. Clipper Publishing Co.*, 213 Pa. 207, 62 Atl. 841. The reason is that such receiver is vested with authority, not from the debtor, but from the court acting in the interest, and for the enforcement of the rights, of creditors. Now it cannot be pretended that a creditors' bill and the appointment of a receiver in the courts of Pennsylvania can reach farther for the benefit of creditors than the proceedings in bankruptcy and the appointment of a receiver by the District Court. The conclusion is irresistible that, where a petition in bankruptcy has been filed against a conditional vendee, the assets in the hands of the conditional vendee are as much

within the grasp of creditors as if some creditor had made a levy by virtue of a writ of execution or had attached the same.

Under the bankrupt law the rights of all persons with respect to the estate of the bankrupt are fixed as of the date of the filing of the petition. Creditors, therefore, are prevented from seizing the property in the hands of the bankrupt after the filing of the petition, and it would be anomalous to hold that assets which the creditor could have seized if the bankruptcy proceedings had not been begun are to be excluded from the bankrupt's assets just because a petition may have been filed in this court before the creditor had an opportunity to levy in the state court.

It is argued that the case of *York Mfg. Company v. Cassell*, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782, supports the contrary position. As a matter of fact, in the light of subsequent decisions of the same court, that case merely holds that the rights of parties and third persons with respect to property sold under conditional sales are to be determined by the law of the place of contract, and that decision was arrived at because the rights of parties under a contract of conditional sale in the state of Ohio were different from the rights of parties and third persons under such a contract in the state of Pennsylvania. It is perhaps unfortunate in the case last cited that the meaning could be drawn from the language used that the trustee in bankruptcy stood in the shoes of the bankrupt with respect to property sold conditionally. He does in the state of Ohio. But we have seen he does not in the state of Pennsylvania. He stands in the shoes of the bankrupt, clothed with all the rights which creditors have at the time of the filing of the petition. See *Fourth Street National Bank v. Millbourne Mills Co.'s Trustee*, 172 Fed. 177, 96 C. C. A. 629, and *Security Warehousing Co. v. Hand*, 206 U. S. 415, 27 Sup. Ct. 720, 51 L. Ed. 1117.

The petitioner in this case has no standing to recover the property, and the petition must be dismissed.

FAWKES v. AMERICAN MOTOR CAR SALES CO.

(Circuit Court, D. Minnesota, Fourth Division. March 18, 1910.)

CORPORATIONS (§ 638*)—FOREIGN CORPORATIONS—CIVIL ACTIONS—PROCESS—AUTHORITY OR CAPACITY OF PERSON SERVED.

Defendant, a New York corporation, with its principal place of business in Ohio, was the exclusive sales agent for certain automobiles. It had no depot or warehouse in Minnesota, and at the time the action was commenced had no property in that state. The summons was served on B., M. B., and S. as defendant's resident agents. B. was defendant's northwestern sales agent, working entirely on commission, with authority only to accept orders from dealers for automobiles, but not to make contracts, all of which were closed direct with defendant and payments made to the factory. M. B. was employed by defendant to travel in the northwestern territory, ascertain from dealers what cars required new parts, to make lists of the parts so required, and send them to the company at its home office, and S. was a mechanic, employed by defendant to repair, or cause to be repaired, all of its automobiles of 1909 model needing or requiring repairs in the city of Minneapolis. *Held*, that none of such

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

representatives was the agent of defendant in such a sense as to make service on him service on defendant.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2603-2627; Dec. Dig. § 668.*

Service of process on foreign corporations, see notes to *Eldred v. American Palace Car Co.*, 45 C. C. A. 3; *Cella Commission Co. v. Bohlinger*, 78 C. C. A. 473.]

Action by Leslie H. Fawkes against the American Motor Car Sales Company. On motion to set aside the service of summons. Granted.

Larrabee & Davies and John F. McGee, for plaintiff.

Welch & Shearer, for defendant.

WILLARD, District Judge. The plaintiff, a citizen of Minnesota, brought this action in the district court of Hennepin county, Minn., against the defendant, a corporation organized under the laws of the state of New York. On the 14th day of February, 1910, the summons was served upon the defendant by the delivery of a copy to W. J. Bowman and another copy to M. R. Bookwalter, both of them then being in the city of Minneapolis, Minn., and on the 16th day of February, 1910, service was also made by delivering a copy of the summons to R. M. Shewmacher at Minneapolis. The defendant removed the case into this court, and now has appeared specially and moved to set aside the service of the summons.

It appears from the evidence that the defendant is a corporation of the state of New York, with its principal place of business at Toledo, Ohio. Its exclusive business is the sale of two types of automobiles, known as the "Overland" and the "Marion" cars, of which it has the exclusive sale, but it does not manufacture the machines. On the 3d day of January, 1910, the defendant made a contract with Bowman, the person on whom the service was made, who then resided in the city of Minneapolis. It is stated in that contract that Bowman was employed by the defendant as its factory sales representative in certain territory, which comprised a part of Wisconsin, nearly all of Minnesota, all of North Dakota, a part of South Dakota, and a part of Montana. The powers that were given to Bowman by the contract, however, were specifically set forth therein. He was authorized to canvass the territory, establish dealers, and procure contracts with them to handle and sell the automobiles above mentioned. The contract and the other evidence offered on the hearing showed that the dealers whom Bowman was to secure were themselves to contract directly with the company, and not with Bowman; that the contracts between these dealers and the company did not make the dealers the agents for the company, but constituted outright sales of the machines to them. They were required to pay for the machines before they left the factory at Indianapolis; or, if that was not done, a draft for the price was attached to the bill of lading which accompanied the shipment, and the machine could not be obtained by the dealer or purchaser until the draft was paid. By the terms of his agency, Bowman had no authority to make contracts binding upon the company

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

for the sale of any machine, and he never had any machines in his possession in the state. The company maintained no warehouse or other depository for the machines or other property belonging to it in the state, and at the time this action was commenced had no property in this state. Bowman rented an office in Minneapolis, but the expense thereof was paid entirely by him. He received no salary from the defendant, and his compensation arose entirely from commissions which the defendant paid him upon such machines as it might sell to dealers through his procurement.

Three cases were cited in the argument which upon the facts above stated must control the decision of this motion. One was decided in the Supreme Court of the United States (*Green v. Chicago, Burlington & Quincy Railway Co.*, 205 U. S. 530, 27 Sup. Ct. 595, 51 L. Ed. 916), another was decided in the Supreme Court of the state of Minnesota (*North Wisconsin Cattle Co. v. Oregon Short Line R. R. Co. et al.*, 105 Minn. 198, 117 N. W. 391), and the third was decided in this court (*Boardman v. S. S. McClure Co.*, 123 Fed. 614).

In the first case—*Green v. C., B. & Q. Ry. Co.*—the defendant employed one Harry E. Heller and hired an office for him in Philadelphia, designating him as district freight and passenger agent. His business was to solicit and procure passengers and freight to be transported over the defendant's lines, which did not extend east of Chicago. In conducting this business several clerks and various traveling passenger and freight agents were employed. He sold no tickets and received no payments for transportation of freight. Occasionally he sold to railroad employes who already had tickets over intermediate lines orders for reduced rates over the defendant's lines. In some cases, for the convenience of shippers who had received bills of lading from the initial line for goods routed over the defendant's lines, he gave in exchange therefor bills of lading over the defendant's lines. That action was brought by the plaintiff, a citizen of Philadelphia, in the Circuit Court of the United States for the Eastern District of Pennsylvania, and service was made upon Heller in Philadelphia. The court said:

"It is obvious that the defendant was doing there a considerable business of a certain kind, although there was no carriage of freight or passengers. * * * The business shown in this case was, in substance, nothing more than that of solicitation. Without undertaking to formulate any general rule defining what transactions will constitute 'doing business' in the sense that liability to service is incurred, we think that this is not enough to bring the defendant within the district so that process can be served upon it."

In the second case, the one from Minnesota, it appeared that D. M. Collins and H. F. Carter were in the employ of the defendant the Union Pacific Railroad Company, and that it maintained a permanent office in the city of Minneapolis for their use, and hired to assist them some other employes. Collins and Carter were engaged in influencing shippers of freight and prospective passengers to use the lines of the Union Pacific Railroad Company, no part of which extended into Minnesota. They did not make contracts with shippers or passengers, but secured results, if at all, by inducing such passengers and shippers to route goods or buy tickets over the Union Pacific

lines. The business done by them was fairly described as soliciting business for and advertising their employer. In carrying on this business, the company maintained in Minnesota a permanent office on a fairly extensive scale. The service of the summons was made upon the Union Pacific Company by delivering a copy to Collins in Minneapolis. The court said:

"We have, then, the question whether upon the ultimate facts herein stated the summons was duly served upon the defendant within the meaning of our statute (R. L. 1905, § 4109, subd. 3), which reads as follows: 'If the defendant be a foreign corporation, the summons may be served by delivering a copy to any of its officers or agents within the state. * * * The statute does not require in express terms that the foreign corporation must be doing business within the state in order to justify the service of a summons against it upon its agent; but this is necessarily implied, for it could not be represented within the state by an agent unless it was doing business therein. * * * The statute, however, does not define the character of the business, the doing of which in the state will subject it to the process of the court by service on its agents. It simply provides that service may be made upon the agents of the corporation. Therefore a foreign corporation sending its agents into this state impliedly consents that, if they do for it any acts which constitute doing business within the state, as that term is defined by its court, process against it may be served on such agents. The solicitation of passenger and freight traffic in the state is not within that term. We accordingly hold that the facts of this case do not justify the conclusion that the respondents herein were, or either of them, doing business within this state, so as to authorize the service of the summons upon their soliciting agent."

The last case, the one from this court, was decided by Judge Lochren. In that case the defendant, a New York corporation, was in the business of publishing books and other publications, including periodicals, and including a magazine known as "McClure's." It circulated its magazines in Minnesota by mail from New York. In its magazine business the advertising receipts were twice its circulation receipts. It did a large advertising business in Minnesota, which it obtained there through its traveling solicitors, and especially through Little, the man upon whom service in this case was made. Little traveled through the Western states, including Minnesota, working up advertising business for the magazine, and soliciting and taking orders for advertising. He could only quote rates as fixed by the home office, and his orders as to space and copy were subject to the approval of the home office. He could not make definite contracts, but took orders and submitted them to the defendant.

Referring to the Minnesota statute relating to the service of process upon foreign corporations, the court said:

"I think it would be going too far to hold that under this statute a jobbing corporation who has traveling men sent through the country to solicit orders for goods or wares can be held, under a statute like this, to be doing business wherever those solicitors go, and that it is liable to be served with process by delivering copies of the process to such traveling men going about the country. They would not be transacting the general business of the corporations, which would be to sell goods, either goods that they were dealing in or goods that they were manufacturing. * * * It does not seem to me that it is transacting business in Minnesota simply by having solicitors for advertisements here, and that appears to have been the extent of Mr. Little's business. The testimony of those who are presumed to have knowledge on the subject, of Mr. Little himself, and of Mr. Brady is that he had no authority to make contracts, even for advertisements, but simply to solicit orders, to procure

persons to forward proposed advertisements to the company, or perhaps he took the proposed advertisements, and forwarded them himself, and that from the rates which are made public in the magazine, or in instructions which he had he could assure the persons of whom he solicited advertisements in respect to the rates, and what would be charged for the advertisements if they were inserted, but he did not make definite contracts. The name which such person assumes, even with the knowledge of his principal, will not be controlling, when the real character of his employment appears. I think it was entirely like the employment of ordinary traveling men or runners, who doubtless are able to name the prices of goods for which they seek orders, although they may not be able to make definite contracts that all these orders will be supplied. The dealer may not have the goods to supply them, and may be unable to fill the order, nor required to do it."

In the case of the Mechanical Appliance Co. v. Castleman (decided by the Supreme Court of the United States on January 3, 1910) 215 U. S. 437, 30 Sup. Ct. 125, 54 L. Ed. —, it was held that the defendant corporation was not doing business in the state of Missouri at the time of the attempted service of process, and that the person named in the return of the sheriff was not at that time the duly authorized agent of the defendant corporation. The decision, however, does not state the facts which appeared from the affidavits presented in that case.

The facts in the case at bar bring it within the three decisions first above cited. Bowman had no authority to make any contracts for the sale of any automobiles. His powers were limited to soliciting orders and submitting them to the defendant at its office either in Toledo or Indianapolis, and the definite agreement was there made.

Some evidence was introduced by the plaintiff tending to show that the defendant had held Bowman out as being its agent, and that he did business under the name of the "Northwestern Overland Company, W. J. Bowman, Manager." But, as said by Judge Lochren in the case last cited, "the name which such person assumes, even with the knowledge of his principal, will not be controlling, when the real character of his employment appears." The same doctrine was announced by the Supreme Court of Minnesota in the case of Wold v. J. B. Colt Co., 102 Minn. 386, 114 N. W. 243. The court there said:

"It appears from the affidavits that Burt was not in fact the agent of the corporation, but that he was engaged in selling an acetylene gas generator, manufactured by the corporation, in certain counties in the state of Minnesota, under circumstances which might possibly justify a court in holding that the corporation had held him out as its agent, and would therefore be estopped in the action from denying that he was its agent. The question is whether jurisdiction over a foreign corporation can be obtained by the service of the summons upon a person who is not in fact its agent, but who may for the purpose of the trial be held an agent by the application of the doctrine of estoppel."

That question the court proceeded to discuss and decide in the negative, saying:

"It is well settled by authority that the agent upon whom service may be made must be one having in fact a representative capacity. In Prof. Beale's recent work on Foreign Corporations (section 271) it is said: 'A person who is not really employed by the corporation, but is merely an agent by estoppel or by construction of law, is not a proper person to serve.'"

The service of the process upon Bowman was not a sufficient service upon the company. Nor can the service upon Shewmacher and Bookwalter be sustained. The former was a mere mechanic employed by the defendant since the 24th day of January, 1910, solely to repair or cause to be repaired all Overland automobiles of the 1909 model needing or requiring repairs in the city of Minneapolis. Bookwalter on the 24th day of January, 1910, entered into the employ of the defendant upon an agreement, by the terms of which he was to travel about in the northwestern territory and interview dealers handling Overland automobiles, and ascertain from such dealers what Overland cars, if any, in their territory required any parts, and, if so, what parts in the way of repairs they required; also to make lists of the parts so required in the various localities and send in to the company at its home office in Toledo, Ohio, orders for such parts. Bookwalter also stated in his affidavit that the defendant company had no depot or warehouse in Minneapolis for storing and distributing cars, supplies, or parts for said machines, and has not had since he has been in their employ any depot or warehouse in Minneapolis for the storing or distribution of cars, supplies, or parts of said machines.

The motion to set aside the service of the summons, upon Bookwalter, Bowman, and Shewmacher is granted, and the service of the summons upon each one of the three persons above named is hereby set aside and declared void.

UNITED STATES v. LEHIGH VALLEY R. CO.

(Circuit Court, E. D. Pennsylvania. March 7, 1910.)

No. 97.

Action by the United States against the Lehigh Valley Railroad Company. On motion to dismiss without prejudice. Denied, and defendant's motion to dismiss absolutely granted.

See, also, 162 Fed. 410, and 164 Fed. 215.

Edwin P. Grosvenor, Sp. Asst., and George W. Wickersham, Atty. Gen., for the United States.

J. F. Schapperkotter, Robert W. De Forrest, and John G. Johnson, for defendant.

Before GRAY, BUFFINGTON, and LANNING, Circuit Judges.

PER CURIAM. In considering this motion it must be remembered that the decree of the Supreme Court in the matter of the appeal from the decree of this court in the present case is in these words:

"It is now here ordered and adjudged that the judgment of the said Circuit Court in this cause be and the same is hereby reversed; and it is further ordered that this cause be and the same is hereby remanded to the said Circuit Court for further proceedings in conformity with the opinion of this court."

As we read that opinion, the Supreme Court has decided on the facts set forth in the bills and answers of the several cases before it that the holding by one of the defendant companies of the entire stock

of a bona fide corporation, and the control thereby resulting to it from its power, and the exercise thereof, to appoint its directors and manage its business, does not give such railroad company any interest, direct or indirect, in the coal which may be mined by such corporation and transported in interstate commerce over the lines of such railroad company within the meaning of these words as contained in the act under review. In the bill of complaint filed in this cause it is alleged:

"That the defendant [the Lehigh Valley Railroad Company] is, and has been continuously since long before the said 1st day of May, in the year 1908, the owner of the entire capital stock of the Lehigh Valley Coal Company and of Coxe Brothers & Company, Incorporated, corporations of the said state of Pennsylvania, and that it thus controls, and has been controlling, the election of the directors or managers of said coal companies. That said coal companies hold, by conveyances and leases made long before the said 1st day of May, in the year 1908, anthracite coal lands and coal mines situated and being in the counties of Carbon, Lehigh, Luzerne, and Wyoming, in the said state of Pennsylvania; but said coal lands and coal mines are, as they have been continuously since long before the said 1st day of May, in the year 1908, now being operated, in the mining of anthracite coal, by and under the direct management of the respective presidents and directors of said coal companies, the president of each of said coal companies being, as he has been for a long time past, the president of the defendant, and a majority of the directors of each of said coal companies being officers or directors of the defendant, as they have been for a long time past. That by virtue of the ownership of the entire capital stock of said companies by the defendant, as hereinbefore stated, the defendant owns said coal lands and coal mines, and the anthracite coal therein or thereupon, and mined and being mined, therefrom, * * * and that by virtue of the management of said coal companies by certain of the officers of the defendant, as hereinbefore stated, the operations of said coal companies in the mining of anthracite coal, have been, and are now being, carried on by and under the authority of the defendant."

The defendant, while denying the legal conclusion from the material facts thus alleged by the bill of complaint—

"* * * admits that it is now and has been for many years past the owner of shares of the capital stock of the coal companies named in the bill of complaint, and alleges in regard thereto as follows: This defendant now owns the entire capital stock of the Lehigh Valley Coal Company."

With these averments of the bill and the answer before it, and the cause having been heard on the pleadings, the Supreme Court in its opinion said:

"It remains to determine the nature and character of the interest embraced in the words 'in which it is interested directly or indirectly.' The contention of the government that the clause forbids a railroad company to transport any commodity manufactured, mined, or produced, or owned in whole or in part, etc., by a bona fide corporation in which the transporting carrier holds a stock interest, however small, is based upon the assumption that such prohibition is embraced in the words we are considering. The opposing contention, however, is that interest, direct or indirect, includes only commodities in which a carrier has a legal interest, and therefore does not exclude the right to carry commodities which have been manufactured, mined, produced, or owned by a separate and distinct corporation, simply because the transporting carrier may be interested in the producing, etc., corporation as an owner of stock therein. If the words in question are to be taken as embracing only a legal or equitable interest in the commodities to which they refer, they cannot be held to include commodities manufactured, mined, produced, or owned, etc., by a distinct corporation, merely because of a stock ownership of the carrier. *Pullman Palace Car Co. v. Missouri Pacific R. R.*, 115 U. S. 587 [6 Sup. Ct.

194, 29 L. Ed. 499]; *Conley v. Mathieson Alkali Works*, 190 U. S. 406 [23 Sup. Ct. 728, 47 L. Ed. 1113]. And that this is well settled also in the law of Pennsylvania is not questioned. It is unnecessary to pursue the subject in more detail, since it is conceded in the argument for the government that if the clause embraces only a legal interest in an article or commodity it cannot be held to include a prohibition against carrying a commodity simply because it had been manufactured, mined, or produced, or is owned, by a corporation in which the carrier is a stockholder. The contention of the government substantially rests upon the assumption that unless the words be given the meaning contended for they are without significance. That this is clearly not the case is well illustrated by the *New Haven Case*, supra [200 U. S. 381, 26 Sup. Ct. 272, 50 L. Ed. 515]. In that case the *Chesapeake & Ohio Railway Company*, it was shown, at one time not only directly engaged in buying, selling, and transporting coal, but subsequently, when a statute was passed in West Virginia prohibiting such dealings, it resorted to indirect methods for the continuance of its previous practice. It may well be that the very object of the provision was to reach and render impossible the successful employment of methods of the character referred to. Certain it is, however, that in the legislative progress of the clause in the Senate, where the clause originated, an amendment in specific terms, causing the clause to embrace stock ownership, was rejected, and immediately upon such rejection an amendment, expressly declaring that interest, direct or indirect, was intended, among other things, to embrace the prohibition of carrying a commodity manufactured, mined, produced, or owned by a corporation in which a railroad company was interested as a stockholder, was also rejected. 40 Cong. Rec. (1906) pt. 7, pp. 7012-7014. And the considerations just stated we think completely dispose of the contention that stock ownership must have been in the mind of Congress, and therefore must be treated as though embraced within the evil intended to be remedied, since it cannot in reason be assumed that there is a duty to extend the meaning of a statute beyond its legal sense upon the theory that a provision which was expressly excluded was intended to be included. If it be that the mind of Congress was fixed on the transportation by a carrier of any commodity produced by a corporation in which the carrier held stock, when we think the failure to provide for such a contingency in express language gives rise to the implication that it was not the purpose to include it, at all events, in view of the far-reaching consequences of giving the statute such a construction as that contended for, as indicated by the statement taken from the answers and returns which we have previously inserted in the margin, and of the questions of constitutional power which would arise if that construction was adopted, we hold the contention of the government not well founded. We then construe the statute as prohibiting a railroad company engaged in interstate commerce from transporting in such commerce articles or commodities under the following circumstances and conditions: * * * When the carrier at the time of transportation has an interest, direct or indirect, in a legal or equitable sense in the article or commodity, not including, therefore, articles or commodities manufactured, mined, produced, or owned, etc., by a bona fide corporation in which the railroad company is a stockholder."

The counsel for the complainant, after the reinstatement of the cause, applied to this court for leave to amend the bill of complaint. The court thought the application should be denied, and accordingly did deny it. Thereupon the counsel for the government moved to dismiss the bill of complaint without prejudice, which motion was opposed by counsel for the defendant. The court having declined to grant this motion, the counsel for the defendant thereupon moved to dismiss the bill absolutely. The court then inquired of counsel for the government whether, in view of the premises, it was desired to have the cause stand for further proceedings in this court, and upon the statement that the government would not proceed any further in this court in view of the fact that the amendment had been disallowed, our conclusion is that the bill should be dismissed absolutely

upon the allegations of the bill and answer. It will be observed that this case differs from *United States v. Delaware, Lackawanna & Western Railroad Company*, 213 U. S. 366, 29 Sup. Ct. 527, 53 L. Ed. 836, in which, upon its reinstatement, an injunction was ordered to be issued.

In re MARKS.

(District Court, E. D. Pennsylvania. February 21, 1910.)

No. 2,152.

1. BANKRUPTCY (§ 136*)—WITHHOLDING ASSETS—CONTEMPT—PUNISHMENT—DEFENSES.

A bankrupt should not be committed for contempt for failure to comply with an order requiring him to turn over money to his trustee alleged to have been withheld, where the court is convinced that the bankrupt is without physical ability to comply.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 136.*]

2. BANKRUPTCY (§ 136*)—WITHHOLDING ASSETS—CONTEMPT—PUNISHMENT—HEARING.

Where an order, finding that a bankrupt had retained from his trustee a certain sum of money and directing the payment thereof, had been previously affirmed by the District Court and remained unappealed from, it would not be reviewed by such court in a proceeding to punish the bankrupt for contempt in failing to comply therewith.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 136.*]

3. BANKRUPTCY (§ 136*)—WITHHOLDING ASSETS—CONTEMPT—PUNISHMENT—EVIDENCE.

In a proceeding to punish a bankrupt for contempt in failing to comply with an order requiring him to turn over withheld assets to his trustee, evidence held to require a finding that the bankrupt had not present ability to comply, and was not therefore subject to incarceration for contempt.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 136.*]

In the matter of the bankruptcy of Jacob M. Marks. On rule to commit bankrupt for contempt. Rule discharged.

See, also, 171 Fed. 281.

George Wentworth Carr, for trustee.

Joseph L. Greenwald, for bankrupt.

J. B. McPHERSON, District Judge. In September, 1906, after a prolonged and very careful investigation, the referee found as a fact that in January, 1905, the bankrupt had about \$8,000 belonging to the estate in his possession or under his control, and thereupon directed him to pay that sum to the trustee within 20 days. An application to revoke the order followed, and in February, 1908, the referee first reduced the amount to \$3,000 in round figures, and then revoked the order altogether. On June 24, 1909, the District Court affirmed the reduction, but set aside the revocation; and, as no review of this action was asked for, the starting point of the present inquiry is the order of affirmance.

For the purpose of enforcing it the trustee obtained a rule requiring the bankrupt to show cause why he should not be committed for

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

contempt in failing to pay. He answered the rule, and a hearing was had before me in open court on December 29 and 30, 1909, when such testimony was presented as either party desired to offer. The question for decision is whether the bankrupt should be committed to prison for failure to comply with the order of June 24th; and upon this question the brief of the trustee's counsel concedes that:

"All the cases are practically harmonious in the declaration that, if the court is convinced that the bankrupt is unable to comply with the order, he should not be committed for contempt. Without the physical ability to comply, there can be no contempt."

Unquestionably that is the rule in this circuit. The Court of Appeals approved it in *Trust Co. v. Wallis*, 11 Am. Bank. R. 360, 126 Fed. 464, 61 C. C. A. 342—and there are decisions elsewhere to the same effect. It will be observed that the present case differs from those which involved the preliminary question whether the referee or the District Court should make an order on the bankrupt to pay money or deliver goods. Here that point has been passed. It has been finally decided that in February, 1908, the bankrupt had in his possession or under his control the sum of \$3,000 belonging to his estate in bankruptcy; and it only remains to inquire whether he is now able to pay. In this proceeding the court will not re-examine the question whether the order should ever have been made—either at all, or in the particular amount fixed by the referee. The trustee has therefore an unimpeachable right to the money specified in the order, and presumptively the bankrupt is able to pay it; but the admission must nevertheless be made that the presumption may not correspond with the fact, and that in reality the bankrupt cannot comply with the order. Unless he has the physical ability to comply, he should not be committed for contempt. In practical effect, although perhaps not in legal contemplation, this would revive the abolished penalty of imprisonment for debt. If he cannot pay, and if this inability is the result of his own criminal act, he may, of course, be punished by the criminal law, although no civil remedy may be available in the situation. Even if he has misappropriated the money, the court has not the power to imprison him in a proceeding for contempt; for this would deprive him of his constitutional right to submit the charge of misappropriation to a jury in the proper criminal court, and would deprive him, also, of the inseparable right to be exempt from imprisonment for such an offense until he shall have been lawfully convicted. And it is also true that he cannot be imprisoned in a proceeding for contempt, if for any other reason he cannot produce the money; for the court cannot imprison as a punishment. It can only imprison to compel obedience to its order. But with an order to pay in force against him, and with the need to overcome the presumption of his ability to comply, it will no doubt happen at times that a bankrupt may fail to meet the burden of proof, and may be obliged to go to jail until he satisfies the court that he was telling the truth when he pleaded poverty. Certainly his bare denial of present ability to pay may be properly regarded with suspicion, and he may be required to satisfy the court with clearness that obedience to the order is wholly beyond his power. Such situations must be dealt with as they arise.

No general rule can be laid down, and each case must stand upon its own facts. A decision upon the general subject has been recently reported from the Second Circuit. *Re Stavrahn* (C. C. A.) 174 Fed. 330.

In the present case I cannot escape from the conclusion that the bankrupt is now unable to comply with the order. The evidence satisfies me that he is in straitened circumstances, a merchant in a very small way, practically living from hand to mouth, and barely able to make a scanty livelihood for himself and his household. In my opinion, to commit him to prison would not obtain a dollar for his creditors, but would simply result in destroying what little business he has managed to acquire, and would probably reduce those dependent upon him to penury. It is already clear to me that the court would be obliged to release him after an unproductive confinement of several weeks or months, and I do not think I have the right to imprison him at all, unless there is at least a doubt concerning his ability to comply with the order. In a doubtful case, I think it is clear that the court has the right, and may be under the duty, to resort to imprisonment in order to test the sincerity of the bankrupt's denial.

The rule is discharged.

In re QUINN.

(District Court, E. D. New York. October 7, 1909.)

1. CRIMINAL LAW (242*)—PLACE OF TRIAL—REMOVAL OF DEFENDANT.

On a complaint for the removal of a defendant to another federal district for trial, where the indictment is included as a part of the complaint, it is unnecessary to consider whether all of the counts would be sustained on demurrer; the sole question being whether there was probable cause shown that the defendant committed in the district to which the removal is sought the offense for which he is held.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 242.*]

2. CRIMINAL LAW (§ 242*)—PLACE OF TRIAL—REMOVAL OF DEFENDANT.

On an application for the removal of a defendant to another federal district for trial, the question whether there was probable cause shown that the defendant committed in the district to which the removal is sought the offense for which he was held must be determined by the court to which application for removal is made.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 510; Dec. Dig. § 242.*]

3. HABEAS CORPUS (§ 19*)—PROCEEDINGS REVIEWABLE—APPLICATION FOR REMOVAL OF DEFENDANT FOR TRIAL.

The decision of the court, to which an application for removal of a defendant to another federal district for trial is made, that probable cause is shown, is not reviewable, so far as the correctness of the decision is concerned, by habeas corpus.

[Ed. Note.—For other cases, see Habeas Corpus, Dec. Dig. § 19.*]

In the matter of the application for removal of Joseph T. Quinn to the Southern district of New York: Granted.

Leo Oppenheimer, for petitioner.

William J. Youngs, U. S. Atty.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

CHATFIELD, District Judge. The indictment, which is made a part of the complaint, sets forth successively counts charging three individuals with (1) conspiracy, in the Southern district of New York, to commit an offense by effecting and aiding in effecting an entry of certain goods, wares, and merchandise dutiable by law, at less than the true weight thereof, at the port of New York; (2) conspiracy to defraud the United States of moneys due as duty upon the importation of certain cheese, to be imported and entered by the two individuals who are named as co-conspirators with the defendant here.

The indictment also contains four counts charging the three men in question with having unlawfully effected and aided in effecting an entry of certain cheese at less than the true weight. Each of these last counts attributes certain steps in the transaction to the other two defendants, and certain steps to the defendant whose removal is now sought, but does not seem to charge joint participation in the acts attributed to each.

The conspiracy counts do not go into great detail, except in reciting the overt acts. The removal of the defendant Quinn is now sought upon a complaint charging him with having conspired with the other two men, with whom he is indicted, to commit an offense against the United States, by effecting and aiding in effecting an entry of goods, to wit, cheese, at less than the true weight thereof.

It will be seen that, treating the indictment merely as an affidavit, or as a part of the record, it is unnecessary to consider whether all of the counts in the indictment would be sustained on demurrer. The sole question under discussion is whether there was probable cause, shown by the record, that the defendant committed, in the Southern district of New York, the offense for which he has been held by the commissioner in this district for trial in the Southern district.

Taking the allegations of all the different counts of the indictment, together with the evidence before the commissioner here, there seems to be abundant reason for holding that the defendant should be taken to the Southern district of New York, and that any discussion as to the exact form of the particular charges to which he may be called to plead be had there. The decision in the case of *Tinsley v. Treat*, 205 U. S. 20, 27 Sup. Ct. 430, 51 L. Ed. 689, merely requires this court to determine that probable cause exists, and does not alter the rule, established in the cases of *Beavers v. Henkel*, 194 U. S. 73, 24 Sup. Ct. 605, 48 L. Ed. 882, and *Benson v. Henkel*, 198 U. S. 1, 25 Sup. Ct. 569, 49 L. Ed. 919, that hearing upon an application for removal is not equivalent to the argument of a demurrer upon all the counts of the indictment.

The question of probable cause comes up on the application for removal, and, if decided adversely to the defendant, is not reviewable, so far as the correctness of decision is concerned, by habeas corpus. *Riggins v. United States*, 199 U. S. 547, 26 Sup. Ct. 147, 50 L. Ed. 303. In the particular case at bar the writ of habeas corpus and return thereto disclose no defect of jurisdiction. Nor do the records produced by the writs of habeas corpus or certiorari show that no such crime as is charged could have been committed.

The writs of habeas corpus and of certiorari will be dismissed, and the order of removal granted.

MEMORANDUM DECISIONS.

CARONDELET CANAL & NAVIGATION CO. v. DEMOURELLE. (Circuit Court of Appeals, Fifth Circuit. April 12, 1910.) No. 1,852. Appeal from the District Court of the United States for the Eastern District of Louisiana. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. In affirming the judgment of this case, we filed no written opinion, because the points involved were well known to the parties, and we were not called on to make a declaration of law for other than this particular case, which case shows that there was neither request nor opportunity to pay tolls in the canal until the incoming vessel should reach the Old Basin, and rule No. 33, relied upon by the appellants, was in effect an invitation to incoming sailing vessels to come up to the harbor under sail, and there was negligently moored in the canal a crib of logs, which to some extent obstructed navigation, and near by there was a stump, very near to the channel, four feet under water, upon which the Lolita struck and received her damages. The damages allowed in the District Court, though assigned as error, did not appear to be contested on the hearing, and they were substantially proved in the record. The petition for rehearing is denied.

FOSTER v. BOULO. (Circuit Court of Appeals, Fifth Circuit. March 29, 1910.) No. 2,009. In error to the Circuit Court of the United States for the Southern District of Alabama. Peter J. Hamilton, for plaintiff in error. H. Pillans, for defendant in error. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. With all the evidence offered by the plaintiff below admitted, we are of opinion that it is insufficient to establish title to the lot in controversy. Besides, see *Boulo v. N. O., M. & T. R. R.*, 55 Ala. 480-493. But, however this may be, the plaintiff's claim is barred by the statute of limitations of the state of Alabama, as construed by the Supreme Court of that state. See *Woodstock Iron Co. v. Fullenwider*, 87 Ala. 584, 6 South. 197, 13 Am. St. Rep. 73; *Lowery v. Davis* (Ala.) 8 South. 79. The judgment of the Circuit Court is affirmed.

HUFF et al. v. BIDWELL et al. (Circuit Court of Appeals, Fifth Circuit. April 12, 1910.) No. 2,048. Appeal from the Circuit Court of the United States for the Southern District of Georgia. For opinion below, see 176 Fed. 174. Du Pont Guerry, J. H. Hall, and T. S. Felder, for appellants. John I. Hall, W. G. Smith, T. E. Ryals, W. J. Grace, James L. Anderson, George S. Jones, N. E. Harris, Chas. H. Hall, Jr., R. L. Anderson, Walter A. Harris, and J. E. Harris, for appellees. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. The original decree, as affirmed in this court, required all the property of the defendant Huff to be sold to pay off, adjust, and satisfy the many liens thereon, and in the conduct and management of the sale complained of the trial judge had and exercised a sound discretion. As the case is presented by the record, we conclude that the sale in question was properly confirmed. The decree appealed from is affirmed, and, considering the large amount of funds tied up by the appeal, mandate will issue at once.

JAMES GIBBONY & CO. v. ENGBLOM et al. (Circuit Court of Appeals, Fifth Circuit. March 15, 1910.) No. 1,979. Appeal from the District Court of the United States for the Southern District of Alabama. T. M. Stevens

and Joseph H. Lyons, for appellant. John W. McAlpine and H. Pillans, for appellees. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. In this case it is difficult to see how the Russian ship Sylfid, which, at the instance of and for the benefit of the libelants, was taken possession of by the harbor master and moved from its dock, can be held liable to the libelants for any collision which resulted from or followed such moving; and we agree with the trial judge that there was not sufficient evidence to establish negligence or fault against the pilot. The decree of the District Court (169 Fed. 995) is affirmed.

THOMPSON v. DUNNINGTON. (Circuit Court of Appeals, Fourth Circuit. February 23, 1910.) No. 941. On Petition to Superintend and Revise, in Matter of Law, Proceedings of the District Court of the United States for the Eastern District of Virginia, at Richmond. George Bryan and E. B. Thomason (Thomason & Minor, on the briefs), for petitioner. J. T. Coleman (Coleman, Easley & Coleman, on the briefs), for respondent. Before PRITCHARD, Circuit Judge, and BOYD and DAYTON, District Judges.

PER CURIAM. After careful consideration of this record, we are clearly of the opinion that the alleged errors sought to be revised and corrected present not alone questions of law but of fact, and should, therefore, have been brought here by appeal; but, while we reach this conclusion, we nevertheless realize the case has been properly determined on its merits. *Coder, Trustee, v. Arts*, 213 U. S. 223, 29 Sup. Ct. 436, 53 L. Ed. 772; *Steiner v. Marshall*, 140 Fed. 710, 72 C. C. A. 103; *Kenova L. & T. Co. v. Graham*, 135 Fed. 717, 68 C. C. A. 355. Petition dismissed.

WRIGHT et al. v. BLACK. (Circuit Court of Appeals, Fourth Circuit. February 21, 1910.) No. 909. In Error to the Circuit Court of the United States for the Northern District of West Virginia, at Wheeling. J. P. Handlan and Henry M. Russell, for plaintiffs in error. William Erskine, Benjamin S. Allison, and Edward Kibler, for defendant in error. Before PRITCHARD, Circuit Judge, and BRAWLEY and CONNOR, District Judges.

PER CURIAM. This was an action in assumpsit to recover compensation for personal services. It involved questions of fact that seem to us to have been fairly submitted to the jury, and a careful examination of the record and of the printed arguments submitted fails to satisfy us that any reversible errors were committed on the trial. The judgment of the court below is therefore affirmed.

ZELL et al. v. NORFOLK & S. RY. CO. et al. (Circuit Court of Appeals, Fourth Circuit. March 11, 1910.) No. 964. Appeal from the Circuit Court of the United States for the Eastern District of Virginia, at Norfolk. Thomas Leaming, R. T. Thorp, and Tazwell Taylor (John G. Johnson, on the brief), for appellants. T. L. Chadbourne, Jr., and Edward R. Baird, Jr. (Frederick Hoff, on the brief), for appellees. Before GOFF and PRITCHARD, Circuit Judges, and BOYD, District Judge.

PER CURIAM. We find no equity in the claim of appellants, which is made against the purchasers of the property described in the proceedings of this cause, and we conclude that the court below did not err when it refused to allow said appellants, under the circumstances disclosed by this record, to file their intervention in the foreclosure suit then being disposed of by it. Affirmed.

GORHAM MFG. CO. v. WEINTRAUB et al. (Circuit Court, S. D. New York. March 5, 1910.) On motion to amend complaint. Denied in part. See 176 Fed. 927. Hugo Mock, for complainant. Benno Loewy, for defendants.

LACOMBE, Circuit Judge. The complaint as it now stands avers, among other things, that defendants have affixed to the silver plated ware sold by them a mark substantially the same as that employed by complainant. This seems broad enough to admit proof of infringing marks which are not Chinese copies. Motion to amend is denied, except as to the averments of citizenship.

END OF CASES IN VOL. 176.

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